TAPFUMANEYI RUZAMBO SOLOMON MUJURU N.O.
THOMAS TUNGAMIRAI
TAWANDA TUNGAMIRAI
versus

THE MASTER OF THE HIGH COURT N.O.
PAMELA CHRISTINE TUNGAMIRAI
IN THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 18 May and 20 November, 2008

Opposed Application

Mr *Fitches*, for the applicants
Mrs *B. Mtetwa*, for the 2nd respondent

GUVAVA J: This is an application for review of the Master of the High Court's decision which was made on 12 October 2005. The applicants cited two grounds for review. Firstly, they submitted that the decision was grossly irregular in that it failed to recognize and uphold the clear intention of the deceased from the document which purported to be his will. Secondly, the applicant submitted that the decision rejecting the will was grossly unreasonable. The applicants thus seek an order in the following terms:

1. The decision by the first respondent rejecting the will executed by the late Josiah Tungamirai on 10 September 1988 is hereby set aside.
2. The document executed by the deceased, Josiah Tungamirai, on 10 of September 1988 shall be deemed as his will for purposes of winding up his estate in terms of the Administration of Estates Act [*Cap 6:01*].
3. The first respondent shall appoint the first applicant as the sole executor of the late Josiah Tungamirai's estate and shall revoke the appointment of second respondent as joint executor of the said estate.
4. In the event of this application being opposed, the second respondent shall pay the costs of suit.

Following the application for review, the applicant had also filed an application for condonation for the late noting of an appeal and appeal in relation to this same matter. At the commencement of the proceedings however, Mr *Fitches*, for the applicant withdrew the appeal

and the matter proceeded as a review. In my view this was the correct procedure to adopt as the applicant was seeking to set aside the Masters decision on the basis of a procedural irregularity.

The facts which have given rise to this matter may be summarized as follows. Josiah Tungamirai (the deceased) passed away on 25 August 2005. He was survived by his wife, Pamela Christine Tungamirai, (Pamela) who is the second respondent in this matter. The second and third applicants are the children of the deceased from another union but it is common cause that Pamela raised both children as her own. It is also common cause that Pamela did not have any children with the deceased. The first applicant was appointed as executor of the deceased's estate through a will executed by the deceased. At an edict meeting convened by the first respondent the first applicant was appointed joint executor with the second respondent.

The will which was made by the deceased bequeathed the bulk of his estate to his two sons who are the second and third applicants in this matter. The estate comprised of the matrimonial home and its contents together with a farm and all its equipment and shares in various companies. To Pamela the deceased makes a bequest of her personal car, bedroom suit, kitchen household (I assume utensils) and 1 television set. When the will was submitted to the Master in accordance with the Wills Act [*Cap 6:06*] (the Act) the Master declined to accept the will.

The first respondent, in a letter dated 12 October 2005, stated the reasons for refusing to accept the deceased's will as follows:

> "I acknowledge receipt of your letter dated 3rd October 2005 whose contents have been noted. The will dated 10th September 1988 has been rejected by the Master for want of compliance with the provisions of the Wills Act [*Cap 6:06*] s 8(b) and (d). Even if the Master was to exercise his discretion in terms of the Act. Such discretion would violate the rights of the surviving spouse at law.
> We will now proceed interstate and the edict meeting to choose an executor will be held before me tomorrow (12th October 2005 at 11am). Anyone who is aggrieved by this my decision should take me on review within 21 days of this letter."

It was pursuant to this letter that the applicants then launched this application.

The application was opposed by the second respondent on the basis that the Will does not comply with the Wills Act and that it excludes six other children of the deceased. The first

respondent filed a report as required by rule 248 of the High Court Rules as amended in which he reiterated and expanded the issues set out in his letter rejecting the will.

The issues before me are therefore as follows:

1. whether the first respondents decision in rejecting the will was unreasonable, and
2. whether the first respondents decision in rejecting the will was grossly irregular.

In order to determine these issues it is necessary to examine the provisions of the Act. Section 8 of the Act has provision for the formalities that must be complied with by a testator in making a will. The relevant provision of the Act provides as follows:

"8 Formalities for making wills, other than soldiers wills, wills made during epidemics and oral Wills

(1) Subject to subsections (3) and (5), a will shall not be valid unless—

(*a*) it is in writing; and

(*b*) the testator, or some other person in his presence and at his direction, signs each page of the will as closely as may be to the end of the writing on the page concerned; and

(*c*) each signature referred to in paragraph (*b*) is made or acknowledged by the testator in the presence of two or more competent witnesses present at the same time; and

(*d*) each competent witness either—

(i) signs each page of the will; or

(ii) acknowledges his signature on each page of the will;

in the presence of the testator and of the other witness".

(Subsection as amended by s.3 of Act 21 of 1998).

It is clear from an examination of the Will (which original document I caused to be brought before me from the Masters File) that it does not comply with s 8 (1) (b) and (d) of the Act. The Will was drafted on three A 4 size pages. The Will is partly type written and the other part is handwritten in the testators own hand. The pages are not signed on each page by either the testator or the witnesses. The testator signed the Will on the last page in the presence of the two subscribing witnesses. The Masters decision to reject the Will on this basis therefore cannot be faulted as it did not subscribe to the formalities set out in the Act. (see *Janda v Janda* 1995 (1) ZLR 375)

The second issue in my view warrants some consideration. It was submitted by the applicants that the first respondent should have used the provisions of s 8 (5) of the Act to accept the Will for the purpose of administering the estate. It was argued on their behalf that the failure by the first respondent to apply this provision when arriving at a decision was grossly irregular. Section 8 (5) of the Act allows the Master, if he is satisfied that the document was intended to be the Will of the deceased, to accept it for the purpose of administering the Estate. The provision provides as follows:

> "Where the master is satisfied that a document or an amendment of a document which was drafted or executed by a person who has since died was intended to be his will or an amendment of his will, the Master may accept that as a will for the purposes of Administration of Estates Act [*Cap 6:01*] even though it does not comply with all the formalities for the execution of wills referred to in subsection (1) or (2) or (b) to amendments…"

It seems to me from an examination of the case authorities that this provision was enacted in order to remedy the mischief which had presented itself in a number of cases. The sentiments expressed by GUBBAY CJ in the *Janda* case (*supra*) did not fall on deaf ears as a real injustice appeared to be taking place because certain formalities had not been complied with. The amendment to the Act was introduced in 1998 to give the Master a discretion where formalities in a will have not been complied with. It seems to me that a proper application of this provision would require the Master to adopt a two stage approach in coming to a decision. Firstly, he must satisfy himself that the document before him does not comply with the formalities in the Act. The second stage of the inquiry is to satisfy himself that the document was in deed intended to be the last will and testament of the testator. If the first respondent is so satisfied then he has a discretion whether or not to accept it for the purpose of the administering the estate.

In this case the first respondent successfully completed the first stage of the inquiry and found that the will did not comply with the formalities in the Act. He however did not proceed to consider whether the document before him was a true document, which is devoid of fraud, or whether or not he should accept it for the purpose of administering the estate. The first respondent made his decision without any reference to s 8 (5) of the Act at all when the express wording of the section enjoins him to apply the section in making a decision. It seems to me that the failure by the first respondent to apply the second stage of the inquiry was a gross irregularity which would warrant the setting aside of his decision.

The applicant has asked this court to step into the shoes of the Master and determine whether or not the will should be accepted for the purpose of administering the estate. In seeking this relief they have relied on the case of *Mashakada v Master of the High Court & Anor* 2001 (2) ZLR 311. It seems to me from the facts of this particular case that this would not be the correct approach to adopt. The facts in the Mashakada case (supra) show that that the court was constrained to act in the manner it did as it was dealing with a new provision which had come into operation after the Master had already made his decision. The provision in my view envisages the exercise of this discretion by the Master with this court determining the matter on appeal in the event that one of the parties is dissatisfied with his decision. I have also considered that the matter came before me on review and the appropriate relief would be to remit the case to the first respondent for him to consider.

The second respondent also proceeded to find that the Will was invalid on the basis that it is contrary to the provisions of s 5 (3) (a) and (b) of the Act. In my view having set aside the decision of the first respondent on the grounds of irregularity it is not necessary for me to determine this point.

The applicant sought costs against the second respondent. In my view as the review was warranted by the irregularity occasioned by the first respondent, the second respondent was entitled to oppose the application as the relief sought affected her rights as co executor of the estate. This is an estate matter and in my view it is only appropriate that costs are borne by the estate.

Accordingly I make the following order:

1. The decision by the first respondent rejecting the will by the late Josiah Tungamirai on 10 September 1988 is hereby set aside.

2. The first respondent is ordered to consider the matter *de novo* and take into account s 8 (5) of the Wills Act [*Cap 6:06*]

3. The costs of this application shall be borne by the estate of the late Josiah Tungamirai.

Scanlen & Holderness, applicants' legal practitioners
Mteywa & Nyambirai, 2nd respondent's legal practitioners