HILDA SALILA
and
MARIA SALILA
versus
GERRY MUNYARADZI SALILA N.O
and
HUGHES SALILA MUSARIRA
and
MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS
and
GIDEON SHAVA
and
VIRGINIA SHAVA

IN THE HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 22 MAY, 9 JULY 2009 AND 25 FEBRUARY 2010

FAMILY LAW COURT

Opposed Application

Mr *Mutasa*, for applicants
First and second respondents in default
Mr *D. Kufaruwenga*, for fifth and sixth respondents

MUSAKWA J: In this application applicants are seeking relief to the effect that-

"1. The allocation and transfer of house no. 20 Creil Road, Southdowns, Gweru to 2nd Respondent under deed of transfer No. 2050/00 be and is hereby declared null and void.

2. House No. 20 Creil Road, Southdowns, Gweru be and is hereby transferred to the Estate Late Rginald Tswakai Griffin Salila.

3. The Executor Dative proceed to draft and lodge the First and Final Administration Account and Distribution Plan in the Estate Late Reginald Tswakai Griffin Salila forthwith.

4. There be no order as to costs."

In her founding affidavit first applicant states that first respondent was appointed executor dative of the estate of their late father, Reginald Tswakai Griffin Salila. Stand number 20 Creil Road, Southdowns, Gweru was included in the inventory of assets to the estate. Some

time in 2000 first respondent allocated the property to the second respondent and had it transferred to him.

First applicant further contends that no "First and Final Administration Account and Distribution Plan" was lodged with third respondent as is required in respect of deceased estates. The executor was issued with letters of administration on 17 December 1999 but the estate has not been wound up since then.

The second applicant deposed to a supporting affidavit in which she associated herself with the averments of the first applicant. In her answering affidavit she conceded that she took two beds, a set of sofas, two sets of curtains and two carpets for safekeeping. However, the property is said to have worn out "due to fair wear and tear over the past seven or so years".

It turns out that the house in question was sold to fifth and sixth respondents. After institution of the present proceedings fifth and sixth respondents sought an order of joinder to which first and second respondents consented.

Fifth respondent deposed to an opposing affidavit in which he stated that on 31st March 2007 he and second respondent entered into an agreement of sale in respect of stand 2723 Gwelo of Gwelo Township Lands also known as house number 20 Creil Road, Southdowns, Gweru. After the purchase transfer was effected into their names. He also contended that they were innocent purchasers. In addition he also contended that the claim by applicants had prescribed.

Mr *Mutasa* for the applicants submitted that the issue is how the estate was administered. The prescribed procedures were not followed as some beneficiaries benefited to the exclusion of others. On the aspect of lack of adherence to prescribed procedures he cited section 52 of the Administration of Estates Act [*Chapter 6; 01*]. On this basis, he argued that the transfer of the property to second respondent was null and void.

Mr *Mutasa* further argued that since deceased was married according to customary law, his estate should be administered in terms of section 68A of the Act. He conceded that first respondent was properly appointed as executor. He also noted that first respondent was appointed heir but that was only for limited purposes in terms of the Act. The estate could not be distributed without lodging an administration and distribution account with the third respondent. In this respect he referred to section 68D. In terms of this provision first respondent should have consulted all beneficiaries before the estate was distributed.

As regards beneficiaries, Mr *Mutasa* referred to section 68 F (2) (h). In this respect it was his submission that since deceased was survived by six children they are all beneficiaries in equal shares.

Mr *Mutasa* further submitted that applicants acquired vested rights in the estate upon the death of their father. These rights are then suspended pending compliance with certain procedures. He contended that prescription cannot run until the account has been confirmed. He also referred to the case of *Greenberg v Estate Greenberg* 1955 (3) S.A. 361 (AD).

Finally, Mr *Mutasa* submitted that the fifth and sixth respondents did not acquire any rights since the estate was not administered in accordance with the law. He referred to the case of *McFay v United Africa Company Limited* [1961] All ER 1169(PC).

On the other hand Mr *Kufaruwenga* submitted that there is a dispute of fact. He further submitted that it is common cause that property constituting a deceased estate cannot be transferred without the Master's consent. However, according to him, the fact that transfer took place signifies the Master's consent.

Mr *Kufaruwenga* further submitted that what is important is what the beneficiaries agreed on. He referred to section 68E of the Act. It was also his argument that the Master had no option but to ratify what had been agreed upon, which means that he approved the inheritance plan.

According to Mr *Kufaruwenga* in an estate governed by customary law there is no requirement to lodge a final distribution account. What is only required is an inheritance plan. He further submitted that section 68F is only invoked where an executor and beneficiary fail to agree on a distribution plan.

Finally Mr *Kufaruwenga* submitted that the fifth and sixth respondents only came onto the scene after the house had been transferred to the second respondent. Since they had no knowledge of the dispute they were innocent purchasers. Any irregularity would not affect their rights.

The Master submitted a report in terms of rule 248 of the High Court Rules. In the report it is stated that the estate was first registered at Gweru Magistrates Court. The file relating to the estate was referred to the Master following a complaint that had been lodged concerning the manner in which the estate was being administered. Although no progress was noted in the finalization of the estate, the two immovable properties constituting part of the estate were transferred without following laid down procedures. The transfers were irregular as no distribution account was lodged with the Master. A meeting was convened and it was attended by applicants as well as first and second respondents. Although procedures were explained and it was agreed that the estate had to be regularized, the second applicant did not carry out what had been agreed upon. Although this is not explained I assumed it related to the transfer of the Gweru property. Consequently, no certificate of authority was issued by the Master. The appointment of first respondent as heir is symbolical as it cannot affect the interests of other beneficiaries to the estate.

Section 68 (4) of the Administration of estates Act provides that:-

"(4) Subject to this Part, an executor appointed in terms of subsection (2) shall be responsible for—

(*a*) discharging the claims of creditors against the estate of the deceased person concerned; and
(*b*) administering and safeguarding the estate of the deceased person concerned, pending its distribution in terms of this Part."

It is clear that an executor can only exercise his powers in terms of the Act or as prescribed by the Master. This is in accordance with subsection (5) which states that:-

"(5) In the exercise of his responsibilities in terms of subsection (4), an executor shall have such of an executor's powers under this Act, and shall be subject to such of an executor's duties, as may be prescribed or as the Master may confer or impose on him."

I can only further note that in terms of section 52(2) of the Act an executor is obliged to lodge an administration and distribution account within six months from the time letters of administration are issued or within such time as the Master may allow. In terms of subsection (4) an executor must render accounts from time to time as the Master may direct. If no account is lodged within six months the Master or any person with an interest in the estate may summon the executor to show cause before the High Court why such an account has not been lodged. All these processes did not occur apart from the one meeting convened by the Master as explained in his report.

For purposes of distribution of the estate governed by customary law an executor is enjoined to draw an inheritance plan in terms of section 68D. There is no evidence that such a plan was drawn in this case. Once an inheritance plan has been drawn up it has to be lodged with the Master for approval in terms of section 68E. Again it is clear that no such plan was presented to the Master. There is no doubt that the distribution of the estate requires the approval of the Master. This is by virtue of section 68F which provides that:-

"(3) If the Master—
(*a*) is satisfied that a plan submitted to him in terms of subsection (1) has been agreed to by all the beneficiaries concerned or by such of them as the executor could with reasonable diligence have consulted, the Master shall approve the plan and authorize the executor to distribute or administer the estate in accordance with it;
(*b*) has reason to believe that the executor has failed to consult a member of the deceased's family or a beneficiary whom he could with reasonable diligence have consulted, the Master shall refuse to approve the plan until that family member or beneficiary has been consulted and, in the case of a beneficiary, his agreement to the plan has been obtained;
(*c*) has reason to believe that one or more of the beneficiaries concerned have not agreed to a plan submitted to him in terms of subsection (1), the Master shall proceed to determine, in accordance with section *sixty-eight F*, any issues in dispute between the executor and the beneficiary or beneficiaries, and shall direct the executor to distribute or administer the estate in accordance with his determination."

It therefore means that the distribution of the estate without the approval of the Master is a nullity. However there is the issue of prescription that was raised by fifth and sixth

respondents. The transfer of the immovable property to second respondent by first respondent occurred in 2000. The present application was only instituted in 2007.

The relevant provision is section 16 of the Prescription Act [*Chapter 8:11*] which provides that:-

"(1) Subject to subsections (2) and (3), prescription shall commence to run as soon as a debt is due.
(2) If a debtor wilfully prevents his creditor from becoming aware of the existence of a debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
(3) A debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises:
Provided that a creditor shall be deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care."

In opposing this application the fifth respondent simply stated that he was advised that even if the applicants' claim has merit, it cannot succeed as it has prescribed. No other averments are made in support of this contention.

The onus lies on fifth and sixth respondents to prove on a balance of probabilities that applicants became aware of the facts on which their claim is based and failed to institute the present proceedings within three years of such knowledge. In light of the proviso to section 16 (3) of the Prescription Act the fifth and sixth respondents can also prove by laying facts from which it can be deemed that the applicants were aware of such facts on which their claim was based if they could have acquired knowledge thereof by exercising reasonable care.

This was the approach adopted by MALABA J (as he then was) in the case of *Peebles v Dairiboard Zimbabwe (Pvt) Ltd.* 1999 (1) ZLR 41(H). In that case the plaintiff sought damages arising from a collision between his vehicle and a trailer belonging to the defendant. The defendant raised the special plea of prescription. The plaintiff sought to argue that the facts from which the debt arose became known to him from the time he obtained legal advice. In dealing with the issue of prescription and when the debt became due the learned Judge had this to say at pp45-47:-

" In this case, "the facts from which the debt arises" are the facts relating; to the damage and loss (the nature and extent of the bodily injuries; the pain and suffering that ensued; the loss of earning); how the damage was caused (the collision, the disconnection of the trailer, the defect in the coupling system) and the wrongful conduct accompanied by culpa (the omission to inspect the coupling system; the duty to do so), to which the cause of the damage is attributable: Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 388H-839A.

The question for determination here is, when did Mr Peebles first have knowledge or is he to be deemed to have first had knowledge of the above mentioned facts from which the debt arose? The onus is on Dairiboard, which raised the defence of prescription, to show that Mr Peebles first had knowledge or should be deemed to have first had knowledge of such facts on any date more than three years prior to the date on which the summons was served on it, that is to say, a date between 9 May and 30 September 1994: Gericke v Sack 1978 B (1) SA 821 (A); Brand v Williams 1988 (3) SA 908 (C) at 910B.

The rule applied is the discovery or knowledge rule. In the application of the rule contained in s 16(3) of the Act to decide whether Dairiboard has shown, on a balance of probabilities, that Mr Peebles acquired during the relevant period the requisite knowledge of the facts from which the cause of the action arose it is not necessary to seek knowledge of meticulous particulars of the cause of action. The court must look at all the circumstances of the case and decide whether Mr Peebles had or should be deemed to have had knowledge of the broad or material facts establishing the essential elements of the cause of action.

Loubser Extinctive Prescription (1996) in n 281 on p 104 makes reference to the case of Jolly v Eli Lilly 2d Cal 751 (1929) to illustrate the application of the discovery or knowledge rule. The plaintiff in the case suffered cancer as a result of her mother's ingestion of a harmful drug during pregnancy. The California Supreme Court applied the discovery or knowledge rule to bar the claim where the plaintiff was aware of the injury and its cause and could have suspected that she had been wronged although still unaware of facts establishing wrongdoing on the part of the drugs manufacturer.

It was held in that case that the discovery of the injury and its cause was enough to have triggered the running of the limitation period, even though the plaintiff was still unaware of all the facts establishing a failure to test the drug or a failure to warn about its possible effects by the manufacturer.

In n 300 on p 109, the learned author also makes reference to Ward v City of Alliance (1988-89) 22 Creighton LR 449. This was a case of a municipal employee who suffered various ailments and cancer as a result of direct skin exposure to oil in an electric transformer which was later discovered to contain a toxic chemical. A one-year limitation period was applicable to the employee's action against his employer. The discovery or knowledge rule was applied. It was found that the claimant knew or should have known of the causal relationship between his exposure to the chemical and his ailments more than one year prior to instituting action.

The learned author then states:

"The issue in this type of case is whether discovery should entail knowledge or imputed

knowledge of the injury and causation only or also knowledge or imputed knowledge of wrongful or negligent conduct by the defendant ... In the Ward case, the court required knowledge of the ailments and the causal relationship between the ailments and exposure to the toxin or in appropriate circumstances [the emphasis is mine] knowledge that the injury resulted from wrongful conduct of the defendant. The latter may be a consideration for determining accrual in some circumstances, but what is contemplated is only an imputed awareness of wrongful cause and not actual determination of negligent conduct or fault. Thus, the plaintiff need not be aware of the actionability of a claim or have knowledge of wrong doing at the level of certainty for the claim to accrue.

... In the Ward case, a test for discovery was accepted which is not constrained by rigid discovery articulation and permits the court to determine objectively the most equitable point of claim accrual based on the amount of information the injured party knows or should know."

Apart from raising the issue of prescription the fifth and sixth respondents have not proved when applicants became aware of the transfer of the immovable property. It cannot also be said that the circumstances are such that the applicants are deemed to have become aware of such facts as constituting the cause of action if they could have acquired knowledge of the transfer by exercising reasonable care. It means then that the application succeeds. However, part of the relief sought is that the property be transferred to the Estate Late Reginald Tswakai Griffin Salila. Taking into account that a deceased estate has no legal personality it is impossible to grant such an order. In any event there is no such provision in the Administration of Estates Act save that an executor is required to take charge of an estate before it is distributed.

Accordingly, the application is granted as follows-

"1. The allocation and transfer of stand 2723 Gwelo Township of Gwelo Township lands also known as house no. 20 Creil Road, Southdowns, Gweru to 2nd Respondent under deed of transfer No. 2050/00 be and is hereby declared null and void.

2. The first respondent shall proceed to draft and lodge an inheritance plan in respect of the estate of the late Reginald Tswakai Griffin Salila with the third respondent within seven days of service of this order upon him.

3. There shall be no order as to costs."

Karuwa & Associates, applicants' legal practitioners
Gundu & Mawarire Legal Practitioners, fifth and sixth respondents' legal practitioners