RACHEL FILON
and
GLORIA MOTSI
versus
MARGARET SIBANDA
and
WORDSWORTH RUNYARARO MOTSI
and
CHRISTOPHER CHIGWANDA
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
PATEL J

Civil Trial

HARARE, 16 to 18 November 2010, 18 January 2011 and 3 May 2011

R. Filon (in person), for the plaintiffs
M. Mandikumba, for the 1st, 2nd and 3rd defendants

PATEL J: The dispute in this case revolves around the 4th defendant's registration of the will of one Martin Philip Motsi, who died on 10 September 2002, and the subsequent appointment of the 3rd defendant as the executor of Motsi's estate. The principal assets of the estate consist of three immovable properties. Apart from the 3rd and 4th defendants, the parties are related to one another.

The primary issue for determination is whether the will was in fact executed by the deceased and whether the Master erred in accepting that will. The secondary issue is whether or not the 3rd defendant's appointment as executor should be set aside.

It is admitted by the defendants, firstly, that the 3rd defendant was not in attendance at the meeting where he was appointed and, secondly, that his representative at that meeting was not a legal practitioner or executor. Nevertheless, they assert that this appointment as executor was not invalid.

The Evidence

Rachel Filon (the 1st plaintiff) testified as follows. In 2005, at a family gathering in Bulawayo, an unsigned will of the deceased was produced by his friend, one Ginson Sibanda. The authenticity of the will was challenged by the plaintiffs and several others present at the gathering. Many years later, the plaintiffs were invited on one day's notice to a meeting at the Master's Office held on 11 November 2009. At the meeting, she raised various objections to the will that had been accepted by the Master on 6 November 2009 [Exhibit 1]. The signature of the testator was not the deceased's and the document was incomplete in certain material respects. The Master's official disregarded these objections and proceeded to appoint the 3rd defendant as executor of the deceased estate, even though he was not present at the meeting [Exhibit 2]. The letters of administration were issued on 13 November 2011 [Exhibit 3]. The Master's authority to sell one of the estate assets, a property in Highfield, was granted on 19 November 2009 [Exhibit 4]. On 2 November 2009, even before the meeting was convened, the Master had given his consent to transfer that property [Exhibit 5]. Later, when she perused the estate file, she found the following documents: a second will with the same date and signatures [Exhibit 6]; an affidavit, dated 7 July 2005, by the 2nd defendant purporting to distribute the assets of the estate as heir at customary law [Exhibit 7]; a death notice, filed by the 3rd defendant on 22 September 2002, stating that the deceased had left a will [Exhibit 8]; an inventory of assets filed by the 3rd defendant on 22 September 2009 [Exhibit 9]. She produced various letters and cards signed by the deceased [Exhibit 10] with signatures that differed from those on the two wills. In February 2010, she sought and obtained an urgent interdict against any disposal of the estate properties by the 3rd defendant, pending the finalisation of this case. The Master's Report of 15 February 2010 was filed in relation to that matter [Exhibit 11].

Sheila Motsi and Martha Motsi confirmed that Ginson Sibanda produced and read out a will at the family gathering in 2005. The will was typed but not signed and was different from Exhibits 1 and 6. In terms of this will, the immovable properties of the deceased were bequeathed to the 1st and 2nd defendants.

Gloria Motsi (the 2nd plaintiff) confirmed the preceding evidence as to the events in Bulawayo in 2005. The will produced was typed but not signed by the deceased or anyone else. It was not the same as Exhibit 1 or Exhibit 6. She corroborated the 1st plaintiff's evidence as to what transpired at the meeting in November 2009. She also identified the signatures in Exhibit 10 as belonging to the deceased. The signatures on Exhibits 1 and 6 were not the deceased's.

Margaret Sibanda (the 1st defendant) testified as follows. At the 2005 gathering in Bulawayo, Ginson Sibanda said that he had been given a will by the deceased and that the latter had signed it. The will was read out by one of her sons. The three immovable properties in Bulawayo and Harare were bequeathed to her and the 2nd defendant. She was not shown or given the will to look at. A week after the gathering, in July 2005, the 2nd defendant sent Exhibits 1 and 6 to her by post because he was returning to the United Kingdom. She identified the signatures on Exhibits 1 and 6 as well as Exhibit 10 as those of the deceased. In 2009, she took steps to register the deceased estate and handed the relevant papers to the 3rd defendant. She could not explain why Ginson Sibanda did not produce the will at the deceased's funeral in 2002. Nor could she explain why the deceased signed two separate wills on the same date, *i.e.* 22 April 2002. No will of the deceased was ever brought to her attention between his death in September 2002 and the Bulawayo gathering in July 2005.

Ega Motsi is the deceased's grandson. His evidence related to the family gathering in 2005. At that time, Ginson Sibanda said that the deceased had left the will with him to sign as a witness, but that

the deceased died before he got around to signing it. The will had been signed by the deceased and one witness and was displayed to all present to look at. He maintained that what was produced by Sibanda was Exhibit 6 and not Exhibit 1. He could not recall the contents of the will and did not know how it was dealt with thereafter.

Peter Sameke worked with the deceased from 1972 to 1992 and was his good friend. He stated that he knew the 1st defendant to be the deceased's daughter but only met her at the trial. His evidence was that the deceased signed both Exhibits 1 and 6 in his presence. At the same time, he affixed his signature as a witness to both documents and inserted the dates thereon. The deceased said that he would get the second witness, who would have been Ginson Sibanda, to sign later that day. He could not explain why the deceased would have executed two separate wills at the same time.

Christopher Chigwanda (the 3rd defendant) is a legal practitioner and administrator of deceased estates. In September 2009, he was instructed by the 1st defendant to administer the Motsi estate. She brought various papers, including the two wills [Exhibits 1 and 6]. He submitted both wills to the Master's Office. (The statement at paragraph 6 of the Plea, which was prepared by his firm and in which it was denied that he registered the wills, was incorrect). He also filed the death notice [Exhibit 8] together with the inventory [Exhibit 9] on 22 September 2009. (The date on the death notice was incorrectly recorded as 22 September 2002). Rodwell Muparutsa attended the meeting on 11 November 2009, representing the firm, and signed the acceptance of executor's office [Exhibit 2] on behalf of the witness. He admitted that this acceptance should have been subscribed to by himself. He could not explain why the Master's consent to transfer [Exhibit 5] predated his appointment as executor. He was also unable to explain why he registered the estate on 22 September 2009 but only filed the two wills on 6 November 2011, or why he filed both wills instead of one.

He conceded that there could only be one last will and testament in respect of any testator.

Eldard Mutasa has been the Acting Deputy Master since 2006. He testified that, as a matter of practice, juniors in a legal firm are allowed to represent their seniors and to sign acceptances of office on their behalf. He accepted that this was not strictly in accordance with the wording of the subscribing clause in the relevant form [MHC 15]. Moreover, the practice was also contrary to section 26 of the Estate Administrators Act [*Chapter 27:20*] which requires that any person accepting such office must be a registered person with a valid practising certificate. As regards the two wills, he registered Exhibit 1 as opposed to Exhibit 6 because the former was more detailed and covered all of the deceased's assets. Even though it did not comply with the requisite formalities, he accepted it as the deceased's last will, in conformity with section 8(5) of the Wills Act [*Chapter 6:06*]. As stated in his Report [Exhibit 11], the Master's consent to transfer [Exhibit 5], which predates the letters of administration [Exhibit 3], was erroneously date-stamped by a member of his staff. The consent to transfer should have been granted after or concurrently with the authority to sell [Exhibit 4] which the witness himself had granted on 19 November 2009. He accepted that the death notice [Exhibit 8] clearly shows that the deceased was a widower and had left a will. However, he was unable to explain the anomalous provision in the registered will in favour of the deceased's wife. He also conceded that it was unusual to have two last wills signed by a testator on the same date.

The final witness, Ginson Sibanda, presently resides in Bulawayo. He was unable to attend court in order to testify in person due to his advanced age and extremely poor health, as is evidenced by a medical report dated 17 November 2010 [Exhibit 12A]. He was accordingly directed, through his lawyers, to depose to a sworn affidavit duly authenticated by a notary public. His affidavit dated 10 February 2011 [Exhibit 12B] swears/declares the following:

> "That sometime after the death of my friend Mr. Martin Motsi, his son, Runyararo Motsi came to my house with a typed document which he said he had found amongst his late father's belongings. He asked me to read the document at a special meeting where his late father's clothes would be distributed. I read the document in the presence of my friend's family members including his three sisters and children. Everyone present saw the document, touched the document and read for themselves and noted that it was not signed. Everyone present accepted the contents of the document in which my friend Martin Motsi was leaving his estate to his son, Runyararo. I never said the document was a will, and my friend Mr. Motsi never mentioned a will to me. There was no other document produced at that meeting while I was there.
>
> I have no interest in this Estate."

Assessment of Witnesses

As regards the Bulawayo gathering in 2005, the evidence of the plaintiffs and their witnesses was clear and consistent on the crucial question as to what was produced by Sibanda at that time. It was that the document presented was typed and unsigned by the deceased or by anyone else. In contrast, the defendants' evidence on this point is far from being clear. What the 1st defendant stated in court, that only one will was produced by Sibanda, is flatly contradicted by her statements at paragraphs 5 and 6 of her opposing affidavit (filed on 4 December 2009) in which she refers to "wills" having been produced. Again, at paragraph12 of the same affidavit, she states that "the wills were exhibited to us duly signed and witnessed by one person". However, her evidence in court was that Sibanda did not display the will or pass it around and she was not shown or given the will to look at. She would therefore not have been in a position to say whether or not it was signed. The only other defence witness present at the gathering was Ega Motsi. When asked to identify the document that he saw, he insisted that what was produced by Sibanda and what he looked at was Exhibit 6 and not Exhibit 1. It follows that there is no evidence before the Court by any witness to the effect that Exhibit 1, the signed and

registered will, was produced by Sibanda at the Bulawayo gathering in 2005.

There is then the evidence of Peter Sameke, who signed as the sole witness to Exhibits 1 and 6 and who was identified by the defendants as a witness shortly before the trial. His evidence was that he attended the burial of the deceased's wife, but that he could not recall where that burial took place. What is even more curious is that he claimed not to have met the 1st defendant until the date of the trial. This is surely not possible if he had indeed attended the burial, where ho would undoubtedly have met the deceased's daughters, including the 1st defendant. It is also incomprehensible that the defendants did not take steps to identify the sole witness to the two wills at a much earlier stage, *i.e.* soon after the contentious family gathering in 2005, rather than have him "discovered" only after the wills were filed with the Master. More significantly, his explanations as to why he inserted the dates for the other signatories to Exhibits 1 and 6 are quite implausible. The documentary evidence shows that the deceased would have dated his own signature. As for the second witness, it does not make any practical sense to insert the date of signature for a witness who was not even present at the time.

Turning to Ginson Sibanda, it is common cause that he attended the Bulawayo gathering in 2005 and that he presented a document to the family members at that time. His affidavit discloses the following salient facts: the typed and unsigned document was given to him by the 2nd defendant to be read out at the gathering; he duly complied and then handed the document over; it was seen and handled by all present, who also noted that it was not signed; he never said that it was a will and the deceased never mentioned any will to him; no other document was produced at the meeting while he was there.

Counsel for the defendants challenges the admissibility of Sibanda's affidavit as not having been recorded in terms of the

Rules of this Court. I find this submission difficult to understand, having regard to the wide discretion conferred by Rule 408 and given the reasons for which the affidavit was authorised. This Rule provides that the Court may at any time for sufficient reasons and on such conditions as it thinks reasonable, *inter alia*, order that any particular fact or facts be proved by affidavit, or that the affidavit of any witness be read at the hearing or trial. This discretion is subject to the proviso that where the other party *bona fide* desires the production of a witness for cross-examination, and where such witness can be produced, an order shall not be made for the evidence of such witness to be given by affidavit. In the present case, I am amply satisfied from the medical report tendered to the Court that it was not possible for Sibanda to attend the trial because of "his poor health in general, reduced mobility, and partial loss of vision". I am also satisfied that the conditions under which his affidavit evidence was adduced did not in any way prejudice the defendants. See *Davis* v *Davis* (1894) 11 SC 253; *Electrical and Furniture Trading Co. (Pvt) Ltd* v *M & N Technical Services (Zimbabwe) (Pvt) Ltd* 1988 (2) ZLR 265 (H).

I fully appreciate that the probative value of the affidavit might be diluted by the fact that its contents were not susceptible to cross-examination. However, with that cautionary rule in mind, I take it to be evidentially relevant in assessing the credibility of the witnesses and accuracy of the evidence otherwise before the Court. Taken in the context of all of the evidence lead at the trial, I find its contents to be corroborative of the plaintiffs' version of what transpired at the family gathering in 2005. It also serves to belie the defendants' assertions that Sibanda was given the so-called will by the deceased and that what he produced was a signed document.

Whether Will Duly Executed and Properly Accepted

In terms of section 5(1) of the Administration of Estates Act [*Chapter 6:01*], a notice of death must be delivered or transmitted

to the Master or a magistrate within 14 days after the death in question occurs. Again, section 8(1) of the Act stipulates that every person, who has in his possession at the time of the death of the maker of any will or who comes into possession of any will after the death of its maker, must forthwith, at the first opportunity, deliver or transmit every such will to the Master or a magistrate. By virtue of sections 5(3a) and 8(7), the failure to comply with either of these mandatory requirements entails the commission of an offence and the imposition of the prescribed penalties.

In the instant case, no evidence was lead at the trial to explain the inordinate delay, from September 2002 to September 2009, in registering the deceased estate. Moreover, neither the 1st defendant nor any other witness was able to explain why the existence of the two wills was not divulged soon after they surfaced in 2005 and why they were not presented to the Master's Office for registration until November 2009. This in itself raises considerable doubt as to the authenticity of the documents under consideration.

Both documents purport to be the deceased's "last will and testament" and declare that the arrangements that they embody should not be disputed or changed but should be adopted as his will. In terms of Exhibit 1, the entire estate, inclusive of the three immovable properties, is bequeathed to the 2nd defendant, with the exception of a demarcated portion of the Bulawayo property which is bequeathed to the 1st defendant. The terms of Exhibit 6 repeat the latter bequest in respect of the Bulawayo property, with the addition that the entire estate should devolve to the 2nd defendant in the event of the 1st defendant predeceasing the deceased. In essence, therefore, both documents need to be read together in order complete the devolution of the deceased's entire estate.

In Exhibit 1, the 2nd defendant is enjoined to take care of his mother (the deceased's wife) and not neglect her till death. As I have already intimated, this provision is nonsensical in light of the fact that the deceased's wife had already died in 2001, before the

will was purportedly executed in 2002. The signatures of the testator on both wills appear to resemble the deceased's undisputed signatures in Exhibit 10. However, it is also perfectly possible that they are very clever forgeries. In any event, in the absence of any expert evidence on the point, I do not think it possible to make any specific finding in this respect. Finally, it is common cause that both wills are dated as having been signed on 22 April 2002 by the purported testator and only one witness.

It is not disputed that the deceased was of sound mind and in good health at all material times, including at the supposed date of execution of Exhibits 1 and 6. The letters forming part of Exhibit 10 show that the deceased habitually dated his documents. It therefore seems highly improbable that he would not have dated his own signature to something so important as his own will. It is equally improbable that he would have signed the will in the absence of the second witness whose signature was specifically provided for on the face of the will. Finally, it is extremely difficult to accept that he would have executed a will explicitly providing for the upkeep of his wife who had already died the year before.

Section 8(1) of the Wills Act [*Chapter 6:06*] prescribes the formalities for a valid will as follows: it must be in writing and signed by the testator, or some other person in his presence and at his direction, in the presence of two or more competent witnesses present at the same time, and each competent witness must sign the will in the presence of the testator and of the other witness. In *Janda* v *Janda* 1995 (1) ZLR 375 (S), it was observed that the object of these formalities was to eliminate, as far as possible, the perpetration of fraud, speculation and malpractice. Consequently, the Supreme Court was constrained to declare invalid a will which had been made *bona fide* by the testator and as he believed, pursuant to the law, for want of compliance with the formal requirements of section 8(1). This was so even though the effect of declaring the will invalid was to defeat the real intention of the

testator. Following this decision, the Act was amended (by section 3 of Act 21 of 1998) by the insertion of section 8(5). This provision enables the Master to accept a document as a will, even though it does not comply with all the formalities for the execution of wills, where he is satisfied that the document drafted or executed by a person who has since died was intended to be his will.

It is submitted by counsel for the defendants that section 8(5) of the Act creates a rebuttable presumption in favour of the validity of any document purporting to be a will that is presented to the Master. In my view, this submission is not sustainable on a proper construction of section 8 taken as a whole. The correct position is that a will which is complete and regular on the face of it is presumed to be valid, unless the contrary is shown. A will that is incomplete or irregular is presumed to be invalid, unless it is covered by one of the statutory exceptions. In terms of the exception provided by section 8(5), a will that does not comply with all the prescribed formalities may be accepted as a will by the Master, but only if he is satisfied that the document was drafted or executed by the deceased and that it was intended to be his will.

In the instant case, I am unable to see how the Master could reasonably have accepted Exhibit 1 as the deceased's will. Firstly, it was transmitted for registration over 7 years after the deceased had died. Secondly, although Exhibit 1 is more detailed than Exhibit 6, it does not capture the specific eventuality provided for in the latter relating to the 1st defendant dying before the deceased. Thirdly, Exhibit 1 contains the nonsensical provision for the deceased's wife who had already died before the will was supposedly executed. Fourthly, the Master was presented with two last wills and testaments, a veritable contradiction in terms. Given these glaring anomalies, coupled with the plaintiffs' strenuous objections at the meeting on 11 November 2009, the Master should have instituted a more detailed inquiry into the matter. I accordingly take the view that he misdirected himself in accepting Exhibit 1 as the authentic

will of the deceased for the purposes of the Administration of Estates Act [*Chapter 6:01*].

To conclude the primary issue for determination herein, the most plausible scenario that emerges from the evidence before the Court is that the 2nd defendant, in connivance with Sameke, forged several draft wills over the years and used them as dictated by changing circumstances. Of course, there is a range of other possibilities as to what precisely transpired between 2002 and 2009. Be that as it may, I do not deem it necessary to make any definitive finding in this regard. What I do find, on an overwhelming balance of probabilities, is that neither of the documents presently under scrutiny was drafted or executed by the deceased Motsi as his last will and testament. It follows that the deceased did not draft or execute the document registered by the Master's Office on 6 November 2009 and that the Master erred in accepting it for registration. It also follows that the deceased must be declared to have died intestate.

Appointment of Executor

The validity of the 3rd defendant's appointment as executor of the deceased's estate must be considered, firstly, in relation to the validity of the will on which it appears to have been founded. According to the so-called minutes of the meeting held on 11 November 2009, the Master decided on this appointment because the beneficiaries under the will supported it, despite the protestations of those who were not such beneficiaries. To this extent, although the 3rd defendant was not appointed specifically in terms of the will, the Master's decision was effectively influenced by the provisions of the will. It is axiomatic that the appointment of an executor cannot be predicated on a will that is invalid. Indeed, counsel for the defendants accepts the position that, if the will is found to be invalid, then everything done consequent to it is a nullity.

Additionally, quite apart from the above consideration, there is a further and more compelling reason for setting aside the appointment. It is admitted by the defendants that the 3rd defendant was not in attendance at the Master's meeting where he was appointed, but was represented at that meeting by one of his juniors who was not a legal practitioner or executor. The latter subscribed to the acceptance of office by the 3rd defendant which, as was conceded by the defendants, was in itself procedurally irregular. More significantly, there are the mandatory provisions of the Estate Administrators Act [*Chapter 27:20*] that were flouted by the Master at those proceedings. Section 26(1) of the Act prohibits any person registered under section 23 from performing the work of an estate administrator or soliciting appointment as the executor of a deceased estate, except in accordance with the terms and conditions of a valid practising certificate issued in terms of section 28. More pertinently *in casu*, section 61(1) as read with section 61(6), renders it a punishable offence for any unregistered person to do anything for gain that constitutes the work of an estate administrator, or solicit appointment as the executor of a deceased estate, or pretend or by any means whatsoever hold himself out to be a registered person. By virtue of section 62(1), notwithstanding the prohibition contained in section 61, a company or partnership may carry on the business of an estate administrator under certain specified conditions relating to the direct control and management of a principal who is, *inter alia*, a registered person. However, even in this case, in every premises where any such business is not done personally by the principal, it must be done under the direction of that principal by an assistant who is himself a registered person. In my view, given that the conduct prohibited by section 61 is criminally punishable, the section is not merely directory but peremptory, and non-compliance therewith renders null and void any work done or appointment made pursuant to such conduct.

For the above reasons, I find that the appointment of the 3rd defendant as executor of the deceased estate *in casu* was invalid and constituted a nullity. Obviously, the effect of such nullification also extends to the letters of administration, authority to sell and consent to transfer issued by the Master to the 3rd defendant.

Relief Sought and Costs

In the premises, the plaintiffs are clearly entitled to the relief that they seek in their pleadings. However, through their closing submissions they seek additional relief, firstly, that they be appointed joint executors of the deceased estate and, secondly, that the order for costs against them made by Guvava J. on 1 April 2010 be rescinded or reversed.

I am wholly disinclined to accede to either of these additional claims. The first does not form part of the relief sought in the original pleadings, which presently remain unamended, nor was it canvassed in the evidence adduced at the trial. As for the second, this too does not appear in the pleadings and, in any event, the earlier order for costs is clearly *res judicata* and cannot be interfered with at this stage in the absence of appropriate proceedings instituted for that purpose.

As regards the costs of this matter, however, I agree with the plaintiffs that the defendants' attempt to legitimise forged documents in pursuit of their material interests warrants the award of punitive costs against them.

Disposition

Before declaring the order of this Court, I deem it necessary to express my deep reservations about the manner in which the deceased estate *in casu* was handled at the Master's Office. As is evident from the testimony of the Acting Deputy Master, there is need for corrective measures to be put in place so as to avoid the irregular practices that appear to have become entrenched in the administration of deceased estates. The Registrar is accordingly

directed to transmit a copy of this judgment to the Master. An additional copy must also be forwarded to the Attorney-General with the request that he institute criminal investigations into the conduct of the 1st, 2nd and 3rd defendants.

In the result, it is declared that:

(i) The document registered with the Master on the 6th of November 2009 as the will of the late Martin Phillip Motsi (the deceased) is null and void.

(ii) The deceased died intestate.

It is further ordered that:

(iii) The decision of the Master that the aforesaid document was executed or signed by the deceased be and is hereby set aside.

(iv) The Master's appointment of the 3rd defendant on the 11th of November 2009 as the executor of the estate of the deceased be and is hereby set aside.

(v) The Master shall convene another meeting to appoint an executor of the estate of the deceased; the said meeting shall be presided over by an official other than the official who presided over the meeting of the 11th of November 2009 or any of the officials who previously dealt with the estate of the deceased.

(vi) The 1st, 2nd and 3rd defendants shall pay the costs of suit, the one paying the others to be absolved, on a legal practitioner and client scale.

Chigwanda Legal Practitioners, 1st, 2nd and 3rd defendants' legal practitioners