REPORTABLE (47)

NEWTON ELLIOT DONGO

V

(1) JOYTINDRA NATVERIAL NAIK (2) HEMENT KUMAR NAIK (3) BABNIK INVESTMENT (PRIVATE) LIMITED (4) CLINVEST INVESTMENT (PRIVATE) LIMITED (5) THE MASTER OF THE HIGH COURT (6) THE REGISTRAR OF DEEDS OFFICE

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, GOWORA JA & MAKONI JA
HARARE, SEPTEMBER 13, 2018 & MARCH 16, 2020

Appellant in person

T.E Mazarura, for the third respondent

GWAUNZA DCJ

[1] This is an appeal against the judgment of the High Court which dismissed the appellant's application for a declaratory order in terms of s 14 of the High Court Act [*Chapter 7:06*] on the basis that the appellant lacked the requisite *locus standi* and had no legal right to protect.

FACTS

[2] The first respondent is the executor testamentary to the estate late Sushila Natverial Naik ("Sushila"). The estate, through the deceased, had a lease agreement which was concluded sometime in 2000, in terms which it leased stand number 107 Salisbury Township (herein after referred to as "the property") to Gold Pack Investment. The property was to be used as a flea market for the sale of furniture as well as office use.

The property was sold to the third respondent in September 2016. The fourth respondent then took over the lease agreement from Gold Pack Investment as the new lessee.

[3] In the court *a quo* the appellant averred that he was a subtenant to the property and that it was in that capacity that he was seeking a *declaratur* in terms of s 14 of the High Court Act. The declaratory order sought was to the effect that the appointment of the first respondent as executor had no legal effect as he was not qualified to be appointed as such, much less to be issued with Letters of Administration in respect of the estate. The appellant further sought an order directing the fifth respondent to revoke the Letters of Administration appointing the first respondent as the executor and declaring the transfer of the property to the third respondent, to be null and void.

[4] In support of his quest for the declaratory order the appellant, in the court *a quo*, submitted that for one to be appointed executor testamentary, one had to file an application with the office of the fifth respondent, while resident in Zimbabwe. Further, that as the first respondent had not complied with this requirement, it was not within the fifth respondent's power to appoint him executor in terms of s 24(2) of the Administration of Estates Act [*Chapter 6:01*] ("the Act"). The appellant in addition submitted that by virtue of that section, the first respondent could not validly be appointed executor testamentary as he had not been to Zimbabwe subsequent to the registration of the deceased's will. Consequently, the appellant submitted, the fifth respondent had no power to authorize the sale of the property in question to the third respondent.

As will become clear later on in this judgment, nothing turns on these submissions of the appellant, whether true or not.

[5] The first to third respondents opposed the application and raised two points *in limine.* The first point related to the appellant's *locus standi.* They queried the capacity in which the appellant, who was neither a relative of the deceased nor a beneficiary in the estate, was seeking a declaratory order invalidating the appointment of the executor testamentary. The respondents argued further that the appellant had no direct or substantial interest in the order that he sought as he was an illegal subtenant to the property in question. They also averred that the appellant had no right to be on the property since both the original lease agreement in favour of Gold Pack Investment and the one in favour of the fourth respondent prohibited any subletting of the property. It was in view of this circumstance that all illegal subtenants, including the appellant, were duly issued with a notice of intention to sell the property to the third respondent in November 2015.

[6] The respondents asserted as regards the second point *in limine*, that the appellant, by filing an application rather than issuing summons against the respondents, had adopted the wrong procedure. They submitted that there were material disputes of fact not capable of resolution on the papers before the court. The respondents further asserted that the application was in effect one for a review disguised as an application for a *declaratur* since it sought to impugn the procedural steps that the fifth respondent took to appoint the first respondent. The second respondent also submitted that despite the first respondent not being in Zimbabwe, he was nevertheless empowered to act on his behalf as executor testamentary since the Act conferred power: -

i) on the fifth respondent to grant Letters of Administration but not deliver them until the executor testamentary has accepted *domicilium citandi* in Zimbabwe; and
ii) on the first respondent as the executor, to appoint through a power of attorney, another person in Zimbabwe with full power to act for him.

As these requirements were fully met, the second respondent submitted, the sale of the property in question to the third respondent was valid and binding and the third respondent as the registered owner of the property had the right to evict anyone from it.

[7] The court *a quo* held that the appellant had failed to show that he was an interested party, a condition precedent to the filing of an application for a declaratory order in terms of s 14 of the High Court Act. It found that the appellant had no direct or substantial interest in the administration of the estate of the late Sushila, and therefore lacked the requisite *locus standi* to seek the *declaratur* in question. The court found further that the appellant was an illegal subtenant who had brought the application for a *declaratur* in order to foil his threatened eviction from the property. It noted in addition, that the appellant was given to abusing court process and ignoring the directions of the court.

Accordingly, the court *a quo* dismissed the application with costs on an attorney and client scale.

[8] Dissatisfied with the judgment of the court *a quo*, the appellant filed this appeal on the following grounds: -

1. The court *a quo* erred in law and misdirected itself in holding that the appellant had no *locus standi* when the appellant had proven a direct and substantial interest in the administration of the estate of Sushila.
2. The court *a quo* erred and misdirected itself in awarding costs on an attorney and client scale against the appellant when the circumstances of the case did not justify costs that are punitive in nature.

These grounds of appeal, I find, aptly capture the issues that arise for determination *in casu*. I will consider them *seriatim*.

1. Whether or not the appellant had *locus standi* to file a declaratory order in respect of the administration of the estate of Sushila.

[9] Before this Court, it was the appellant's contention that the second respondent illegally represented the estate of the late Sushila and that accordingly, he illegally sold and transferred the property to the third respondent. Ultimately, he submitted that the first respondent's appointment as the executor testamentary of the estate was a nullity. He further contended that he was in peaceful occupation of the property as a subtenant through the fourth respondent, by virtue of clause 1.2 of the lease agreement. He also took the view that his *locus standi* arose from the fact that any person aggrieved by the appointment of an executor can approach the courts for a remedy. He wished for the estate to be lawfully wound up, a circumstance that in his view, would enable the decision of whether or not his threatened eviction was lawful.

[10] Counsel for the third respondent, to the contrary, contended that the appellant was an illegal subtenant and had no *locus standi*, nor did he have any existing, future or contingent right in the estate of the late Sushila, to protect. He was neither a beneficiary, an heir or a creditor and accordingly, had no legal entitlement in the administration of

the deceased estate in question. That being the case, counsel argued, the application fell short of the requirements of s 14 of the High Court Act.

[11] The appellant's application for a *declaratur* in the court *a quo* was made in terms of s 14 of the Act which states as follows: -

> "The High Court may, in its discretion at the instance of any interested person enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination".

Implicit from a reading of the provision is that a *declaratur* is sought by a person with an interest in the subject matter of the dispute, inquiring or seeking a determination of an existing, future or contingent right. In *Johnsen v Agricultural Finance Corp* 1995 (1) ZLR 65 (S) GUBBAY CJ had occasion to consider when a *declaratur* should be granted. The learned Chief Justice remarked as follows at 72E-F: -

> "The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an 'interested person', in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a pre-requisite to the exercise of jurisdiction."

See also *Family Benefit Friendly Society v Commissioner for Inland Revenue and Anor* 1995 (4) SA 120 (T).

[12] On the basis of this authority, before a court can exercise its discretion to grant a *declaratur*, it must satisfy itself that the person seeking such relief has a real interest in the matter and that there is an existing, contingent or future right to protect. Cilliers AC, Loots C and Nel HC in their book *Herbstein and Van Winsen, The Civil Practice of the*

High Courts of South Africa (5th edn, Juta and Co. Ltd, Cape Town 2009) state as follows in this regard at p 1433 to 1434:

> "It is a trite principle of the common law that an applicant seeking a *declaratur* must have a direct interest in the right to which the order will relate. The right must attach to the applicant and not be a declaration of someone else's right. It is essential for a prospective litigant to have the necessary *locus standi* in law when commencing proceedings…' This requires that a litigant should be both endowed with the necessary capacity to sue, and have a legally recognised interest in the relevant action to seek relief."

It is common cause that the dispute between the parties arises from the administration of a deceased estate and the property thereunder. The condition precedent is therefore that the appellant must be an interested person in the sense of having direct and substantial interest in the subject matter of the litigation, *in casu*, the property or the administration of the estate as a whole, which interest could be prejudicially affected by a court's judgment.

[13] The nature of the right that an applicant for a *declaratur* seeks to protect must clearly be articulated. This was stressed in *Electrical Contractors' Association (South Africa) and Another v Building Industries Federation (South Africa)* (2) 1980 (2) SA 516 (T) at 519H-520B in the following words: -

> "A person seeking a declaration of rights must set forth his contention as to <u>what the alleged right is</u>. (See *O'Neill v Kruger's Executrix and Others*) 1906 TS 342 at 344-5; *Smit v Roussow and Ors* 1913 CPD 436 at 441.)." (*emphasis added).*

[14] The appellant contended that the law allows any person aggrieved by the appointment of an executor to approach courts seeking the nullification of the appointment. He submitted that as a subtenant at the property in question he was within his rights to seek nullification of the first respondent's appointment as the executor testamentary. This he said despite conceding that there was no sub-lease agreement between him and the

fourth respondent. It will be recalled that the lease agreement entered into between the deceased and Gold Pack Investment, was taken over by the fourth respondent. The appellant took the view that by virtue of clause 1:2 of the lease agreement which stated that the property under lease was to be used as flea markets, subletting was inferred. Clause 8 of the agreement however states as follows: -

> "The Lessee shall-
>
> 8.2 shall not allow use of the property by any person other than the Lessee
> ….
> ….
> 8.9 The lessee shall not sub-let the whole or any part of the property without the written consent of the lessor and if the lessor consents to the sub-letting of the whole or any part of the property the Lessee shall remain liable to the Lessor for all its obligations in terms of this Lease notwithstanding such sub-letting."

Clause 8 whose sub-clauses are worded in peremptory terms, clearly forbade subletting of the property without the written consent of the landlord, that is, the deceased or her estate initially, and later, the third respondent. It follows that any other clause in the lease agreement that could have been read and understood to suggest that subletting was permitted had to be read in conjunction with clause 8 thereof.

[15] The court finds no merit in the appellant's submissions. There clearly is no basis for the submission that the provision in the agreement allowing the property to be used as a flea market was to be taken as a circumstance conferring sub-tenant rights onto the appellant or any other person. Such rights according to the lease agreement were only to be conferred by the lessee with the written consent of the owner of the property. The appellant conceded that no sub-lease agreement was entered into between him and the fourth respondent. He did not produce the lessor's written consent to show that the

fourth respondent was authorized to sublet the property to him. In the absence of this written consent, I find that the appellant does not have any legal right, current, contingent or future, to protect in so far as anything to do with the administration of the estate of the late Sushila Natverial Naik, is concerned. He did not have any interest, much less substantial, in the matter and was therefore not entitled to the *declaratur* that he attempted to secure. As s 14 of the High Court Act makes clear, it is not any party that can seek nullification of an executor's appointment. Rather only a party that has a real interest in the estate can do so. Deceased estates are dealt with in accordance with the laws governing such matters. There are people or entities that are entitled to benefit from that estate, be it testate or intestate. These are the ones with a direct interest in the dissolution of the estate. In stating this, I am fortified by the decision in *Katirawu v Katirawu & Ors* 2007 (2) ZLR 64 (H) at 69D-E where MAKARAU JP (as she then was) remarked that: -

> "While s 117 (1) empowers the fifth respondent to approach the court for the removal of an executor for the listed grounds, in my view, such a power granted to the fifth respondent was not intended to take away the right of all those having an interest in the estate from approaching the court at common law to have the executor removed if they can establish to the satisfaction of the court that the continuance in office of the executor does not augur well for the future welfare of the estate and beneficiaries." (*emphasis added*).

[16] The appellant, not being a beneficiary, heir or creditor in the estate cannot in my view have an interest or legal right in issues regarding the dissolution and administration of that estate. A *fortiori*, the appellant did not have *locus standi* to claim the *declaratur* that he sought, which in any case did not deal with the rights, existing or future, that he had or may have had, which he sought to protect. The discretion vested in the court in issuing declaratory orders only relates to substantive, and not illusory, legal rights and obligations. The finding of the court in D*urban City Council v Association of Building*

Societies 1942 AD 27, to the effect that the interest of a party must be a real one, not merely abstract intellectual interest is apposite to the circumstances *in casu*.

[17] Even if the appellant had shown a valid sub-lease agreement with the lessee concerned, it is highly unlikely that he would have had the *locus standi* to challenge the appointment of the executor testamentary in the estate of the owner of the property in question. That appointment had no direct bearing on his supposed rights as a subtenant. Against this background, the court *a quo* was in my view correct in finding that the appellant's intention in futilely seeking the *declaratur* in question was to resist eviction or postpone the day of reckoning in that respect. He has, in short, failed to prove a case for interference, by this Court, of the exercise by the court *a quo* of its discretion in refusing to grant such *declaratur*. Clearly, granting the relief that he sought would have been tantamount to the court sanctioning an illegality.

In the result, I find that the first ground of appeal is devoid of any merit. It is dismissed.

[18] **Whether or not costs on an attorney-client scale were justified in the circumstances.**

The appellant correctly contends that courts do not lightly order punitive costs against a litigant unless it is clear that such litigant exhibited a lack of seriousness in pursuing his or her case. He himself, he contended, was fully genuine in his quest for the *declaratur* sought. Accordingly, he charged, the court *a quo* erred in ordering punitive costs against him. Counsel for the third respondent, to the contrary, submitted that the court *a quo* properly exercised its discretion by awarding costs on a higher scale. This was particularly so in view of the fact that it was not the first time the court *a quo* was being called upon to make a determination on the same facts and between the same

parties. Reference was made to an extant judgment under HH 384/17 where CHAREWA J, held that the appellant was not an interested party and had no *locus standi* to seek participation in or review of any matter relating to the administration of the estate of the late *Sushila*.

[19] It is settled law that costs are at the discretion of the court. The award can only be set aside where the discretion was not exercised judiciously. It is also settled that costs on a higher scale are granted in exceptional circumstances. The grounds upon which the court would be justified to make an award for costs on a legal practitioner and client scale include dishonest or malicious conduct, and vexatious, reckless or frivolous proceedings by and on the part of the litigant concerned.[1]

[20] In justifying the award of costs on a higher scale, the court *a quo* reasoned that the appellant not being an interested party in the administration of the estate had no basis for bringing the application before the court as he lacked the requisite *locus standi* to do so. The court *a quo* further took the view that the appellant was clearly abusing court process by frustrating the administration of the deceased estate. The court also indicated that there was an extant magistrates' court order for the eviction of the fourth respondent and all those claiming occupation through it, which in this case included the appellant as a supposed sub-tenant through the fourth respondent. Another order, still extant, was obtained in the case of *Newton Elliot Dongo v Bobnik Investments (Pvt) Ltd & Anor* HH 384/17. In that case, the court dismissed the appellant's urgent application for a stay of execution related to an order for his eviction from the same premises. The

[1] *Mahembe v Matombo* 2003 (1) ZLR 148 (H) where the court made reference to Rubin L *Law of Costs in South Africa* Juta & Co (1949)

High Court dismissed the application on the basis of lack of both urgency and *locus standi*. Lastly, the court found that the appellant was bent on abusing court process in situations where he ignored directions from the court.

[21] An abuse of court process attracts punitive costs. This was stated in *Karengwa v Mpofu* HB-56/15 where it was held that: -

> "On the issue of costs, the court is generally reluctant to award costs on an attorney and client scale against a self-actor. In exceptional circumstances, however, where there is a clear abuse of court process the court is inclined, in such event, to order costs against a self-actor on a punitive scale. The awarding of costs is at the discretion of the court."

On the basis of this authority and given his conduct as outlined, I find that the court *a quo* did not misdirect itself but judiciously exercised its discretion in ordering costs on a higher scale against the appellant.

Accordingly, I find that the second ground of appeal is without merit. It is also dismissed.

The appeal as a whole lacks merit and ought to be dismissed.

DISPOSITION

[22] The appellant failed to establish a basis upon which this Court could interfere with the court *a quo's* exercise of its discretion in refusing to grant the declaratory order sought. He had no *locus standi* to seek such *declaratur*, having failed to prove any interest in the administration of the estate of the late *Sushila* nor that he had any legal right, current, contingent or future, to protect through the *medium* of the said *declaratur*. Costs on the

higher scale were properly ordered against the appellant, given his conduct in these proceedings.

In the result it is ordered as follows: -

"The appeal be and is hereby dismissed with costs."

GOWORA JA : I agree

MAKONI JA : I agree

G.N Mlotshwa & Company, 1st and 2nd respondent's legal practitioners

Gasa, Nyamadzawo & Associates, 3rd respondent's legal practitioners

C. Kuhuni Attorneys, 4th respondent's legal practitioners