REPORTABLE (23)

(1) FEXEN MPANSI (2) EDWARD DUBE (3) JABULANI DUBE (4) VINCENT DUBE (5) THOMAS MPANSI
v
(1) MORGAN DUBE (2) THE MASTER OF THE HIGH COURT (3) WILBERT NYAMUFUKUDZA N.O.

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & HLATSHWAYO JA
HARARE, JULY 16, 2013 & APRIL 21, 2015

C F Dube, for the applicants
N Chikono, for the first respondent

HLATSHWAYO JA: This is an application for the correction or variation of the order issued by the Supreme Court under SC 161/09 on 16 July 2011 allowing the appeal by the applicants (then appellants), on the basis that the order is ambiguous. The application was filed under the same case number as the original appeal. The impugned order (per SANDURA JA with GARWE JA and CHEDA AJA concurring) reads as follows:

> "1. The appeal is allowed with costs.
> 2. The order of the court *a quo* is set aside and the following is substituted:
>
> > "Judgment is granted for the plaintiffs with costs to the extent that the will attested to by the late Richard Mpansi and registered with the second defendant under LW 47/2005 be and is hereby declared null and void."

The applicants contended that the above order must be interpreted to mean that the first respondent is liable for costs in his personal capacity or, alternatively, since he participated in the litigation in a representative capacity as a duly appointed executor, he should pay such costs out of his own pocket (*de bonis propriis)* as he had allegedly conducted himself grossly negligently and maliciously in defending the validity of the will. Accordingly, the applicants pray that the above order be "corrected" to read as follows:

> "1. The appeal be and is hereby allowed ***with costs (to be) borne by the first respondent on a party/party scale*.**
> 2. The order of the court *a quo* is set aside and the following substituted:
>
> > 'Judgment is granted for the plaintiffs ***with costs being borne by the first defendant on a party/party scale*** to the extent that the will attested by the late Richard Mpansi and registered with the second defendant under LW 47/2005, be and is hereby declared null and void.'" (emphasis added)

The key issue is whether this matter is properly before this Court.

The applicants have approached this Court in terms of Rule 449 of the High Court of Zimbabwe Rules, 1971. The High Court Rules apply pursuant to Rule 58 of the Rules of the Supreme Court, 1964 which provide that the practice and procedure of this Court shall follow that of the High Court where the Rules of this Court are silent on any matter.

Rule 449 of the High Court Rules provides that a court or judge may, in addition to any power it or he may have, *mero motu* or upon application by any party affected, correct, rescind or vary any judgment or order, *inter alia*, in which there is an ambiguity or patent error or omission, but only to the extent of such ambiguity, error or omission.

The applicants submitted that the order of the Supreme Court lacks clarity and certainty as to whether the first respondent is liable to pay costs personally or whether such costs should be paid out of the estate.

That costs may be ordered against the estate is without doubt. However, such a special order of costs must be specifically pleaded, otherwise the ordinary rule that costs follow the event applies. The standard rule requires parties to pay costs in the capacities they participate in litigation based on the outcome of the matter. This rule applies even in legal proceedings involving deceased estates unless special circumstances are invoked. In *Bonsma v Meaker* 1973 (4) SA 526(R) at p 531 C-E the court observed as follows:

> "While normally in legal proceedings instituted by or against a deceased estate the ordinary rule that costs follow the event applies, there are circumstances under which a person who is instituting proceedings against a deceased estate will, whether he is successful or not, be entitled to have costs made payable out of the estate. This can be the position not only where the validity or construction of a will is in dispute but also in matters arising from or concerning the administration of an estate."

In my view, the Supreme Court order in question was crafted in line with the ordinary rule pertaining to costs. No special circumstances were alleged in earlier proceedings both in the High Court and Supreme Court, necessitating a departure from the ordinary rule. No claim was made for the executor to pay costs *de bonis propriis* at any stage until now. There is no suggestion that this court omitted to deal with any issue that had been raised. In the circumstances, it is difficult, nay impossible, to conclude that the order in issue is vague or ambiguous in any way.

I am further fortified in this conclusion by an examination of how this case proceeded.

This matter commenced by way of court application at the High Court but because it was found that there were irreconcilable disputes of fact, the matter was referred to trial and subsequently ended up before the Supreme Court on appeal.

Of significance is the fact that at court application stage, the first respondent objected to his being cited in his personal capacity instead of his official capacity as the appointed executor. The applicants conceded the point and duly withdrew the matter against the first respondent in his personal capacity, tendering wasted costs. The matter then proceeded against the first respondent in his representative capacity of executor.

As a general rule executors are only visited with personal costs in exceptional circumstances. The remarks of the learned authors, Corbett, Hahlo, Hofmeyr and Kalin, *The Law of Succession in South Africa,* Juta & Co Ltd, 1980 are apposite. At page 601, they state:

> "Having regard to the executor's duty to defend the will, if such defence is unsuccessful but was reasonable, the executor's costs will be ordered to be paid out of the estate as well as costs of the successful party. Generally, where an executor litigates in the interest of the estate and not in his own interests, he will not personally be mulcted in costs in the absence of circumstances making it desirable for the court to mark its disapproval of his conduct."

No special order of costs against the first respondent was prayed for either at the High Court or Supreme Court. In fact, in the draft order of the High Court application, the applicants did not ask for costs at all. Nonetheless, after a full trial the High Court issued a standard order of costs, thus:

"Accordingly it is ordered that:

1. The plaintiffs' claim is dismissed.

2. The plaintiffs shall pay the first defendant's costs for both the application and trial jointly and severally the one paying the others to be absolved."

In their Notice of Appeal to the Supreme Court the present applicants (then appellants) sought the following relief:

> "Appellants pray that the judgment of the court *a quo* be set aside with costs and be substituted by a judgment granting the relief sought by the appellants setting aside the contested will with costs."

Once more, the applicants prayed for ordinary costs consequent upon a favorable outcome to them. That is precisely what the Supreme Court granted in the impugned order. There is nothing ambiguous about that order. Therefore, r 449 is not applicable.

The attempt by the applicants to introduce a higher scale of costs and to insist on costs *de bonis propriis* at this stage is completely impermissible: matters having been definitively concluded by this Court. These matters not having been raised then certainly cannot be raised now on the basis that r 449 applies.

As far as the costs of this application are concerned, there is no need to depart from the ordinary rule that costs follow the outcome since no special order of costs to be paid out of the estate has been made. However, Mr *Dube,* for the applicants, indicated to this court that the value of the estate was so small that he has had to waive his fees and appear *pro bono.* It was not clear whether his commendable gesture applied only to this application or to the whole litigation. However, according to correspondence on the record it appears that he had initially charged a fee of over $40 000 against the estate.

Certainly if Mr *Dube* is waiving the fees for all the proceedings, this would be a most welcome relief for the small estate already much diminished by the heavy litigation costs.

Although Mr *Chikono* in his heads of argument had sought costs on the legal practitioner-client scale, in oral argument both parties agreed that an order directing each party to pay its own costs would be appropriate.

Accordingly, the application is dismissed. Each party shall bear its own costs.

ZIYAMBI JA: I agree

GARWE JA: I agree

Messrs Dube, Manikai & Hwacha, applicant's legal practitioners

Ngarava Moyo & Chikono, respondents' legal practitioners