PHILANI GAMA N.O
versus
LUNGISANI MPOFU
and
PATRICIA PHIRI
and
MBALI NGWENYA
and
THE ADDITIONAL ASSISTANT MASTER N.O
and
THE ASSISTANT MASTER, HIGH COURT
OF ZIMBABWE, BULAWAYO N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 10 AND 18 MARCH 2016

Opposed Application

Z. C. Ncube for the applicant
1st respondent in default
2nd respondent in person
3rd respondent in default

MATHONSI J: In this matter two deceased estates, one for the late Mishack Nyathi and the other for the late Kuyibisa Masuku, who were married to each other on 4 November 1997 in terms of the Marriage Act [Chapter 5:11], are now fighting each other with the other respondents being mere casualties in a winding up process that went horribly wrong.

The late Kuyibisa Masuku died intestate in 1997 at a time that she was married to the late Mishack Nyathi aforesaid. Her estate was registered by the fifth respondent as DRB 2249/97. The late Mishack Nyathi who survived his wife was then issued with a certificate of authority by the fifth respondent on 21 April 1998 in terms of the provisions of the Administration of Estates Act [Chapter 6:01] to administer and distribute his late wife's estate and in particular to "deal with and take over house number 2459 Cowdray Park" Bulawayo.

Armed with the certificate of authority to take over the house, Nyathi must have thought that all was over. He did not proceed to take transfer of the house he had inherited in accordance with the law until nature caught up with him as well. He died intestate on 21 May 2005. His

estate was registered by the fifth respondent as DRB No. 802/05 and the present applicant was appointed executor of the estate.

Meanwhile something strange was also happening at the fourth respondent's office, that is the Additional Assistant Master whose office is subservient to that of the fifth respondent. 15 years after the estate of the late Kuyibisa Masuku was registered and the late Mishack Nyathi inherited the estate as the surviving spouse, the first respondent approached the fourth respondent's office and purported to register that estate anew. The fourth respondent obliged and registered the estate as DRBY No. 689/12. Unbeknown to the fourth respondent, not only had the estate been registered by the fifth respondent and the late Nyathi inherited it, the estate in question fell to be administered only by the fifth respondent and not the fourth respondent who deals only with estates governed by customary law because the deceased was married in terms of general law.

The unfolding drama found expression in the appointment of the first respondent, the son of Masuku, as the executor. He wasted no time in applying for and obtaining authority in terms of section 120 of the Act to sell stand 2459 Cowdray Park Bulawayo by private treaty, the same property which had devolved to the late Nyathi by authority of the fifth respondent fourteen years earlier.

The first respondent moved with indecent haste in appointing the second respondent as his agent with authority to dispose of the property and it was duly sold to the third respondent who immediately took transfer by Deed of Transfer number 174/2014, never mind that when that occurred on 17 February 2014, the third respondent was only four years and three months old (according to the transfer deed she was born on 18 November 2009). Happily one Qhelani Moyo has stepped in as legal guardian of that minor child to assist her in this litigation.

The applicant has now approached this court seeking a declaratur that the second registration of the estate as DRBY 659/12 is unlawful and therefore null and void. As a corollary to that, the applicant seeks the nullification of the purported sale of stand 2459 Cowdray Park Bulawayo to the third respondent and that the said property be registered in the name of the estate of the late Nyathi and punitive costs against the first, second and third respondents.

It is those respondents who have opposed the application. The first respondent says he was unaware that her mother's estate had been registered already when he sought to have it

registered again. He however seeks to uphold its winding up and finalization by himself not withstanding its prior registration and management. He then argues extraneously about the house having been purchased by his late mother, him being listed as one of the occupants, and being the beneficiary of the estate because her mother had married, Nyathi "on her death-bed" before "she died two weeks later". The other respondents followed in unison to chorus their support of the first respondent.

The first and third respondents did not turn up for the hearing. Only the second respondent who is the agent of the first respondent and facilitated the sale of the house to the third respondent was in attendance. She stated that after receiving the notice of set down she telephoned the first and third respondents (the mother of the third respondent in the latter case) to advise them of the set down date and even suggested that if they were unable to attend, they should instruct a legal practitioner to do so on their behalf.

They certainly did not take heed because neither them nor their legal practitioners were in attendance. The sheriff took the additional trouble to serve the notice at the first respondent's address being 4858 Emganwini Bulawayo even through his address for service given in the notice of renunciation of agency filed by James Mutsauki Attorneys is 3C Astra Complex, H. Chitepo Street, Bulawayo, where another notice of set down was served. I am therefore satisfied that the respondents have defaulted despite due notice being given.

The applicant seeks a declaratory order which is a remedy provided for in s14 of the High Court Act [Chapter 7:06] in terms of which this court may, at the instance of any interested party, inquire into and determine any existing, future or contingent right or obligation. In interpreting s14 of the Act GUBBAY CJ pronounced as follows in *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 (1) ZLR 337 (S) 343G -344 A-E:

> "The condition precedent to the grant of a declaratory order 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. See *United Watch and Diamond Co (Pty) Ltd and Others* v *Disa Hotels and Another* 1972 (4) SA 409 (C) at 415 *in fine*; *Milani and Another* v *South Africa Medical and Dental Council and Another* 1990 (1) SA 899 (T) at 902 G-H. The interest must relate to an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest. See *Anglo-Transvaal Collieries Ltd* v *SA Mutual Life Assurance Soc* 1977 (3) SA 631 (T) at 635 G-H. But the existence of an actual dispute between persons interested is not a statutory requirement to an exercise by

the court of jurisdiction. See *Exp Nell* 1963 (1) SA 754 (A) at 759 H- 760A. Nor does the availability of another remedy render the grant of a declaratory order incompetent. See *Gelcon Investments (Pvt) Ltd* v *Adair Properties (Pvt) Ltd* 1969 (2) RLR 120 (G) at 128 A –B; 1969 (3) SA 142 (R) at 144 D-F. This, then, is the first stage in the determination by the court. At the second stage of the inquiry, it is incumbent upon the court to decide whether or not the case in question is a proper one for the exercise of its discretion under s14. What constitutes a proper case was considered by WILLIAMSON J in *Adbro Investment Co Ltd* v *Minister of the Interior and others* 1961 (3) SA 283 (T) at 285 B –C to be one which, generally speaking, showed that –

> 'despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet nevertheless justice or convenience demands that a declaration be made, for instance as to the existence of or as to the nature of a legal right claimed by the applicant or of a legal obligation said to be due by a respondent. I think that a proper case for a purely declaratory order is not made out if the result is merely a decision on a matter which is really of merely academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought'.

See also *Reinecke* v *Incorporated General Insurance Ltd* 1974 (2) SA 84 (A) at 93 D-H."

See also *Bulawayo Bottlers (Pvt) Ltd* v *Minister of Labour, Manpower Planning and Social Welfare and Others* 1988 (2) ZLR 129 (H); *Johnsen* v *AFC* 1995 (1) ZLR 65 (H).

The applicant is the executor of the estate late Mishack Nyathi, an estate which in law inherited from the estate of the late Kuyibisa Masuku, the latter having pre-deceased her husband. He therefore is an interested person who could be prejudicially affected. It is an interest relating to an existing right. The first stage of the inquiry is therefore answered in the affirmative.

The second stage of the inquiry is whether this is a case in which the court has to exercise its discretion reposed by s14. What has happened here is that the surviving spouse registered the estate of his wife during his lifetime and probably complied with all the requirements for winding up hence the decision by the fifth respondent to grant him leave to take transfer of the house belonging to the estate. The estate fell to be administered in accordance with the law under the process initiated by its registration in 1997. If the first respondent had a claim against the estate he had to make it under that process. He could not wait several years and then purport

to initiate a winding up process of his own because his step-father had passed on. It was incompetent.

That position is confirmed by the master's report submitted in terms of r248 of the High Court of Zimbabwe Rules, 1971. He has reported that:

> "Estate late Kuyibisa Masuku is registered with my office under DRB 2249/97 whilst estate late Mishack Nyathi is also registered with my office under DRB 802/05. A perusal of the file shows that (in the) estate late Kuyibisa Masuku there was a will which was nullified by an existence of a marriage certificate. It therefore means that the estate was supposed to be dealt with intestate. On the 21st of April 1998 my office issued a certificate of authority in favour of Mishack Nyathi who was the surviving spouse. See annexure 'A'. The deceased's husband took time to change ownership of the said property until he also died. On the other hand estate Kuyibisa was also registered at Tredgold Magistrate(s) Court under DRBY 689/12. The estate was done and finalized consent to transfer were (sic) issued by the magistrates court which necessitated the transfer of the property. The executor then Mr Lungisane Mpofu applied for section 120 authority and he was given. Since the estate late Kuyibisa Masuku had a will and the two were also married in terms of Marriage Act [Chapter 37], (sic) the estate was indeed supposed to be registered at my office. <u>The certificate of authority produced by my office was for the purpose of transferring the property to the surviving spouse Matthew (sic) Nyathi ----. I therefore believe that the double registration of the estate was only meant to confuse the system and as such I submit that I will have no objection to the order sought."</u> (The underlining is mine).

The fact that Nyathi survived his wife Kuyibisa Masuku triggered the application of s3A of the Deceased Estates Succession Act [Chapter 6:02] as well as the provisions of s3 of the Administration of Estates Act [Chapter 6:01]. He was entitled to inherit her estate and did inherit. See *Chaumba* v *Chaumba* 2002 (2) ZLR 51 (S) 53F; *Nyathi and Another* v *Ncube and Others* HB 123/11; *Mpofu* v *Mlavu and Others* HB17/16.

When the first respondent purported to inherit house number 2459 Cowdray Park, Bulawayo and to wind up the estate of his late mother he was engaging in futility. The estate had already been dealt with and the house in question had already been inherited. The purported registration of the estate, inheritance by the first respondent and everything else that flowed from it was a nullity. There was no longer an estate to be dealt with that way. The often cited seminal remarks of Lord Denning in *Macfoy* v *United Africa Co Ltd* [1961] 3 ALLER 1169 (PC) at page 1121 are apposite:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, although it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurable bad. You cannot put something on nothing and expect it to stay there. It will collapse."

And so will the purported sale and transfer of the house to the third respondent collapse as well. That conclusion is consistent with the pronouncement of the Supreme Court in *Standard Chartered bank Zimbabwe Ltd* v *Matsika* 1997 (2) ZLR 389 (S) 389G that;

> "A cardinal principle of the common law is expressed in the aphorism: '*nemo exproprio dolo consequitur actionem'* which translates: no one maintains an action arising out of his own wrong. Complementary to this principle is another which stipulates: '*nemo ex suo delicto meliorem suam conditionem facere potest'* which means: no one can make his better by his own misdeed."

That is what the first respondent did and that brings me to the issue of costs. I agree with Mr *Ncube* for the applicant that punitive costs against the first respondent are justified because of his improper conduct of side-stepping due process which had been initiated by his step-father trying to capitalize on the delay in effecting transfer and the death of his step-father. Such misdeed must be rewarded only with punitive costs.

In the result, it is ordered that;

1. It is declared that the purported registration of the estate late Kuyibisa Masuku by the first respondent at the office of the fourth respondent as DRBY 689/12 was unlawful and therefore null and void.

2. The purported sale and transfer of house number 2459 Cowdray Park Bulawayo by the first respondent through the agency of the second respondent to the third respondent is hereby declared null and void.

3. Deed of transfer number 174/2014 is hereby cancelled.

4. The costs of this application shall be borne by the first respondent on a legal practitioners and client scale.

Ncube and Partners, applicant's legal practitioners