

STEPHEN NYANYIWA

APPLICANT

versus

EDWARD NYANYIWA Jnr

1<sup>ST</sup> RESPONDENT

and

CLEVER MANDIZVIDZA

2<sup>ND</sup> RESPONDENT

*(in his capacity as executor estate late Edward Nyanyiwa)*

and

SVIVA CONTRACTORS (PVT) LTD

3<sup>RD</sup> RESPONDENT

and

THE SQUIRES LOFT (PVT) LTD

4<sup>TH</sup> RESPONDENT

and

E PFUGARI PROPERTIES (PVT) LTD

5<sup>TH</sup> RESPONDENT

and

THE MASTER OF THE HIGHT COURT

6<sup>TH</sup> RESPONDENT

HIGH COURT OF ZIMBABWE

HARARE, 12 October 2022 & 24 May 2023

### **DECEASED ESTATE**

*Mr C Warara*, for the Applicant,

*Mr T Vhudzijena*, for 1st Respondent

*Mr T Mutangi*, for 2nd Respondent

*Mr T.J Chivanga*, for 3rd - 5th Respondents

No Appearance for the 6th Respondent

### **NDLOVU J**

#### **INTRODUCTION**

This is an application for an Interdict. It is opposed.

The following is the Applicant's prayer: -

1. *The 2<sup>nd</sup> Respondent be and is hereby interdicted from continuing to act as self-appointed director in 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents respectively.*
2. *The 1<sup>st</sup> Respondent be and is hereby interdicted from continuing to act as director of the 4<sup>th</sup> Respondent.*
3. *The 1<sup>st</sup> and 2<sup>nd</sup> Respondents be and is hereby interdicted from holding meetings on as directors in the affairs of 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Respondents.*
4. *The 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall pay the costs of this application jointly and severally.*

The 1<sup>st</sup> - 5<sup>th</sup> Respondents took 3 *points in limine*. This Ruling is in respect of those *points in limine* and they are:-

1. **Locus Standi**
2. **Fatal Non-Joinder**
3. **Material Dispute of facts**

## **THE PARTIES**

The Applicant is the son of the now-late Edward Nyanyiwa [*the deceased*]. The 1<sup>st</sup> Respondent is also a son of the deceased born of a different woman though from the Applicant. The 2<sup>nd</sup> Respondent is the Executor of the late Edward Nyanyiwa's estate and is cited herein in his official capacity as such. The 3<sup>rd</sup>-5<sup>th</sup> Respondents are companies duly registered in terms of the laws of Zimbabwe in which the deceased held shares in various percentages in. According to the 2<sup>nd</sup> Respondent, the shareholding of the deceased in the 3 companies is in dispute and under litigation in this Court under case number **HC 4329/20**. The 6<sup>th</sup> Respondent is the Master of the High Court who presides over the Administration of Estates in Zimbabwe.

## **THE MATTER**

The Applicant's bone of contention is that as a beneficiary of the estate of the deceased, he is not happy with the manner in which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents became Directors in the 3<sup>rd</sup> to the 5<sup>th</sup>

Respondents and in that on the 9<sup>th</sup> of April 2020 as 3<sup>rd</sup> -5<sup>th</sup> Respondents Directors the two made resolutions to sale immovable properties which belong to the 3<sup>rd</sup> -5<sup>th</sup> Respondents in order to clear due administration fees for the estate of the deceased. The 2 also resolved that the 3<sup>rd</sup> Respondent would sell some of its immovable properties and that the 2<sup>nd</sup> Respondent would represent the company in the sale of those properties. According to the Applicant, in doing all this, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted without consulting other beneficiaries of the estate. The Applicant, therefore, founds this application to interdict the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, on the above issues. At the heart of this application is the Directorship of the 3 companies, and the rights of a beneficiary or potential beneficiary of an estate in the affairs of those companies. According to documents filed of record the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are presently at law Directors of the 3<sup>rd</sup> -5<sup>th</sup> Respondents. The Applicant says they self-appointed themselves to such positions without consulting the beneficiaries including him. The Applicant is neither a Director nor a shareholder of any of the 3 companies.

## 1. LOCUS STANDI

The Applicant is saying he is a beneficiary of the estate of the deceased who had shares in the 3 companies and therefore is entitled to approach the court to ensure that matters administered on his behalf by those doing so are properly managed. According to the Applicant, estate beneficiaries can sue for the protection of the law if they believe that the executors are mismanaging the estate. He relied on the authority of the SC:

**Master of Otrs SC the High Court of Zimbabwe N.O & Otrs Vs. David Takaendesa & Otrs SC 101/22.**

According to the Applicant, the 6<sup>th</sup> Respondent has a duty under Section 120 of the Administration of Estates Act [*Chapter 6:01*] to consult the beneficiaries and through that process, the beneficiaries ought to sit with the Executor and agree to appoint him (executor) a Director of a company in which the deceased held shares. No one should self-appoint himself a Director of a company simply because he is an Executor of an interested estate. Being a beneficiary of the deceased's estate that has interests in the 3 companies he by extension has a

direct interest in the 3 companies because their mismanagement will appreciate or depreciate his share in the estate.

The Respondents have argued and said that the Applicant and other beneficiaries were as a matter of fact consulted. They have also argued that being a beneficiary or potential beneficiary of an estate does not clothe one with the right to meddle and interfere with the business of the company in which the estate has a stake because a potential beneficiary is neither a Shareholder nor Director or Creditor of that company.

The Applicant is unhappy with the appointment or migration of the Executor of his father's estate to the Directorship of the 3 companies. He is also unhappy with the manner in which, as Directors of the 3 companies in question, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are doing business particularly the disposal of some, of the 3 companies' estates.

To properly navigate the question of *locus standi* in such a matter, in my view, the following questions must be considered and answered because of the interfacing of company law and the administration of estates law in such cases.

- 1) *Do beneficiaries of a deceased shareholder's estate have a right to be consulted on or to delegate one of their choices as a Director to replace the deceased in the company?*
- 2) *Do beneficiaries of a deceased shareholder's estate have a right to be consulted on or be informed of the goings on in the company other than as regards the deceased's shares?*

It is trite law that a company is a separate legal entity that conducts its own affairs separately from its shareholders.

***Salomon v Salomon & Co Ltd [1897] AC22 (HL)***

As separate juristic entities, companies can deal with their assets as they deem fit. The beneficiary's interests extend only to the shares that the deceased had in a company. It is only when there is activity pertaining to the sale of the deceased's shares in the company that the Master's consent and by extension the opinion of the beneficiaries (in some cases) would be required. *See*

***Salma Ebrahim v Attiya Ebrahim [In her capacity as Executrix Dative of Estate late Basheer Ahmed Ebrahim] & Others HH 448/18.***

Equally, the beneficiaries of the estate of a deceased shareholder have nothing to do with the day-to-day operations of the company and/or its Boardroom politics and strategies. The reason is simply that they are not shareholders. The estate might be a share-holder but they are not. Their inheritance is not the shares but the value of the shares. Ultimately, they get to be paid the value of the shares in the deceased's portfolio. They do not become shareholders per se in the company.

The property or assets of the company are not their inheritance. The right to inherit/benefit from the estate does not extend to being a right to interdict a company from carrying on with its usual business. One shudder to think of what would happen when a big corporate is interdicted from operating at the death of its 1% shareholder because the beneficiaries of his/her estate are not happy with something going on at the company or being sold by the company.

To found *locus standi* the Applicant must show that the sales he is concerned about pertain to the deceased's shares and not the property of the company. That the 2<sup>nd</sup> Respondent migrated from being a Director is coincidental and arguably undesirable or fortunate but clearly a non-issue. Who becomes a Director of a company is not and should not be the concern of the beneficiaries of an estate of the deceased.

The case of Takaendesa case [*supra*] is not applicable to this case. It is distinguishable from this case because it concerned the non-consultation of the beneficiaries by the Master prior to the disposal of the estate's assets. Those assets were not shares in a company. The appropriate authority, in this case, is that of Salma Ebrahim [*supra*].

In this case, the Applicant has no *locus standi* to bring this application and I, therefore, uphold the point *in limine* taken.

However, a repeat of what the Supreme Court said in the **Takaendesa** case [*supra*] is apt:

“... any decision by the executor concerning estate property must be made with the knowledge that, at law, the property belongs to the beneficiaries. The executor's function is only to ... ensure

*that the beneficiaries receive their inheritance.....what they thereafter [do] with it [is] ....not his concern.”*

An executor is not there to “perpetuate” the life of the deceased. Neither is the Executor there to improve the estate. His or her mandate is to identify the assets of the estate, preserve them, pay legitimate and proven claims against the estate, and to lawfully distribute the estate to the beneficiaries.

## **2. FATAL NON-JOINDER**

The Applicant has not cited the Registrar of Companies in this application. The Applicant has sought to rely on *Rule 32 [11]* of the *High Court Rules 2021*, which reads as follows:

*“[11] No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.”*

The Rules of this Court are clear in this regard. I will on the bases of *Rule 32 [11]* dismiss this point *in limine* taken without further do.

## **3. MATERIAL DISPUTE OF FACTS**

The Respondents were thin in argument on this point. That was not surprising at all. That is so because this point was intertwined with that of non-joinder.

I must however repeat what has been stated by this court in various other matters that a point *in limine* should not be taken for the fashion of it. It must be taken because it is capable of disposing of the case. I might as well add that a weakness in a party’s case should not be raised by the other party as a point *in limine*.

I dismiss this point *in limine* taken, on the basis that it lacks merit.

## **DISPOSITION**

The point *in limine* on the want of *locus standi* having been upheld, this application is dismissed with costs.

*Warara and Associates*, Applicant's Legal Practitioners.

*Musunga & Associates*, 1<sup>st</sup> Respondent' Legal Practitioners.

*DNM Attorneys*, 2<sup>nd</sup> Respondent's Legal Practitioners.

*Scanlen & Holderness*, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Respondents' Legal Practitioners.

***NDLOVU J.***

***22/05/2023***