TAPFUMANEYI RUZAMBO SOLOMON MUJURU N.O.
and
THOMAS TUNGAMIRAI
And
TAWANDA TUNGAMIRAI

versus

PAMELA CHRISITNE MUJURU
And
MASTER OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 25 November 2005, 16 and 17 January and 15 February 2006

Urgent Chamber Application

G Gapu for, the applicants
T K Hove, for the first respondent
No appearance for the second respondent

GOWORA J: The first respondent is the surviving spouse and widow of Josia Tungamirai who died in South Africa on 25th August 2005. Pending the acceptance of a will that the decease had drawn up prior to his death, the first respondent was appointed Curator Bonis of his estate. The second and third applicants are the sons of the deceased from unions with other women, although they were brought up by the first respondent and the deceased. The second respondent,

hereinafter referred to as the Master, refused to uphold the will and held that the estate be administered and distributed as intestate. The first applicant and the first respondent were, as a consequence of that decision, appointed joint executors dative on 12th October 2005. The applicants then took the Master's decision on review, which application is yet to be determined.

In the meantime, the first respondent has put in motion the process of winding up the estate. She has advertised for debtors and creditors to the estate. She is also in the process of compiling an inventory of the assets of the estate. It is common cause that all this was done by the first respondent acting on her own and without the participation of the first applicant. The first respondent has issued summons to have the second applicant evicted from 8A Lynchgate Road, Kambanji. Together with herself, she has cited the first applicant as the plaintiff. It is common cause that the first applicant did not consent to the litigation nor did he give instructions to the legal practitioners who brought the proceedings to court on behalf of the first respondent to also act on his behalf. It is as a result of the actions of the first respondent in acting independently of the first applicant in winding up the estate that the applicants have brought this matter to court as an urgent chamber application for a temporary interdict.

The draft order filed with the chamber application has the same relief in the interim and final relief. I will revert to the draft order later on in this judgment. In the draft order the following relief is being sought:

1. Pending the determination of the application in Case No 5635/05, the 1st respondent is hereby interdicted from dispossessing the Applicants or any one of them of any movable or immovable property belonging to the estate of the late Josiah Tungamirai.

2. Pending the determination of the application in Case No 5635/05, the 1st respondent shall not institute any action or process for the recovery of any property belonging to the estate of the late Josiah Tungamirai from any third party or debtor, or use or dispose of any property movable or immovable belonging to the estate without the written consent of the 1st applicant in his capacity as joint executor of the estate which consent shall not be unreasonably withheld.

3. The 1st and 2nd respondents shall not distribute the assets of the estate late Josiah Tungamirai who passed away on

25th August2005 until the appeal over his "Will" in Case No HC 5635/05 has been determined.

In the final relief being sought an order for costs is sought against the first respondent. When the parties appeared before me initially it appeared from submissions by counsel that there was in fact no dispute and that an order binding all the parties could be obtained by consent. I then postponed the matter sine die to enable the parties to negotiate a settlement. During the December vacation the legal practitioners for the applicants wrote to the Registrar and advised that the parties had been unable to achieve settlement. The matter was thereafter set down before me for argument on the merit. After hearing counsel I requested for written heads of argument on the duties of executors and the rights and obligations of joint executors. I am indebted to both counsel for their submissions in this regard.

As a point *in limine*, the first respondent took issue with the applicants having brought the matter to court on a certificate of urgency. She queried whether or not the matter was urgent. She also questioned the *locus standi* of the first applicant based on the ground that, despite having been appointed as joint executor on 12th October 2005, the first applicant had not, by the time she deposed to the opposing affidavit, signed his acceptance to being appointed joint executor to the estate. She mentions

further that it would not augur well for the estate not to have a substantive executor pending the resolution of the dispute on the validity or otherwise of the 'will' and that it would not be in the interests of anyone for there to be a vacuum and submitted that for that reason the matter was not urgent.

The first respondent is an interested party in the distribution of the estate in that she is the surviving spouse of the deceased. The 'will' that was rejected by the Master sought to dispossess her in favour of the two sons of the deceased. If she proceeds to wind up the estate and distribute the assets thereof in the absence of the participation of the first applicant, it is very possible that the second and third applicants' rights under the purported will might be prejudiced and that irreparable harm might be occasioned to the applicants. She has instituted an action for the eviction of the second applicant without reference to the first applicant even though he has been cited as a plaintiff. In the event of the second applicant being successful in this action costs against the estate would as a natural course follow to the prejudice of the estate. This would ultimately prejudice beneficiaries especially as the other executor would not have been consulted and has not consented to the suit. Her actions, in acting as a sole executor were such that, in view of the potential prejudice to them, the applicants would have been entitled to approach the court on an urgent basis.

I turn now to the merits of the application. In the first instance, the applicants seek to interdict the first respondent and the Master from proceeding with the administration of the estate pending the finalization of the application to have the Master's decision set aside and have the will accepted as being valid. The first port of call naturally would the statutory provisions regulating the administration of deceased estates.

An executor to a deceased estate is obligated, in terms of s 38 of the Administration of Estates Acts [*Chapter 6:01*], the Act, as soon as possible after being granted Letters of Administration, to make an inventory showing the value of property, movable and immovable, which forms part of the estate. The inventory shall, in terms of the Act, be transmitted to the Master as soon as possible. In terms of s 42 of the Act, if any person who is not the Executor of an estate has in his possession property belonging to the estate, such person shall forthwith deliver such assets or property to the executor or report the particulars thereof to the Master. An executor is further obliged, in terms of s 43, to forthwith cause a notice to be published in the Government Gazette and some other newspaper circulating within the district, calling upon all creditors and debtors to the estate to lodge claims with such executor.

What therefore emerges from a perusal of the sections referred to above is that the primary duty of an executor is to

finalize as quickly as possible the administration of the estate. To this end, it is imperative that the executor take control of all the assets of the estate, and realize as many assets as is necessary to meet the liabilities of the estate before distributing the residue to the beneficiaries. An executor should therefore consult the beneficiaries, heirs and legatees in any decision involving the administration of the estate. An executor, in administering the estate should not dispose of more assets than are absolutely necessary to meet the obligations of the estate.

The complaints against the first respondent, as enumerated by the first applicant are that she has started taking action to wind up the estate. She is in the process of compiling an inventory of the assets belonging to the estate. She has also advertised in the Government Gazette calling upon creditors and debtors to submit their claims. She has, in addition, issued summons against the second applicant claiming an order for his eviction from 8A Lynchgate Road Kambanji Glen Lorne which is part of the estate. Apart from the issue of the summons, which I will consider later in the judgment, there can be no suggestion that the actions of the first respondent are contrary to what her duties as provided for in the Act entail. If anything, her actions show that she is very much alive to the duties and obligations that go with the position of being an executor of a deceased estate. She has realized the need to gather and safeguard the

assets of the estate including collecting debts and receiving claims against the estate. The validity or otherwise of the 'will' is still to be determined by this Honourable Court. That fact alone does not justify inaction on the part of the executors in winding up the estate. In my view, unless and until the will is upheld the two executors have a duty in terms of the Act to do such acts as are prescribed by the same to ensure a proper administration of the estate. Both have been appointed as executors to the estate and until and unless set aside by the court, such appointments remain valid. The proposal by the first applicant and his legal practitioners that the administration of the estate be put in abeyance until the determination of the application regarding the validity of the will seems to me to be impracticable and not in the best interests of the beneficiaries and the estate. I am more amenable to a suggestion from them, as now appears in the amended draft order, that the disposal and distribution of the assets of the estate wait the determination of the application. However the process of winding up and collection of assets and debts due to the estate should proceed. It is, in my view, more prejudicial to the beneficiaries for the entire process to be stayed as there is no indication as to when the application may be determined. In the meantime if the assets are not brought under the control of the executors they may be dissipated destroyed or

disposed of to the detriment of the creditors and beneficiaries alike.

The interdict to stop the first respondent from collecting the assets of the estate would run foul of s 42 of the Act. As beneficiaries under the 'will', the entitlement of the second and third applicants to possess and hold onto the property of the estate would only come into force on the will being held to be valid. For the purposes of the administration of the estate, the executor would have, in accordance with the provisions of the Act the right and duty to have such property in their possession. In so far as the second and third applicants are concerned, until such time as the decision of the Master is set aside and the will is held to be valid, the first respondent has, together with the first applicant or with his consent, the right in terms of the Act in her capacity as an executor to demand delivery to her of any asset that belongs to the estate. The second and third applicants have a corresponding duty to deliver any asset in their possession to the executors appointed by the Master. If, as suggested by the second applicant, the first respondent has been abusing her position as curator prior to her being appointed as joint executor with the first applicant, the right course of action would be to lodge a complaint with the Master and seek her removal. The position of executor is one of trust and his actions must be justifiable in terms of the indivisibility of the assets and the

wishes of the heirs. The guiding principle which an executor should observe in the administration of a deceased estate is that he or she occupies a position of trust and his or her actions should be dictated by considerations which will serve best the interests of the beneficiaries. If he or she does not discharge those duties properly then such executor may be removed. It is not however the appropriate remedy to seek an interdict against the discharge by the executors of his duties as defined in the Act. To do so would be in violation of the clear provisions of the Act. There is nothing before to suggest that there is need to bypass the provisions of the Act. There is no indication that any of the applicants lodged a complaint with the Master about the first respondent having abused her position as curator and used money from the estate for her own benefit. The applicants have as a result not shown that this court is obliged to grant them an order authorizing the retention by them of property vesting in the estate contrary to the provisions of s 42 of the Act. In the event the interdicts sought in the first paragraph of the draft order fails.

Where more than one executor is appointed in an estate, they are required to act jointly. See *Hofmeyr v le Grange*[1]. Their liability for the administration of the estate is joint and several.

[1] 1921 C.P.D. 432.

See *Hodgson v du Preez*[2]. In the instant case, it is common cause that the first respondent had summons for the eviction of the second applicant from 8A Lynchgate Road issued out without the consent of the first applicant. Not only did she not have the consent of the first applicant to institute the proceedings in the name of the estate, she had the temerity to join him to the proceedings as plaintiff in their capacities as joint executors. Although she alleges that he has not formally accepted his mandate by signing thereto, it is not part of her case that she has sought his consent to her actions and that he had withheld such consent. There is therefore no reason why she would have cited him as plaintiff in the action against the second applicant. In the event, her actions in citing him on the process in the absence of consent on his part was wrong. Equally, in the absence of consent or agreement on the part of the first applicant, the first respondent did not have the right to act as a sole executor and institute proceedings against the second applicant in the name of the estate. She should also have acted with his consent and jointly with him in all the other actions taken on behalf of the estate as she is not invested with the functions of a sole executor. However, it appears that the first applicant is disinclined to perform his functions under the Letters of Administration granted him until the appeal against the

[2] (1894) 11 S.C. 335

Master's decision would have been determined. In his affidavit he says that it is improper for the first respondent to proceed with the administration and winding up of the estate before the application pertaining to the validity of the deceased's will has been determined. The proposal by his legal practitioners to the first respondent's legal practitioners was that all actions pertaining to the deceased estate be put in abeyance pending the determination of the application by this Honourable Court. The first applicant, just like the first respondent, is responsible for the administration of the estate. He can refuse to allow the first respondent to act on her own, but he cannot refuse to participate in the administration of the estate. In the event of an executor refusing to participate in the administration, the other executor(s) may apply to court to compel him to act, to dispense with his concurrence or have him removed from office. See *Baard v Estate Baard*[3]. The application for review or appeal filed by the applicants does not, in my view, suspend the appointment of the first applicant and first respondent as joint executors and there is no compelling reason that has been advanced for an order to stop the first respondent, in conjunction with her co-executor from administering the estate.

The first respondent is wearing two hats. First and foremost she is the widow and surviving spouse of the late Josiah

[3] 1928 C.P.D. 505

Tungamirai. As such, she has an interest in the estate and may have claims against the estate. The order sought against her is to stop her from instituting process for the recovery of any property belonging to the estate without the written consent of the first applicant. The order is so wide in its terms that were I to grant it as framed, then, the first respondent would not be in a position to claim any property that she would be entitled as of right as a surviving spouse unless she had the written consent of the first applicant. The applicants seek also to stop the first respondent from using or disposing of any property, movable or immovable without the written consent of the first applicant. Again as surviving spouse there are or may be certain items that she would be entitled to use which form part of the estate. The pertinent question is whether or not the applicants have the right as matters stand to demand that she not be entitled to the use of the same. They have not made out a case for the order being sought. Despite their having been named in a will, such will has been held to be invalid and the estate must at least be administered as intestate until such time as the will is upheld. The applicants are therefore not entitled claim rights in terms of that will, which clearly they are intent on doing. They claim a greater entitlement to the assets of the estate than the first respondent on the basis of the rejected will. In my view they are mistaken. They have to conduct themselves in accordance with

the ruling of the Master until a court has validated their entitlement under the will.

As far as the first applicant is concerned, it is obvious that he would rather the winding up be delayed until the application on the validity of the will is determined. He would rather that when the will is validated he be the sole executor. It would in his view be taxing to unravel the winding up process started by the first applicant. In the meantime he would recommend that the whole process be put in abeyance. The first respondent has indicated in her opposing affidavit that the first applicant has not accepted his appointment as joint executor dative together with herself. This is also manifest in his refusal to do anything with the winding up process. He is not inclined to work together with the first respondent under the Letters of Administration issued to him by the Master. I must say that this attitude on his part then makes it rather difficult to accept that in seeking that the first respondent only act with his written consent the first applicant would be acting in the interest of the beneficiaries and nor the estate . The view I take is that he is obstructing the process of having the estate wound up. Equally the first respondent is investing herself with powers she does not have as joint executor to the estate. It is necessary therefore that an order be granted that would enjoin her not to act without the consent of the applicant. I will assume that as a result of this application, the

first applicant would be fully aware of his responsibilities as an executor and the likely consequences of a failure on his part to perform the duties demanded of him in terms of the Act. It is therefore expected that it will not be necessary for the first respondent to approach her co-executor for written consent to administer the estate and that both parties will co-operate. As the issue of the will is still sub-*judice*, it is necessary that the process of administration not proceed beyond the collection and payment of debts and the securing of estate property. Distribution, in my view, must await the conclusion of the application.

The draft order was the same in terms of the interim and final relief sought. These courts have stressed that the practice of applying for a provisional order where there the terms of interim relief and final relief are the same is undesirable. The effect of such draft orders is that the applicant, on the basis of placing before the court a *prima facie* case, obtains an order which is final in its terms. See *Kuvarega v Registrar-General & Anor*[4]. In the instant case, the applicant required a temporary interdict to be issued pending the determination of the application to review the Master's decision. It is possible in my view to issue a provisional order that would have relief that is substantially dissimilar in the interim and final relief sought by

[4] 1998 (1) ZLR 188 (H)

the applicants so as not to offend against the practice of this court. To do so would not, in my view, unduly prejudice the respondents as the amendments do not go to the substance of the relief being sought.

I will therefore issue a provisional order as follows:

TERMS OF ORDER SOUGHT

Pending the determination of the appeal by the applicants against the decision of the Master in holding the will of the late Josiah Tungamirai who died on 25th August 2005 as invalid the applicants are granted the following relief:

1. The first and second respondents shall not dispose of or distribute or otherwise alienate the assets in the estate of the late Josiah Tungamirai until the appeal over the will of the said Josiah Tungamirai shall have been determined.

2. That the costs of this application shall be borne by the 1st respondent.

TERMS OF INTERIM RELIEF GRANTED

Pending the determination of this application the applicant is granted the following relief:

1. It is ordered that the first respondent be and is hereby interdicted from instituting any action or process (in her capacity as joint executor of the estate of the late Josiah Tungamirai) for the recovery of any property belonging to the estate from any third party or debtor or from disposing of any such property, whether movable or immovable, without first obtaining the written consent of the first applicant, which consent shall not be unreasonably withheld.

SERVICE OF THE PROVISIONAL ORDER

The applicants' legal practitioners be and are hereby granted leave to serve this order on the respondents or their legal practitioners.

Scanlen & Holderness legal practitioners, for the applicants

T K Hove & Partners legal practitioners, for the first respondent