HB 110/18
HC 1951/14

SELINA THEBE (NEE MABALEKA)

Versus

LEONARD MABELEKA

And

MUNICIPALITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 20 OCTOBER 2017 & 3 MAY 2018

Opposed application

Ms L. Mumba for the applicant
Advocate L. Nkomo for the respondent

TAKUVA J: This is an application for rescission of a default judgment wherein the applicant has brazenly adopted a scattergun approach by relying on rules 63 and 449 of this court's rules.

The facts which form the genesis of this case are that the applicant's late husband and 1st respondent were brothers born to the now deceased Lucy Msipa who owned house number 61218 Pelandaba. The estate of the late Lucy Msipa was registered under DRBY number 172/08. Applicant was subsequently appointed as Executrix Dative on 17 December 2009. Lucy Msipa had died intestate on 26 April 1991.

On 25 February 2010, a distribution account was approved by the Additional Assistant Master. The final liquidation and distribution account declared the applicant and 1st respondent sole beneficiaries of the property in dispute in equal shares. Both parties agreed that the house be sold by private treaty but appeared to disagree on the purchase price. Applicant offered, from February 2010 to buy 1st respondent out. However, this she did not do for 3 years although she continued to lease the property and taking rentals to her exclusive benefit. Surprisingly,

applicant adopted the attitude that the house belongs to her late husband after it was donated to him by his mother Lucy Msipa.

Undaunted by that shameless assertion, applicant continued to frustrate 1st respondent by refusing to approach the Master to apply for section 120 authority to sell the property by private treaty. First respondent then sought the intervention of this Court in terms of summons under case number HC 2627/13 claiming the following relief:

"a) An order that house number 61218 Pelandaba, Bulawayo be sold by private treaty, which property belongs to plaintiff and 1st defendant in undivided equal shares, in terms of a distribution account in the Estate of the late Lucy Msipa DRB 172/08 and which property the latter is failing, refusing or neglecting to cooperate with plaintiff in having it disposed of by way of sale or otherwise for the purposes of having a proper sharing of its net proceeds.

b) An order directing the Deputy Sheriff to sign an agreement of sale and all cession documents at 2nd defendant's offices and transfer the right, title and interest of stand number 61218 Pelandaba Township, Bulawayo from the names of the late Lucy Msipa to the names of any person who shall be the purchaser in terms of a sale to be held in terms of paragraph (a) above.

c) An order that one half of the net proceeds of such sale be paid to plaintiff and the other half to the 1st defendant less all rentals collected and received by 1st defendant in respect of plaintiff's shared portion of the property from the 1st March 2010 to the date of full payment at the rate of US$120,00 per month or US$5,90 per day to the date of full and final payment.

d) An order for the eviction of 2nd respondent and anyone claiming through her from stand number 61218 Pelandaba Township, Bulawayo.

e) Costs of suit to be paid by 1st defendant."

The applicant defended the summons on the basis that she would buy out the 1st respondent but was still seeking funds. In her plea, applicant stated:

"5. Ad paragraph 8-11

Not disputed save to say that 1st <u>defendant is willing to have the property sold and would like to be given the first option to purchase the plaintiff's share in the property."</u> (my emphasis)

In this application applicant contends as follows;

(a) that she has a reasonable explanation for her default in that her failure to file discovery documents was not willful as it was occasioned by her going to South Africa for medical treatment.
(b) that the sale of the disputed property was a legal nullity as the consent of the Master of the High Court was not sought.

(c) that the 1st respondent erred at law by failing to cite the Master of the High Court in its application for default judgment; and

(d) that legal process was not followed in issuing the final distribution account.

In opposing the application the 1st respondent raised a point *in limine* as well as attacking the application on its merits. *In limine,* the 1st respondent claimed that applicant is raising fresh defences that she did not raise at the time she pleaded. However, 1st respondent did not specifically deal with those new defences in his opposing affidavit. I take it that the new defences relate to non citation of the Master of this Court in case number HC 2627/13 and that the final distribution account was not issued in terms of the law. These issues have been extensively covered by both parties in their heads of argument on the merits. I will therefore deal with them as such.

The law

In order to discharge the onus of proving 'good and sufficient cause' as required by Rule 63 of the High Court of Zimbabwe Rules 1971 an application for rescission of judgment must prove the following factors;

(a) the reasonableness of applicant's explanation for the default;
(b) the *bona fides* of the application to rescind the judgment; and
(c) the *bona fides* of the defence on the merits of the case which carries prospects of success – see *Stockill* vs *Griffiths* 1992 (1) ZLR 172 (S) at 173D-F.

In the present case, the applicant's explanation for failure to make discovery is unreasonable for the following reasons;

(i) the applicant left for South Africa in the middle of a court process and did not inform her legal practitioners of her contact details in South Africa.

(ii) she accepts in her opposing affidavit that she was not incapacitated in South Africa yet, surprisingly, she did not bother to communicate with her legal practitioners to check on the progress of her case. She clearly adopted a lax attitude to her case punctuated by lack of diligence.

(iii) her explanation that she used to phone her gardener at hone does not make much sense in that she should have phoned her lawyers instead to check on any correspondence regarding the case.

(iv) her erstwhile lawyers could not even write a letter to the respondent's legal practitioners to advise them of the challenges they were facing in locating the applicant and getting instructions. On the contrary they ignored every correspondence directed at them by the respondent's legal practitioners in a clear case of negligence. This negligence, can in appropriate circumstances be visited on the applicant – see *S* v *McNab* 1986 (2) ZLR 280 (SC) where DUMBUTSHENA CJ (as he then was) quoting the remarks of STEYN CJ in *Salojee & Anor NNO* v *Minister of Community Development* 1965 (2) SA 135 (A) stated thus:

> There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Considerations *ad misericordam* should not be allowed to become an invitation to laxity … The attorney after all is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship no matter what the circumstances of the failure are."

As regards the *bona fides* of the application to rescind the judgment, it is common cause that the parties agreed that the property be sold and proceeds shared equally. That being at the

heart of this matter, the applicant further requested that she be allowed in that arrangement to buy the 1st respondent out. She was duly afforded that opportunity but she could not raise the required half share over a period in excess of three years. In my view for her to turn around now and challenge the sale by raising all sorts of spurious legal technicalities demonstrates her deep seated malice and *mala fides*. This becomes clearer when one considers the fact that she is and has been the sole beneficiary of the house in question. The applicant has not alleged that she has been prejudiced financially as a result of the sale of the house. If applicant has good intentions, she should simply collect her half share and move on with her life.

I now deal with the *bona fides* of her defence on the merits and the prospects of success.

Whether or not the consent of the Master was required

Applicant's argument here is that the default judgment was erroneously granted as the court a quo did not consider that the consent of the Master was needed to dispose of the house as required by section 120 of the Administration of Estates Act Chapter 6:01. The section states:

> "If, after due inquiry, the Master is of the opinion that it would be to the advantage of persons interested in the estate to sell any property belonging to such estate otherwise than by public auction he may, if the will of the deceased contains no provision to the contrary, grant the necessary authority to the executor so to act." (my emphasis)

In *Songore* v *Gweru & Ors* HH-90-08 this section was held to apply only where the deceased left a will. KUDYA J said:

> "It does not appear to me that the sale to the 1st respondent was void for lack of the master's consent. The cases that I have been able to find in which section 120 of the Administration of Estates Act was applied such as *Logan* v *Morris NO & Ors* 1990 (2) ZLR 65 (SC) (the present section 120 was then section 117) did so in a matter in which the deceased had died testate. As worded it seems to me that the master's approval applies in a case in which there is a will. In the present matter the deceased died intestate."

In the present case, and on the same reasoning, since the deceased died intestate, section 120 is inapplicable. In any event, it was the applicant as Executrix dative who should have

sought the consent. Instead she sat on the matter to the disadvantage of other beneficiaries until 1st respondent approached this court for relief. He obtained a court order which authorized him to sell the house.

Applicant contended that the Distribution Account merely bestowed personal not real rights in the property. This argument is devoid of merit because once a person is appointed heir they acquire the right to dispose of their inheritance. In *Songore* v *Gweru supra* this principle was stated thus;

> "In his counter claim, the 1st respondent demonstrated that he holds cession in the property. The applicant admits as such… That cession was taken after the master and the local authority had approved the transfer of rights to him. He is entitled to enjoy the fruits of his investment. The applicant does not have any discernable defence to his claim … The heir was thus entitled to dispose of the property as it devolved to him on his appointment."

In casu, the 1st respondent was appointed joint-owner of the property. In that regard, I am not convinced that the classification of the right as real or personal as between applicant and 1st respondent is relevant because personal rights have to be respected by all men in so far as an intentional infringement of a personal right constitutes an actionable wrong and in so far as they are protected by the doctrine of notice. The general principle *nemo ex suo delicto meliorem suan conditionem facere potest* operates against the applicant in that she cannot be permitted to defeat 1st respondent's "potential real right" conferred by derivative acquisition for her own benefit in circumstances where she knows of its existence. Put differently, nobody will be allowed to derive a benefit or advantage from his or her own bad faith.

Non citation of the Master of the High Court

Applicant's further argument is that the non-citation of the Master in proceedings under case number HC 2627/13 rendered the application for default judgment fatally defective. This argument is not well taken because in terms of section 68E of the Administration of Estates Act Chapter 6:01 (the Act) once the Master approves a final distribution account, he becomes *fanetus*

officio thus dispensing the need to cite him. Clearly, the onus shifts to the executrix dative to do her job, namely to distribute the estate. This, the applicant did not do compelling the 1st respondent to sue her for the completion of her task.

In any event, this is just but a technicality and not a defence at all. On the following facts regarding the merits, there is a need to go beyond mere technicalities in an endeavour to do justice;

(i) A final distribution account which is a legally binding document was approved by the Master of the High Court;
(ii) The applicant had a duty as Executrix Dative to implement it but she failed to do so hence the 1st respondent approaching this court for relief;
(iii) The applicant's failure, which has not been explained, amounted to a failure as executrix dative and borders on unlawfulness as it has the effect of depriving heirs of their inheritance;
(iv) The applicant has no reasonable defence for her refusal or failure to execute a final distribution account issued by the master of this court. It cannot be said that the applicant acted with utmost good faith for the benefit of beneficiaries;
(v) Applicant in her initial plea did not deny her obligation to execute the final distribution account.

For these reasons, this ground is without substance.

Procedural irregularities

Further, applicant averred that there were procedural irregularities in the approval of the final distribution account in that section 52 (5) of the Act was, not complied with.

The section states:

"Every executor's account, except in such cases as the master may rule otherwise, shall lie open for inspection –

(a) at the office of the master if the deceased resided or carried on his principal business within the area defined in the First Schedule; or
(b) at the office of Assistant Master if the deceased resided or carried on his principal business outside the area defined in the First Schedule …
for inspection for not less than three weeks by any person interested in the estate."

Surprisingly, applicant has not provided in her founding affidavit proof as to how this legal requirement was not complied with. Applicant also argued that she has not obtained her discharge as executor from the Master in terms of s52 (11) of the Act. This is a confused argument because the Master can only discharge her after the final liquidation of the estate, which procedure applicant has delayed and frustrated. If she is desirous of being discharged, she should approach the Master to have the estate liquidated so that proceeds are given to the heirs.

Applicant rather alarmingly contended that certain statutory fiscal regulations were not observed in the granting of the order and disposal of the estate. This cannot be true because the order specifically states that it is only the net proceeds that were to be shared among the heirs.

In the circumstances, the application for rescission of default judgment is devoid of merit.

Accordingly, it is hereby dismissed with costs.

Masiye-Moyo & Associates, applicant's legal practitioners
Ndove, Museta & Partners, 1st respondent's legal practitioners