KENIAS MUTYASIRA CLAIMANT
and
BARBRA GONYORA RESPONDENT

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 28 October, 2010

REFERRAL IN TERMS OF ORDER 38 RULE 313 OF THE HIGH COURT RULES, *1971*.

CHITAKUNYE J. This matter was referred to me in chambers in terms of the provisions of Order 38, Rule 313 of the High Court Rules, 1971. The basic background is as follows:-

In 1976 the late Muchineripi Rishon Gonyora (hereinafter referred to as the deceased) married the respondent in terms of the African Marriages Act, [*Cap 5:07*]. The deceased died on 13 August 2002 in Harare. Barbra Gonyora registered the deceased's estate at Harare Magistrates Civil and Customary Law Courts. On 17 October 2002 an edict meeting was held before a Provincial Magistrate. The respondent was appointed executrix dative with the powers to ascertain and verify the assets and liabilities of the deceased, which included documentary proof of current bank balances, documentary proof of liabilities, balances with mortgage, a plan of how the estate was to be distributed among the beneficiaries and presentation of that plan before a magistrate on an agreed return date for approval.

On 25 August 2005 while the executrix was still to lay the distribution account and inheritance plan before a magistrate and this was close to three years after her appointment, the Master called her for a special meeting on 30 August 2005 to discuss all matters related to her late husband's estate. She duly attended the meeting with other beneficiaries of the estate. At that meeting the Master appointed the claimant as a curator *bonis* in the estate. Letters of confirmation were granted to the claimant by the Master on the following day.

On 25 September 2005, the Master purporting to be acting in terms of s 25 of the Administration of Estates Act; [*Cap 6:01*], gave notice in the Gazette of an edict meeting to be held at his offices on 5 October 2005. The notice was however gazetted on 7 October 2005, two days after the meeting.

The applicant and other beneficiaries however attended the meeting as they had been notified by other means. At that meeting the curator *bonis* was then appointed as executor *dative*. He there after went about carrying out the duties of his office and compiled a First and

Final Liquidation Account of the estate. His involvement was first challenged by the filing of the first court application, case no. HC 5567/05. He thereafter sought to dispose certain assets of a company with the Master's consent in order to satisfy payments to certain beneficiaries and estate duties. This led to the filing of an urgent application by respondent in HC 221/06.

In both applications the respondent, who was the applicant, submitted that she was properly appointed by the Master as the executrix dative, further that she was not lawfully removed before the Master appointed the claimant and lastly that that appointment by the Master of claimant was in her view therefore void.

The fate of the two applications was decided on 19 May 2006, by KUDYA J when he made an order that-:

"1. The appointment of the second respondent Mr. Kenias Mutyasira as the Executor Dative to the Estate, late Muchineripi Rishon Gonyora DRH1989/02/DR1854/05 be and is hereby declared null and void.

2. The appointment of Barbra Gonyora, the surviving spouse, as Executrix Dative to the Estate late Muchineripi Rishon Gonyora DRH 1989/02/DR1854/05 on 17 October 2002, be and is hereby declared valid.

3. The fees of second respondent for administering the estate shall be paid by the estate up to the date that second respondent was served with the application in case No. 5567/05.

4. The second respondent shall return all the assets and documents of the estate under his custody and control to the applicant within ten days of this order.

5. The costs in case No. 5567/05 and HC 221/06 including the costs of the hearing of the urgent application of 25 January 2006 shall be borne by the Estate Late Muchineripi Rishon Gonyora."

The claimant was not satisfied with some aspects of the judgment and so appealed to the Supreme Court. That appeal was dismissed with costs on 28 May 2007. (See *Kenias Mutyasira v Barbra Gonyora and Master of the High Court* SC 80/06).

The claimant made effort to be paid his dues as Curator *bonis* and as Executor dative in terms of the judgment by KUDYA J. Such effort was resisted by respondent who contended that he could only be paid when the estate had been wound up. In this regard there is a letter by respondent's legal practitioners to claimant dated June 15, 2007 in which they stated in paragraph 2 thereof, *inter alia*, that-:

"Your claim for costs will be dealt with during the ordinary course of winding up of the estate."

On 29 June 2007 respondent's legal practitioners sent another letter to claimant in which they stated categorically in the second last paragraph that:-

> "Your fees are calculated from the assets of the estate. They are therefore only determinable after the Account reflecting the assets of the Estate has been drawn and lodged."

On 30 January 2008 the parties held a meeting with the Master. The issue for discussion pertained to the payment of executor's fees and finalization of the estate. In that meeting Mr. Mutyasira is recorded as having submitted that his bill should be taxed to enable him to lodge his claim for payment. Respondent's counsel, Mr. *Chikumbirike* is recorded as having reiterated that Mr. Mutyasira's fees remain due until the estate is wound up not when the court order was granted. The Master resolved that Mr. Mutyasira should lodge his bill for taxation on the following day.

Apparently no taxation took place as the Executrix dative Barbra Gonyora had not yet drawn up the estate's account. It was only on 25 September 2009 that she advertised the First Interim Administration and Distribution Account for the estate. The account was drawn up in United States dollars.

On 11 January 2010 Mr. Mutyasira presented his bill for taxation in respect of fees for work done as a Curator *Bonis* and as Executor Dative of the estate late Muchineripi Rishon Gonyora.

On 3 March 2010 the parties appeared for taxation. After deliberations and arguments by both sides, the Taxing officer Mr. S. Madi made the following decision:-

"1. That Mr. K. Mutyasira is entitled to 10% of the gross value of the estate in terms of the provisions of the Estate Administrators (Registration and Examination) (Amendment) Rules, 2007 (No. 1) for his work as Curator *Bonis*; and

2. that for his work as an Executor, Mr. K. Mutyasira is entitled to 50% of the fees claimed by the Executrix Barbra Gonyora."

At that meeting Mr. *Mufara* representing Barbra Gonyora objected to have the Curator's and Executor's fees for Mr. K Mutyasira being paid in United States dollars as he argued that the judgment by KUDYA J was premised on Zimbabwean dollars and in any event, the work had been done in 2005 when the Zimbabwean dollar was still in circulation. Mr. K Mutyasira on the other hand insisted that payment had to be in United States dollars.

Faced with the above the taxing officer referred the issue to me for determination in terms of Order 38 Rule 313 of the High Court Rules. That rule states that:-

> "The taxing officer may, without filing any formal documents submit any point arising at a taxation for decision by a judge in chambers, and it shall be competent for the taxing officer and for the legal practitioners who appeared at the taxation to appear before the judge respecting such point."

The issue for determination is whether or not Mr. K. Mutyasira is entitled to be paid in United States dollars for his Curator's and Executor's fees when that work was done in the year 2005 when the Zimbabwean dollar was still in circulation.

I invited the parties to file heads of argument dealing specifically with that issue.

The claimant's position was to the effect that he should be paid in United States dollars as that is the currency in which the account was presented. He argued that the judgment by KUDYA J did not refer to the currency to be used. Although the work was done in 2005 and, as per the judgment by KUDYA J, he should only be paid up to when he was served with the application challenging his appointment, he could not have his bill taxed then due to the litigation in this matter which was protracted. Though at one stage he liquidated some estate property to pay some beneficiaries he could not legally pay himself at the time due to the litigation that was ongoing. He also pointed out that in any case counsel for respondent made it clear that Mr. Mutyasira's bill could only be taxed after the account had been drawn up. To that effect he referred to correspondence from respondent's legal practitioners dated 15 June 2007 and 29 June 2007 buttressing that point. It was claimant's contention that in light of all this, his fees fell due and payable in September 2009 when the First Interim Administration and Distribution Account was lodged.

The respondent on the other hand contended that claimant must be paid in the currency that was obtaining at the time the work was done which is the Zimbabwean dollar. Respondent's attitude was also to the effect that by referring the issue to me I was in effect being asked to review KUDYA J's judgment. As far as KUDYA J's judgment was passed long before the multi-currency regime came into force it could only have related to payment in Zimbabwean dollars. It is my view that counsel for respondent missed the point. The point is not about reviewing the order by another judge. The judgment by KUDYA J set out the period for which claimant must be paid. The period was set as from the time of his appointment to the time when he was served with a court application challenging his appointment. That period is not being challenged at all. The issue was merely in what currency should claimant be paid in

light of the multi-currency regime that came into effect well after the judgment but before claimant had had his bill assessed and taxed. That issue can be resolved by looking at the basis for assessing the fees and when they should be paid.

Section 56 of the Administration of Estates Act, [*Cap 6:01*], herein after referred to as the Act, states that-:

> "Every executor shall, in respect of his administration, distribution and final settlement of any estate, be entitled to claim, receive or retain out of the assets of such estate, or from any person who as heir, legatee or creditor is entitled to the whole or any part of such estate, such remuneration as may have been fixed by the deceased by will or deed or otherwise as fair and reasonable compensation to be assessed and taxed by the Master, subject to the review of the High Court, upon the petition of such executor or of any person having an interest in such estate."

Section 96 of the Act states that-:

> "Every tutor, either testamentary or dative, and every curator, either nominate or dative, shall, in respect of his administration and management of any estate, be entitled to claim, retain and receive out of the assets of such estate a reasonable compensation for his care and diligence in the said administration, to be assessed and taxed by the Master, subject to the review of the High Court or any judge thereof, upon the petition of any such tutor or curator or of any person having an interest in the said estate."

In *casu* the taxing officer upon being presented with the claim assessed and taxed the bill. He came to the conclusion that for claimant's role as curator dative for the period that he so acted a reasonable compensation is 10% of the gross value of the estate. He based that assessment on the provisions of Part C to the Estate Administrators (Registration and Examination) (Amendment) Rules, 2007, S.I 54/07 which provides for the remuneration of tutors and curators in percentage terms in relation to the value of the capital assets. That part provides remuneration of 5% on the value of capital assets on assuming control and 5% on the value of capital assets upon termination of control. This is how the officer appears to have come to a total percentage of 10% of gross value of the estate.

For his role as executor dative for the period up to when his office was challenged, the taxing officer came to the conclusion that a fair and reasonable compensation for the duties and work he did during that period is 50% of fees claimed by the Executrix Barbra Gonyora.

The awards in percentage terms were not challenged in respect of the two roles he performed in relation to this estate.

In as far as the fees for curator *bonis* are based on the value of capital assets it is my view that it is akin to claimant retaining 10% of the estate as his fees. If that were to happen

surely no one would begrudge him if he decided to dispose that portion in a currency of his choice. As is stated in section 96 of the Administration of Estates Act, *supra,* the executor is "..entitled to claim, retain and receive out of the assets of such estate a reasonable compensation for his care and diligence in the said administration,…" The 10% that claimant was awarded as his fees can not, in my view be converted to the monetary value of such 10% in the year 2005, it is a 10% value of capital assets which he is entitled to retain. An award in percentage terms does not really matter in which currency it is realized as long as at the end of the day it remains 10% of the value of the capital assets.

In the same vein on examining the work done by the claimant the taxing officer came to the conclusion that a fair and reasonable compensation for all that he did was an award of 50% of the fees claimed by Barbra Gonyora. That having been expressed in percentage terms makes it not to be affected by the change of currencies. All that has to be ensured is that his fees are 50% of the fees claimed by Barbra Gonyora, no less and no more. In as far as Barbra Gonyora has lodged the account in United States dollars surely the percentages should be calculated using that currency.

Counsel for respondent did not in their submissions deny that it was necessary for claimant to wait till Respondent had lodged the account to have the Master assess and tax his fees. I also did not see any proposal of how they hoped to calculate claimant's fees in Zimbabwean dollars when the executrix had used the United States dollars. In fact in their own letter dated 29 June 2007, which has already been referred to above, respondent's legal practitioners stated to claimant that-

> **"Your fees are calculated from the assets of the estate. They are therefore only determinable after the Account reflecting the assets of the Estate has been drawn and lodged."(**emphasis is mine)

Reference was made to the case of *The Estate late Patrick Matimura* HH12-10. In that case a legal practitioner was appointed executor. In presenting his bill to the taxing officer the executor sought to rely on the Law Society tariff of 2009 for work done from the year 2005 up to 2009. The taxing officer felt constrained to pass the bill as he felt it was not competent for the executor to rely on the Law Society of Zimbabwe tariff for work done before that tariff came into operation. The taxing officer was dealing with a bill based on the Law Society of Zimbabwe tariff. It was in those circumstances that BERE J. at page 3 of the cyclostyled judgment said that:-

> "It is clear that the taxing officer was within his rights to demand that work done in 2005 be charged in accordance with the relevant and applicable Law Society tariff as at that year. In my view the subsequent years ought to have followed the same approach. It was certainly not competent for the executor to seek to rely on the tariff of September 2009 in his computation of fees due to him for any work done before that date. Such an approach was clearly a violation of the Law Society guidelines."

At page 4 of the same judgment the judge went on to say that-

> "In any event it is inconceivable in my view that the Law Society would encourage its members to recoup their legal fees in United States dollars for the time when it was illegal in this country to deal in foreign currency without complying with the relevant exchange control regulations."

I agree with the learned judge on the above view. It is however important to distinguish that scenario from the present. In HC 12/10 the tariff was set on an annual basis. The tariffs were changed from year to year. For each year legal practitioners were expected to charge as per the tariff. In *casu* the basis for the fees is not on given tariff but on percentage basis.

Regarding curator's fees the percentage is based on the value of the capital assets of the estate in terms of the provisions of the Estate Administrators (Registration and Examination) (Amendment) Rules, 2007, S.I. 54/07. That percentage has not changed or been altered upon the advent of the multi-currency regime. It is that percentage that claimant was awarded. It would appear to me that the legislature opted to tie the curator's fees to the value of the assets for a purpose. It may as well be that it was to ensure that the curator got a just compensation for his role as curator and that such compensation be related to the value of the assets involved.

In taxing and assessing the executor's fees the taxing officer opted to award it in percentage terms in relation to the Executrix Barbra Gonyora's claim and did not use the Law Society tariffs. The executrix fees were presented in United States dollars. It is common cause that the executrix was appointed and did some of the work before the multi-currency regime yet she did not seek to be paid in Zimbabwean dollars for that work. She did not divide her remuneration into two different eras. She is clearly seeking to be paid in United States dollars for work done during the Zimbabwe dollar period because her remuneration is due after she has completed the work and the Master has assessed and taxed it. That has been done in a multi-currency era hence her fees are expressed in US dollars. I am of the view that the 50% awarded to claimant is of the executrix's claim in value terms. If the claimant is to realize that percentage in value terms, he should be paid in the same currency as the executrix. If payment

is made in any other currency it must be such that it equates to that percentage award. Payment in a currency and amount that would not equate to 50% would not accord with the award. It would thus not be a fair and reasonable compensation.

Accordingly, I am of the view that claimant is entitled to be paid his compensation or fees, for both roles as curator and as executor, as assessed and taxed by the taxing officer in the currency in which the account was prepared and lodged, that is in United States dollars.

Wintertons, Claimant's legal practitioners
Chikumbirike & Associates, respondent's legal practitioners
The Master, High Court of Zimbabwe