BARBARA COOK
and
SOPHIE WILDLING
versus
ALISTER ABRAHAMS
and
MASTER OF THE HIGH COURT N.O
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MWAYERAJ
HARARE, 15 October 2015

Urgent Chamber Application

T W Nyamakura, for the applicants
Adv *T Mpofu*, for the 1st respondent

MWAYERAJ: The application was brought before me through the urgent chamber book on 14 October 2015 and the hearing was set for 15 October 2015. The applicant sought the following order.

INTERIM RELIEF SOUGHT:

1. That pending the examination of the original will dated 22nd November 2011, the first respondent be and is hereby interdicted from disposing of property known as No. 2 Woodstock Road Arcadia, Harare, also known as 4102 Arcadia, Harare Township and No. 19 Milnerton Crescent, Arcadia, Harare, also known as 7704 Arcadia Township, Harare.
2. The first and second respondent make available to the applicants' experts on or before the 30th October, 2015, the original will dated 22 November, 2011 for examination on security terms determined by the second respondent.

3. That the third respondent be and is hereby interdicted from transferring into the names of any third parties the immovable properties mentioned in para 1 here above.
4. That the applicants produce to the respondents their experts reports on or before 30 November 2015.
5. That the costs of this estate be on an attorney and client scale.

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honorable court, why a final order should not be made in the following terms:

1. That the will purportedly executed by Prudence Clementine Edwards, on 22 November 2011 be and is hereby declared void and of no effect.
2. That the appointment of the first respondent as Executor testamentary over the Estate of the late Prudence Clementine Edwards, consequently be and is hereby set aside.
3. That the second respondent be and is hereby directed to reconvene an edict meeting and necessitate for the appointment of an Executor/Executrix Dative over the Estate of the late Prudence Clementine Edwards.
4. That it be declared that the Estate of the late PRUDENCE CLEMENTINE EDWARDS shall be dealt with as intestate according to law.
5. That 1st respondent shall pay for the costs of this application *de boris propriis* on a scale of legal practitioner and client.

The facts forming the background to this application may briefly be summarised as follows:

The applicants are biological sisters of the late PRUDENCE CLEMENTINE EDWARDS whose estate is registered with the master of High Court, the second respondent under DR No 1165/15. The first respondent produced a will which was accepted by the second respondent the Master. The applicants challenged the authenticity of the said will and sought expert opinion on the handwriting reflected on the will. The applicants thus approached the court on urgent basis to stop winding up of the estate or rather to stop disposal of the estates assets by sale.

The respondent mounted opposition to the application. The respondent raised points in

limine and also presented arguments that the matter was not urgent and that on merit the application ought to be dismissed.

POINTS IN LIMINE

The respondents argued that the applicants have no *locus standi* to bring the application in question simply because they are siblings to the late PRUDENCE CLEMENTINE EDWARDS. *Locus standi* has been defined in several cases before these courts and there has been marked consistence in principle as regards what it is. In brief the term *locus standi* simply entails the capacity to litigate or right to litigate. Herbstein and Van Winsen in their book The Civil Practice Of The High Courts and The Supreme Court Of Appeal Of South Africa Vol (1) 5th edition at p 438 clearly distinguish authority to bring a matter up from *locus standi.* The concept of *locus standi* in *judicio* is given as capacity to bring proceedings. The capacity clearly emanates from the interest or special reason entitling the bringing of the application. In *casu* the applicants are biological siblings of the late Prudence Clementine Edwards and as such close relatives who would ordinarily be close relatives of the deceased. They naturally have an interest in the administration of the Estate of their relative even in circumstances were they are not beneficiaries per the will. See the case of *Wang and Ors* v *Ranchod NO and Others ZLR* (1) 2005 at 415A. It is sufficient for the applicants to only show an interest or special reasons entitling them to sue. They have a legal interest to see their sister's estate administered according to the sister's wish even if there is no practical interest to the outcome given they are not potential beneficiary in terms of the will which has given rise to the cause of action. It follows therefore that given the applicants are close relatives they have a legal interests to be heard and thus have capacity to bring the matter before the courts. The point *in limine* that the applicants have no locus standi cannot be sustained in the circumstances and is accordingly dismissed.

The second point in limine raised concerns the non joinder of the third parties and some family members who bought some of the estate assets. Again that point is not fatal to the application because it clearly does not defeat the cause of action. Rule 87(1) of the High Court Rules 1971 is instructive and it reads r 87(1)

> "No cause or matter shall be defeated by reason of the misjoinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the right and interest of the persons who are parties to the cause or matter".

In the present case although there are third parties who bought property, the applicants

are seeking an interim interdict pending investigations into the authenticity of a will. In the circumstances the non joinder is not fatal. The last point on citation of the first respondent in his personal capacity on the face of it would be improper but the application shows in the founding affidavit he is cited in his official capacity as executor. Again such an irregularity would not be fatal to the application. The point *in limine* again cannot be sustained

URGENCY

The question of whether a matter is urgent or not is entirely within the discretion of the court. As correctly observed by Gowora J as she then was in *Tripple C Pigs and Anor* v *Commissioner General* ZLR 2007 (1) at p27. Warning bells however, ring that in exercise of discretion the courts have to be careful so as not to abuse the exercise of judicial discretion by taking note of the need to maintain what is decided that is to be guided by precedence. The principle of *stare decisis* is quite central in exercise of discretion. This does not by any chance mean the circumstances of each case should not be taken into consideration. Regard simply has to be taken in exercise of discretion to the need for consistence and integrity as a matter of principle and justice. Urgency as contemplated by the rules of this court has been ably defined in plethora of case law and it is fairly settled. One can briefly summarise requirements of urgency as follows

1. a matter is urgent if at the time the need to act arises the matter cannot wait.
2. if the matter is not dealt with irreparable harm will be occasioned.
3. if the matter is not dealt with the relief sought even if it was to be granted later will be rendered hollow or purely academic.
4. if the party sprout to action when the need to act arose, self-created urgency is not the urgency contemplated.
5. The nature of relief sought and cause of action is central on considering whether or not to grant an urgent application.
6. The balance of convenience favours grant of relief on urgent basis.

The case of *Madzivanzira and 2 Ors* v *Dex Print Investment (Pvt) Ltd and Anor* HH 245 -02 quoted with approval sentiments of Paradza J in *Dexprint Investments (Pvt) Ltd* v *Ace Property and Investments (Pvt) Ltd* HH 120/02, wherein it was stated;

> "For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable

prejudice will result, the court can be inclined to deal with that on an urgent basis."

The judge further stated

> "It must also be clear that the applicant did on his part treat the matter as urgent, in other words, if an applicant decides not to act immediately and waits for doomsday to come and does not give reasonable explanation for that delay he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on urgent basis. The same requirements of urgency were ably recorded in the *locus classicas* by Chatikobo J (as he then was) in *Kuverega* v *Registrar General and Another* 1998 (1) ZLR 188."

This case was quoted with approval by Makarau JP (as she then was) in *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2). The exposition in both cases clearly postulates that the extraordinary relief on urgent basis where a party is given preferential treatment of "jumping" the set down queue is only available where the relief sought is one which cannot wait because of the obvious irreparable harm which might be occasioned by waiting.

In the present case the late Prudence Clements Edwards estate was registered with the master of High Court. A will was lodged and accepted by the master. The first respondent was appointed as executor and the applicant had knowledge of such appointment as at 22 June 2015. The applicants objected to the will citing that it was not authentic as their sister died without a will, although it was her wish to have one. The applicants did not lodge a formal application for determination of validity of the will by this court in terms of the Administration of Estates Act [*Chapter 6:01*]. According to the first applicant's founding affidavit para 2:5 p 10 the applicant is aware of the process that has to be ignited. The fact is that there is no pending application on the validity of the will. The applicant alleges original will has not been availed by the first respondent. It is worth noting that the original will ought to be with the master of High Court after being handed in upon registration and after its acceptance by the second respondent. The second respondent's office is a public office and procedure to access documents are well laid out. Suffices to say, it is apparent from submissions both written and oral that the second respondent in a meeting with the parties on 27 July 2015 agreed with the parties to give time up to 11 September 2015 for substantiation of the allegations of the will not being authentic. A letter was written on 11 September advising about the impending sale of the property given the questioning of the will remained an unsubstantiated allegation. The movable property was sold on 17 July 2015 to the knowledge of the applicants. No applications were lodged as regards the movable property, some of which was bought by relatives. Almost a month after some of the sales had

been effected, do the applicants seek redress on urgent basis. The applicants were aware of the acceptance of a will by the master of High Court as way back as June 2015. They were aware of proper channels of challenging the validity of a will but they are still to file a formal application with this court. They were given time to carry out an investigation and the inquiry which according to the applicant required handwriting expert opinion. The investigation was not carried out *per* the agreement of the parties till the deadline. The applicants albeit erroneously seem to suggest the respondents have to take a proactive stance to launch the investigation of what the applicants allege. Finally when the property had been sold, the applicant applied to the court on 14 October 2015 seeking a relief on urgent basis. The conduct of the applicant when placed under scrutiny on whether or not it meets the requirements of urgency clearly falls short.

I make that remark given the sloppiness and casual conduct with which the applicants approached the matter. The applicants simply raised a smoke screen that they need to verify the authenticity of the will and did nothing. They remained sitting on their laurels even after communication on 10 September 2015 that property would be sold. They waited till the day of reckoning after the sale of the property to sprout to action, that the court must stop the sale after the event. That the court must stop the sale to accommodate a contemplated investigation and may be lodge of a formal application. The situation depicted is certainly what was referred to by Chatikobo J in *Kuverenga (supra)* when he remarked;

> "Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules."

In this case the applicants did not only sit on their rights till the deadline drew nearer but they sat on their rights till after the deadline. That certainly is not treating the matter as urgent. It defies logic why a party which is not proactive in protecting its rights seeks to get a remedy on urgent basis. When viewed closely the nature of relief and cause of action as brought by the applicants are not supportive of granting of a relief on urgent basis. I say so because clearly the applicants say they have no interest in the deceased estate but wish to see the speculative wish of their sister accomplished. It could be the fact that they say their sister's wish was to hand over her estate to charity explains their inaction and wait for doomsday or that they have no interest means no injury or harm will be occasioned. The relief sought is for placing the estate in abeyance for unspecified period pending investigation, with no application made formally to challenge the

validity of the will. It is strictly placing the administration of an estate to a halt pending nothing, an indefinite procedure. That type of relief is not relief which qualifies to be granted on urgent basis.

The applicants have no interest in the case by there mere say so, as such it is not desirable to grant the relief to halt proceedings indefinitely on urgent basis. The circumstances of this case wherein the applicants took their time to act and have no reasonable explanation for the delay does not justify treating the matter as urgent. Further the nature of relief sought and cause of action do not justify hearing the matter on urgent basis. In principal the fact that the applicants do not have a practical interest in the matter again defeats any urgency. That lack of practical interest probably explains the dilatory attitude but does not qualify the application as urgent. The application falls short of meeting the requirements of urgency.

Accordingly it is ordered that:

The application be and is hereby dismissed with costs.

Mtetwa & Nyambirai, applicants' legal practitioners
Messrs Costa & Madzonga, 1st respondent's legal practitioners