

ADRIAN MOYO

versus

MASTER OF THE HIGH COURT

and

OLIVER MASOMERA

(in his capacity as the executor Dative of the estate late S.J.L Moyo DR 2120/04)

HIGH COURT OF ZIMBABWE

WAMAMBO J

MASVINGO, 14 November 2019, 15 February 2020, 31 March 2020, 15 June 2020 &
5 February 2021

Opposed application

Applicant in person

S. Makonyera for the 2nd respondent

WAMAMBO J: The applicant who appeared in person sought the following relief: -

“IT IS ORDERED THAT

- 1. The application be and is hereby granted*
- 2. The 1st Respondent shall within 10 days of this order instruct the 2nd respondent to finalise and advertise the supplementary account as provided for under the law*
- 3. The 1st respondent shall instruct the 2nd respondent to commence the necessary court proceedings to recover all the estate’s unaccounted assets or proceeds from the unauthorised disposal of such assets, within 14 days of this order*
- 4. 1st and 2nd respondent to pay costs jointly each paying the other to be absolve”*

The applicant is the son of the late Stephen Joshua Lucas Moyo (hereinafter called Deceased) whose estate is registered under DR 2120/04.

The 1st respondent is the Master of the High Court

The 2nd respondent is the executor to the estate of the deceased

The applicant's version is that his father's confirmed liquidation and distribution account did not account for all the assets that belonged to his estate. On 24 August 2015 applicant submitted a list of all the unaccounted assets to the 1st respondent and documentary evidence to prove that the said assets belonged to the estate. 1st respondent wrote to the estate's previous executor instructing him to act on the issues raised by applicant. When 2nd respondent was appointed as executor to deceased's estate he committed to dealing with the outstanding issues within 6 months. The major issues were among others to recover unwanted estate assets and to distribute it to the relevant beneficiaries. An attempt was made to convince 1st respondent to instruct 2nd respondent to deal urgently with the outstanding supplementary account or alternatively to call an urgent meeting with the beneficiaries to address the matter. 1st respondent responded and stated that the issue of unwanted assets is the sole responsibility of 2nd respondent.

The applicant attached what he titled a supplementary account list as at 27 February 2019 as Annexure D. There are 23 assets listed which include a house, stands, cattle, vehicles, farm expenses and cash paid out without vouchers.

The total value is given by applicant as US\$686 500.00.

The 1st respondent in a report in terms of Order 32 Rule 248 of the High Court Rules 1971 opines as follows:

The existence of the assets in question has not been positively confirmed. The dossiers prepared by applicant reflect the alleged unaccounted assets 1st respondent was unable to accept or dispute the issues raised by applicant as that is the province of the 2nd respondent. The law places the duty on the executor to recover estate assets.

Where there are assets forming part of the estate but which are unaccounted for the executor has an obligation to investigate their ownership and existence. If the executor were to lodge an inventory to the 1st respondent without confirming their existence and ownership the executor would be committing a criminal offence in terms of section 39 of the Administration of Estates Act [Chapter 6:01]. To compel 1st respondent to lodge a supplementary account does not

confirm the existence of the assets. This would also place the executor in a compromised and vulnerable position. The beneficiaries would sue the executor for failure to deliver the non-existent assets.

The 2nd respondent like 1st respondent opposed the application.

His position is as follows: -

The items allegedly not included in the Final Liquidation and Distribution Account do not exist. Only items available and belonging to the deceased's estate are encapsulated in the Final Liquidation and Distribution Account Applicant has not provided proof that the assets he says belong to the estate but are unaccounted for actually exist. To buttress this argument an example is given of a house in Glen Lorne (mentioned by applicant in Annexure "D") which is said to be registered in the name of Doctor M. Mambo and never in deceased's name. There are numerous court suits among the beneficiaries especially between applicant versus the surviving spouse and this is delaying the winding up of the estate Applicants was at some stage granted a special power of attorney to recover the said assets and he was not successful.

The record in this case is quite bulky. Most of the letters and other documents are either emanating from applicant or are in response to his queries.

In oral submissions both counsel referred extensively to the record in buttressing their arguments. I have read the record in detail and considered the documents referred to.

What immediately struck me was the lack of proof of the existence or ownership of the alleged non accounted for assets. One only has to peruse Annexure "D" to realise that proof of property mentioned therein should be easy to obtain. There is a total of 13 vehicles and trailers. There are stands and a house. I note here that 2nd respondent says the Glen Lorne house mentioned in Annexure "D" is owned Dr Mambo and was never owned by deceased. Besides some explanation on how the property was bought by deceased there is not a single piece of proof supporting applicant's case for such a valuable asset.

Surely applicant should have lodged some documentary proof of the ownership of the 13 vehicles and trailers. There are no agreements of sale or any other such proof or vehicle registration books to sway the executor or at this stage the court in applicant's favour.

The 2nd respondent is clear some of the transactions on the estate were overseen by earlier executors of deceased's estate.

Having closely considered what applicant alleges and documents on record I am not convinced a basis has been cemented that there are any unaccounted assets to the estate.

For me to order 1st respondent to order 2nd respondent to advertise a supplementary account or commence court proceedings to recover unaccounted assets is untenable for a variety of reasons.

1st respondent cannot order 2nd respondent to advertise a supplementary account which 1st respondent has not been given proof of to his satisfaction.

2nd respondent will be in a worse position in that if he advertises a non-existent supplementary account he will be in trouble with the beneficiaries who will obviously claim the assets which assets have not been proven to exist.

The other difficulty is that applicant himself was at some stage granted a special power of attorney to identify and help recover the unaccounted assets of the deceased and he was unsuccessful.

No where on record to we have evidence or proof of the asset's applicant is harping about.

The other issue that was brought up especially in oral submission is about the duties and obligations of the executor and the Master of the High Court. The executor stands in a very important position to the beneficiaries of the estate and the Master of the High Court. However, this does not extend to lodging a supplementary account he has not verified. Further the Master cannot also order an executor to lodge a supplementary account on the say so of an applicant.

The duties of an executor are spelt in sections 38 to 66 of the Administrations of Estate Act [Chapter 6:01]. I am satisfied in the circumstances as given above that the order sought by applicant is unmeritorious.

To that end I order as follows: -

1. The application be and is hereby dismissed
2. The applicant is to pay 2nd respondent's costs

Applicant in person

S.Makonyore Legal Practitioners, 2nd Respondents Legal Practitioner