ESTATE LATE ATTWELL GARANDE
(Represented by Sharpstone Garande)
versus
CHIPO MASAITI
and
PAUL MAPHOSA
and
CITY OF HARARE
and
MASTER OF HIGH COURT

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 30 MAY AND 19 JUNE 2008

Family Law: Opposed Application

N. Mhlolo, for the applicant
W. Zhangazha, for 1st and 2nd respondents

KUDYA J: On 6 February 2007 the applicant filed the present application. He prayed for an order that:

a) the appointment of first respondent to the Estate Attwell Garande be and is hereby set aside
b) the agreement of sale and agreement of assignment of stand No 6579 Budiriro 5B Harare done on 17 January 2007 be and is hereby set aside and the property reverts back to the Estate late Attwell Garande

c) the third respondent be and is hereby interdicted from ceding this property to any third parties without the order of this Honourable Court

d) the first and second respondents pay the applicant's costs of suit
e) the fourth respondent be and is hereby ordered to convene an edict meeting for the Estate Late Attwell Garande and proceed to have it administered according to the Garande Family and interested members directions.

It was opposed by first and second respondents. The first respondent raised two preliminary issues. The first was that the applicant lacked *locus standi* to represent the estate and secondly that the procedure used to bring it fell foul of R 259 of the Rules of Court. She

prayed that the application be dismissed without recourse to the merits. I directed the parties to argue the matter on both the preliminary issues and the merits.

THE PRELIMINARY ISSUES

Mr. *Zhangazha*, for the first respondent, submitted that the purported authority relied upon by the applicant was a nullity because it did not adhere to the format set out in form B in the Second Schedule by s 23 of the Administration of Estates Act [*Chapter 6:01*]. He contended that as s 23 of the Administration of Estates Act is worded in peremptory language, exact compliance with its provisions was required. He averred that the letters of administration issued to first respondent met the criterion set out in s 23.

The authority relied on by the applicant is entitled 'letter of appointment of executor dative/ heir'. It has a reference number for a deceased estate file issued by the Chitungwiza Civil and Customary Law Magistrates Court. It has the Provincial Magistrate's date stamp of 8 May 2006 and signature. It appoints the applicant, following an edict meeting, as the executor dative in the estate in question.

The one relied on by first respondent takes the format set out in form B by s 23 but adds the words 'who died at' and 'on the'. It is also not in exact compliance with the provisions of s 23.

It seems to me that both these letters of administration are in substantial compliance with form B. Each serves to inform the world at large that the Master has appointed the named individual on a given date the executor of a deceased estate. Thus, even though peremptory language is used equivalent as opposed to exact compliance with the provisions of s 23 suffices to fulfill the aim and objectives of the section, that is, the identification of the duly appointed executor in a given deceased estate. See *Movement for Democratic Change & Anor v Mudede NO & Others* 2000 (2) ZLR 152 (SC) at 158C-H.

In any event, the submission by Mr *Zhangazha* looses its force in the face of the averment by the Master that the letters of administration that were issued to the applicant were valid. The first preliminary issue is decided against first respondent.

Mr *Zhangazha* further contended that the applicant seeks a review of the Master's decision through the medium of a *declaratur*. He submitted that the application should be dismissed for failing to abide by the requirements of Order 33 Rule 257 and 259 of the Rules of Court. He relied on *Masuka v Chitungwiza Town Council* 1998 (1) ZLR 15 (H). Mr. *Mhlolo*, for the applicant, on the other hand submitted that it was competent for the applicant to seek a declaration of nullity of the Master's decision and consequent relief other than by

way of review. He relied on *Musara v Zimbabwe National Traditional Healers Association* 1992 (1) ZLR 9 (H).

In *Musara's* case, *supra*, ROBINSON J held that it was in the interest of justice that an invalid act be declared a nullity by way of a *declaratur* even if this could be achieved through common law review proceedings and in the alternative exercised his discretion in terms of s14 of the High Court Act [*Chapter 7:06*] to grant the order sought. In *Masuka's* case, *supra*, DEVITTIE J held that a litigant could not by seeking a declaratory order based on recognizable review grounds avoid the mandatory strictures for review proceedings that are set out in r 259.

It seems to me that DEVITTIE J relied on s 26 and 27 of the High Court Act [*Chapter 7:06]* in his bid to dismantle the reasoning in the *Musara* case. He did not pay particular attention to the provisions of s 14 of the High Court Act, which ROBINSON J adopted in the alternative. To the extent that s 26 and s 27 take second fiddle to s 14 of the High Court Act, it seems to me that ROBINSON J was correct to hold that a declaration of nullity other than by way of review was available to any interested party who was prepared to persuade the Court to exercise its discretion under s 14 in his favour. In other words, I incline to the view that notwithstanding that an application may contain recognizable review grounds; it may be brought other than by way of common law review through a *declaratur*.

I would for that reason dismiss the second objection raised by first respondent and find that the application is properly before me.

THE FACTS

The deceased died single at Gweru on 27 February 2006. On 8 May 2006 Sharpstone Garande was appointed executor dative at Chitungwiza Magistrates Court.

The applicant averred that the deceased enjoyed an unsolemnised customary union with the first respondent from mid 1996 to June 2000 which had been dissolved by the time of his death. He then stayed with one Mary Spondarge who passed away in December 2005.

He produced a letter from first respondent's brother to the deceased as proof of the customary dissolution of the union. The letter, however, appears to show that the two were still in the union.

On 30 October 2006, first respondent registered the estate with the Assistant Master at Harare Magistrates in DR 1512/06 and was appointed executrix dative. The immovable

property in question was awarded to her as the surviving spouse and she was also granted the Master's consent to sell her rights and interest in the property on that day. The applicant saw an advertisement in the newspaper for the First and Final Administration and Distribution Account of the estate in the Herald newspaper on12 December 2007. This drove him to write to the Master on 14 December objecting to the appointment of the first respondent as an executrix in the estate. In the meantime on17 January 2007, first respondent signed a deed of assignment of the property in favour of second respondent at third respondent's offices.

Armed with this document second respondent visited the property in February 2007 and this triggered the present application.

The applicant averred that as first respondent was improperly appointed an executrix, the sale was a nullity. He further averred that the Assistant Master connived with her to defraud the estate of its sole asset. He fortified his averment by showing that he took the word of first respondent on face value and without any input from the deceased's relatives, that she was his customary law widow; and further that he ignored the averment in her affidavit of 12 September 2006 of the existence and location of deceased's mother but proceeded to appoint her; he ignored the contradictory averments that the deceased had no relatives and that which indicated she was not in good books with the mother whose address was provided as the matrimonial home and lastly, the First and Final Administration and Distribution Account was advertised in both the newspaper and Government Gazette of 12 December 2006 after it had been approved on 30 October 2006. In any event, the final administration and distribution account was approved before it had been advertised.

The fourth respondent, the Master, filed his report on 16 October 2007. He stated that the registration of the estate by the first respondent was irregular as she was appointed executrix in the face of a valid and existing appointment of applicant to the same office. He further stated that her appointment was also prejudicial to the estate as she averred in her application that the deceased had no relatives. He recommended that her letters of administration be nullified together with all the subsequent acts that flowed from her appointment.

The first respondent averred that she was the customary law union wife of the deceased and that that union subsisted at the time of his death. She attached the memorandum of agreement, entered into by the City of Harare on the one hand and the deceased and herself on the other, of 11 September 2000 in a bid to demonstrate that she was a joint holder of rights in

the immovable property in question. Mr *Mhlolo* attacked the authenticity of this document. In doing so he relied on four documents that were filed of record by the applicant. The first three, which consisted of an application for title deeds filed with third respondent by the deceased on 19 September 2002; the rent card issued by third respondent on 1 June 1998; the building inspectorate form of 5 October 2001, were all in the sole name of the deceased. The fourth document was a purported prototype addendum to an agreement of sale which he alleged the third respondent used with the consent of a spouse to secure the interests of the other spouse in its property.

The dispute on the authenticity of the sale agreement can be resolved on the papers. That agreement is an official document of third respondent. The applicant failed to show on a balance of probabilities that it was forged. In fact, Mr *Mhlolo* abandoned his onslaught on the contents of the document after it became clear to him that he had misconstrued certain information thereon. The document provides a portion for the inclusion of more than one right holder. In those portions the names of the deceased and first respondent appear. Each of them together with officials of third respondent initialed each page of the seven paged document and first respondent also appended her signature as co- purchaser with the deceased. She also produced water bills which are in the joint names of the two.

It does not appear to me that the four documents that were relied on by Mr *Mhlolo* can be used to challenge the authenticity of the agreement of sale. These documents were either drawn by or on the instructions of the deceased without any input from the 1st respondent. The fourth document protected the right of a spouse who was a joint holder of rights by virtue of marriage and could not be used, in my view, on a spouse who was a joint owner in her own right.

I find on the papers that the first respondent was a joint holder of rights in the immovable property together with the deceased.

The second respondent averred that he was an innocent purchaser who bought the property for value, through an Estate Agency, after due diligence. He counterclaimed for a declaration of validity of the sale and that the purchase price be held in trust pending the resolution of the dispute between the applicant and first respondent by fourth respondent; and in the alternative that the dispute between the applicant and first respondent be adjudicated on by the fourth respondent and that the second respondent be declared a creditor of the estate with a claim to be considered by fourth respondent with costs to be borne by the estate.

It seems to me that the fate of the second respondent is inextricably linked with that of first respondent. If I invalidate first respondent's appointment, it must follow that all subsequent acts based on that appointment were void. In that event, the second respondent's counterclaim would fail. See *Katirawu* v *Katirawu & Others* HH 58/2007 at page 5.

The applicant sought the declaration of nullity on the basis of procedural irregularities that arose in the appointment of the first respondent. He did not address his mind to the question whether the Master could issue a second letter of administration while the first one was still extant. Part IIIA in s 68 of the Act defines executor. Section 68B outlines how an executor is appointed. In Part III section 26 deals with the persons who are eligible for appointment to the office of executor. The appointed person is issued with letters of administration which take the format laid out in form B of the Second Schedule. Section 177, which is found in Part V of the Administration of Estates Act, deals with the removal of an executor from office. These sections all contemplate the appointment of one individual as an executor at any given time. Unless co-executors are appointed, it would be incompetent for the Master to appoint a subsequent executor for a deceased estate without first seeking the removal of the one in office.

The first respondent was appointed an executrix at a time when the applicant was in office. I agree with the averment made by the Master that her appointment in those circumstances was void.

I do not believe it is necessary that I deal with the points raised by the parties on the irregularities committed by the first respondent and the Assistant Master in any great detail for the reason that I hold that first respondent's appointment was void. It suffices to observe that the failure by the Assistant Master to call the known surviving relatives of the deceased at the edict meeting at which she appointed her to confirm whether or not she was the widow of the deceased and his failure to deal with the objection of applicant of 14 December 2006 coupled with his approval of the distribution plan before it had been advertised were gross irregularities which would have been fatal to her appointment.

CONCLUSION

The effect of my findings is that the applicant remains the duly appointed executor of the estate of the late Attwell Garande. It is not possible in these circumstances to order the Master to convene an edict meeting for the estate for it to be administered in accordance with

the wishes of interested parties as prayed for in paragraph (e) of the applicant's draft order. It is, however, appropriate for me to grant the other payers set out in that draft order.

DISPOSITION

ACCORDINGLY, IT IS ORDERED THAT:

1. The appointment of first respondent to the Estate Attwell Garande be and is hereby set aside

2. The agreement of sale and agreement of assignment of stand No 6579 Budiriro 5B Harare done on 17 January 2007 be and is hereby set aside and the property reverts back to the Estate Late Attwell Garande
3. The third respondent be and is hereby interdicted from ceding this property to any third parties without the order of this Honourable Court
4. The first and second respondents pay the applicant's costs of suit, jointly and severally, the one paying the other to be absolved
5. The second respondent's counterclaim be and is hereby dismissed with costs.

Mushonga and Associates, applicant's legal practitioners
Chinamasa, Mudimu, Chinogwenya & Dondo, 1st and 2nd respondents' legal practitioners