THE REGISTRAR-GENERAL GHANA
versus
MASTER OF THE HIGH COURT
and
NANA ADAWOA OFOOBEA BOOHENE
and
FELICIA ADWOA BOOHENE
and
YAW AWUK BOOHENE
and
KWESI AKORE BOOHENE
and
KOFI ASIEDU BOOHENE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 5 October 2017 & 7 February 2018

Opposed Application

P Musendo, for the applicant
J Dondo, for 2nd respondent
No appearance for 1st, 3rd, 4th, 5th, & 6th respondents

HUNGWE J: Applicant seeks an order in the following terms;

"1. The holding of edict meetings by 1st respondent is hereby declared illegal. The meetings held on 3rd August and 19th August 2016 and 14th November 2016 presided over by 1st respondent are hereby set aside.

2. The 1st respondent's withdrawal of Letters of Administration issued in favour of applicant is hereby set aside.

3. The appointment of 2nd respondent as executor of the Estate Late Edward Hekaku Boohene is hereby set aside.

4. Applicant be and is hereby confirmed as the executor in the Estate Late Edward Hekaku Boohene and shall continue as such.

5. Respondents to pay costs on an attorney client scale if they are opposed to this application."

The second respondent filed a counter-application seeking an order in the following

terms:

"It is hereby declared that:

1. The last will and testament executed at Accra, Ghana, which is attached to the main application as Annexure 'B' shall not apply to the administration of the estate property of the late Edward Hekaku Boohene which is located at Harare, Zimbabwe.
2. The late Edward Hekaku Boohene's property located at Harare, Zimbabwe shall be administered and distributed in accordance with the applicable estate laws of Zimbabwe.
3. The applicant in the main court application shall pay the costs of this counter-application to the 2nd respondent in the main application."

The sole issue in this application is whether the Master of the High Court's decision to revoke foreign letters of administration that he had previously accepted is reviewable.

The background to the application.

The applicant is the Administrator General of Ghana. By virtue of a written will, applicant was appointed Executor and Trustee of the late Edward Hekaku Boohene ("the deceased") who died in Ghana on 7 October 2008. The High Court of Ghana confirmed the applicant as Executor of the said estate in terms of the deceased's will ("the will"). The deceased owned immovable property registered in his name in Zimbabwe at the time of his death. By reason of the location of the property, it was necessary to register the estate in Zimbabwe for the purposes of administering that portion of the estate. It was duly registered under DR 1130/10. The applicant appointed legal practitioners of record to handle its affairs in respect of the estate in Zimbabwe. Second to sixth respondents are the children of the deceased. There was a dispute between second to sixth respondent and applicant in Ghana over the estate. The matter was eventually heard in the High Court of Ghana. The second to sixth respondent lost their High Court challenge of the will in Ghana. They appealed. The dispute involved the property situated at Harare, known as 16A Enterprise Road, Glen Lorne, Harare.

The Application

Applicant seeks a review of the first respondent's actions in respect of the estate in Zimbabwe on two grounds. In her founding affidavit the applicant avers that the first respondent acted *ultra vires* the provisions of the Administration of Estates Act [*Chapter 6:07*] ("the Act") and that his actions have exhibited prejudicial bias in favour of the second respondent and against the other beneficiaries.

She gives the following chronology of events as the basis of her conclusion.

On 4 August 2016 the first respondent verbally advised the applicant's legal practitioners that an edict meeting had been held. At that meeting, which one Abdul Kassim ("Kassim") was appointed the new executor over the deceased's estate, more particularly the Zimbabwe portion of the estate. Minutes of the edict meeting reflect that the edict meeting was held on 3 August 2016. Upon being nominated the executor, the said Kassim had accepted the appointment. The edict meeting had previously been advertised and gazetted to be held on 19 August 2016. The reason why the edict meeting had been held earlier than the advertised dates was that one of the children, second respondent, was present in Zimbabwe. The applicant and her legal practitioners had not been invited to this edict meeting. Applicant's legal practitioners wrote to first respondent objecting and protesting to the cavalier attitude displayed by the first respondent.

On 12 August 2016, applicant's legal practitioners received correspondence from 1st respondent advising that an edict meeting had been set down for 19 August 2016. There was no mention of the edict meeting of 3rd August 2016, nor any reference to the conversation between the first respondent and applicant's legal practitioners of the previous week.

On 19 August 2016 another edict meeting was then held with the applicant's legal practitioners in attendance. In that meeting the first respondent claimed that the applicant had failed to execute the mandate to administer the estate within the prescribed period. As such another executor needed to be appointed. It was also claimed that the applicant had not advised the second to sixth respondents of the Harare property. In light of that, the applicant was invited to make written submissions explaining the delay in winding-up the estate. The applicant filed her response on 22 August 2016. In September 2016, the applicant received correspondence from first respondent wherein first respondent purportedly ruled that Kassim would be issued with letters of administration. The applicant wrote to the first respondent objecting to the ruling appointing Kassim as an executor of the estate she was already administering. There was no response to the objection.

On 28 August 2016 the applicant wrote to first respondent seeking a review of the decision to appoint another executor when there had been no removal of the incumbent. The applicant also highlighted the reasons behind the delay in finalising the winding-up of the estate. Still there was no response to all these correspondences.

In a somewhat surprising turn of events the applicant on 24 November 2016 received correspondence from the first respondent dated 8 November 2016 but date stamped 24 November 2016 in which the first respondent claimed that his office was now *functus officio*

in the matter. On the same day, at the first respondent's offices, applicant's legal practitioners found a letter addressed to the second respondent and copied to the applicant. It was never dispatched from first respondent's office to either of the addressees. It was an invitation to an edict meeting to be held on 14 November 2016. Upon further checks within the office of the respondent, applicant's legal practitioner established that indeed an edict meeting had been held on that day. In that meeting, Kassim had renounced his appointment as executor and the second respondent had been appointed in his stead. This would be the third edict meeting. Again the applicant's legal practitioners addressed correspondence to the first respondent objecting to the edict meeting of 14 November 2016. Applicant's legal practitioners pointed out the irregularities apparent in the manner in which that office handled the estate.

Applicant challenges the three edict meetings as follows.

The edict meeting of 3 August 2016 had been without notice to her. That edict meeting could not validly appoint Kassim as executor before she had been lawfully removed from that office. In any event, it had previously been advertised for 19 August 2016 therefore the other dated had not been properly advertised.

The meeting of 19 August 2016 had delved into matters which, at that stage, the Master could not lawfully inquire into. First respondent claimed that applicant had failed to execute her mandate as executor as there had been an inordinate delay in finalising the winding up of the estate. She was invited to file written reasons for her dilatoriness. After she had done so, she was advised in writing that first respondent would issue letter of administration to Kassim. There was no formal revocation of her appointment as executor in the edict meeting of 19August 2016. She protested and asked that this ruling be reviewed to no avail.

The edict meeting of 14 November 2016 proceeded on much the same footing as that of 3 August 2016 as she had not been invited. That this meeting had taken place was a discovery made by applicant's legal practitioners when they made a follow up on a letter from first respondent indicating that his office was *functus officio.* In that office was discovered correspondence indicating that applicant had been invited to the edict meeting and that Kassim had renounced his appointment which renunciation had been accepted. First respondent had then substituted Kassim with second respondent with the agreement of all persons present, falsely implying that applicant had been present and had accepted the appointment of second respondent as executor to the estate when her own appointment was still valid.

The second respondent raised several points *in limine.* I consider that these points in limine were misconceived. My reasons for so holding are as follows.

Points *in limine* raised by the second respondent

The first point *in limine* taken by the second respondent is that the application was filed some ten weeks after the decision whose review the applicant is seeking was communicated to her in August 2016. She only brought the application for review in December 2016 some ten weeks later. Without an application for condonation of the late filing of the review application, the applicant is hopelessly out of time and cannot be heard. This point misconceives the applicant's case and the factual basis of the application for review. The applicant is aggrieved by the conduct of the first respondent who has held no less than three edict meetings in circumstances where he should not have, at law, done so. The latest of such meetings was billed for 14 November 2016. If regard is had to this conduct, it will be clear that the complaint that the application for review was filed out of time is without basis. It should not detain this court further. It stands dismissed.

The second point *in limine* raised was that the application for review does not comply with the requirements of the rules of court in that the grounds of review were not stated clearly and concisely on the face of the court application. The applicant concedes that she did not, in this respect strictly comply with the rules of court. She asked the court to exercise its wide powers to condone this oversight as the grounds are clearly spelt out in the body of the founding affidavit. She also argues that this was not a serious infraction of the rules of court and that no prejudice was occasioned by her failure to adhere to the requirements of the rules. Taking the whole application in its proper perspective, I am of the view that this was an oversight which did not prejudice the respondents especially since the relief is being sought against first respondent rather than the second respondent. I am therefore prepared to condone the departure from the rules in the form adopted by the applicant so as to allow the matter to be dealt with on the merits rather than on technicalities.

The last two points *in limine* are closely related and will be considered together. Second respondent argues that the last will and testament of the deceased appointed the Registrar of Ghana and solicitor Kwabla Dogbe as executors and trustees. Since the applicant is the Acting Registrar of the High Court of Ghana, she cannot be the person identified in the will. In any event, the other executor renounced his appointment as an executor. As such she cannot act as the sole executor in light of the fact that the testator intended that two executors administer his estate. In any event, so Mr *Dondo's* argument went, the letters of administration were issued in the name of one Joseph Kofi Harley and not the applicant. Second respondent argues that in light of the above applicant has no *locus standi.* The point of the matter is this; the applicant is

the testamentary executor by virtue of the letters of administration issued by the High Court of Ghana and accepted by the Master of High Court of Zimbabwe, the first respondent in 2010, at the unsealing of the probate under DR 1130/10. Once the first respondent accepted the letters of administration filed with him by the applicant, an important juristic act had occurred whose effect was to dispense with the need to hold an edict meeting in terms of the Act. Second respondent cannot at this stage, challenge the validity of an act which the Master has already recognised and ratified in terms of the law. It is the basis upon which the applicant has approached the court in the present application. It is the Master's subsequent actions and decisions which have given cause for the present application for review. See *Van Niekerk* v *Master of the High Court & Ors* 1988 (1) ZLR 418 (HC)

As such the applicant acquired rights and duties as the executor which the Master and the rest of the respondents are obliged to respect. The deceased appointed the holder of the office of the Registrar General of the High Court of Ghana for the time being. When that office is held by someone in an acting capacity, such a person will be the executor of the estate for the time being. I am unable to agree with Mr *Dondo*'s contention that the court should read into the will the requirement for two executors to act together. As I have demonstrated above, firstly, that is not the plain and ordinary meaning of the words used by the testator. Secondly, this is not the appropriate forum to challenge the validity of the deceased's last will and testament.

In the event I dismiss the final two points *in limine* raised by the second respondent. I turn to consider the merits of the application.

On the merits, the second respondent repeats the averment that the applicant is a stranger to the estate of the deceased. The second respondent repeats this averment to a point where it becomes her anchor in opposing the application. I make this observation in light of the fact that even in her counter-application where she seeks a *declaratu*r, her sole basis for the order is that the deceased's last will and testament does not apply to the property in Zimbabwe. Second respondent recites the following as her reasons for seeking the counter-relief:

(a) That the Master of the High Court of Zimbabwe has since revoked the Letters of Administration that he had previously issued to the applicant;
(b) That the validity of that last will and testament is contested and is subject of pending litigation in Ghana;
(c) The last will and testament did not state that it applies to the deceased's property in Zimbabwe;
(d) That one of the executors under the last will and testament renounced his appointment;

(e) That the purported last will and testament was not properly signed before competent witnesses.

In her founding affidavit to the papers filed in opposition to the counter-claim, the applicant makes the following points. She takes the point *in limine* that the applicant adopted the wrong procedure in bringing her application as she failed to comply with the mandatory requirements of the rules of this court, which rules oblige a counter-application, in terms of Order 32 Rule 229A, to be set out separately in Form 29 with the necessary alterations.

On the merits she makes the point that the Master of the High Court of Zimbabwe, who is the first respondent in the main application and second respondent in the counter-application, has never at any time disputed the last Will and Testament of the late Edward Hekaku Boohene. The reason for the revocation of the Letters of Administration was an alleged failure to wind up the administration of the estate in terms of the timelines set out in the Administration of Estates Act. The Master of the High Court of Zimbabwe accepted the last Will and Testament of the deceased as far back as 2010 when the resealing was granted. The main application challenges the Master's revocation of the previously issued Letters of Administration as irregular, unprocedural and therefore illegal. As, such, the counter-application seeks to bring the same issue before the court in a convoluted fashion rather than await the determination of the issue in the main application. More importantly, the applicant avers that what was revoked were the letters of administration, not the recognition of the last will and testament of the deceased. A testator's will relates to the entirety of his estate not portions thereof. Had he willed differently for the Zimbabwean portion he would have said so in the will. The fact that one of the two appointed executors renounced his appointment does not in any way invalidated the will. The second respondent seeks to challenge the validity of the will when in her founding affidavit she is challenging its applicability to the property situated in Zimbabwe. That will was accepted as valid in Ghana and accepted in Zimbabwe and at no time was its validity questioned here in Zimbabwe.

The validity of the will was contested in the High Court of Ghana by the second respondent and others. They lost that challenge to the will by virtue of the judgment of the High Court of Ghana dated 26 July 2016 which form part of the main application. That is the end of the matter regarding the validity of the will. I shall come to this aspect later.

Applicable law and procedure where foreign elements are involved

The common law rule in respect of movables is that a will is formally valid if it complies with either the *lex loci actus* or with the *lex domicilii* at the time of execution of the will. So far

as a will disposes of an immovable property, it is formally valid at common law if it complies with the requirements of the *lex loci actus* or the *loci situs.* In any event, as I pointed out above, the High Court of Ghana has pronounced itself on the status of both the will and the applicant. There is no basis upon which the second respondent, who was party to the Ghana proceedings should require this court to inquire into the validity of the will. The point is this; the application is seeking an order setting aside certain decisions of the first respondent which appear irregular and therefore reviewable.

Whether a Zimbabwean court has jurisdiction is generally accepted to be dependent on a two-fold enquiry: firstly whether there are sufficient links between the dispute and the territory. Whenever letters of administration granted in any State are produced to, and a copy thereof deposited with, the Master by the person in whose favour such letters of administration have been granted, or his duly authorized agent, such letters may be signed by the Master and sealed with his seal of office, and shall thereupon be of the same effect and have as full operation in Zimbabwe with respect to, and the Master shall have the same control over, the administration of the entire estate of the deceased situate in Zimbabwe as though the said letters had been letters of administration granted by the Master.

Thus a foreign executor wishing to deal with assets of a deceased estate in Zimbabwe is required to apply to the Master of the High Court for the issue of letters of administration. This process entails such a person furnishing the Master with a death notice; a copy of the will (if there is one), a bond of security, should the Master require such security; and an inventory of the deceased's assets. Such an executor must in addition to the above, file an authenticated document choosing a *domicilium citandi et executandi* within Zimbabwe or a local firm of legal practitioners to act as his or her agent in Zimbabwe. Once the Master has accepted the foreign letter of administration, the estate will be supervised by him as if the letters of administration had been granted by him and he shall exercise such control over the administration of the estate as though the letter of administration had been granted by him.

Section 35 of the Estates Administration Act, *[Chapter 6:01]* provides:

> **"35 Recognition of foreign letters of administration**
> Whenever letters of administration granted in any State are produced to, and a copy thereof deposited with, the Master by the person in whose favour such letters of administration have been granted, or his duly authorized agent, such letters may be signed by the Master and sealed with his seal of office, and shall thereupon be of the same effect and have as full operation in Zimbabwe with respect to, and the Master shall have the same control over, the administration of the entire estate of the deceased situate in Zimbabwe as though the said letters had been letters of administration granted by the Master."

Once the applicant produced her letters of administration to the first respondent and first respondent accepted these, she was a lawfully appointed executor of the estate of the deceased. Accordingly, his powers in terms of the extent and limit of such supervisory role are limited to what the Act permits him to do. That section provides:

> **"116 Supervision of executors, tutors and curators**
>
> (1) If it appears to the Master that any executor, tutor or curator is failing or neglecting to perform satisfactorily his duties or to observe all the requirements imposed upon him by law or otherwise in regard thereto, or if any complaint is made to the Master by any creditor, legatee or heir in regard thereto, the Master shall inquire into the matter and take such action thereon as he shall think expedient."

The Master may require the executor to furnish him with information, documents and so on. He may summon him to appear before him and explain himself or herself. (Section 116 (2) of the Act).

Can the Master of the High Court revoke the foreign letters of administration issued outside the jurisdiction of this court?

In terms of s 116 if a beneficiary or creditor files a complaint with the Master in respect of the conduct of the affairs of the estate by the executor, the Master shall inquire into the matter and take such action as he thinks expedient. In so doing, the Master may resort to one or both courses of action set out in s 116 (2) (a) or (b) of the Act. He may call upon the executor to produce specific documents connected with the estate which documents will assist him in formulating a decision regarding the complaint which he is enquiring into. He may, additionally or alternatively, require the executor to appear before him in which case a quasi-judicial enquiry may be undertaken. Section 116 of the Act does give the power to remove an executor from his or her office. That power reposes in the High Court of Zimbabwe by virtue of s 117 which provides:

> **"117 Master may apply for removal of executor, tutor or curator from office**
>
> (1) The Master may apply to a judge in chambers for the removal of an executor, tutor or curator from his office on the ground—
>
> (*a*) that he was not qualified for appointment to such office or that his appointment was for any other reason illegal; or
>
> (*b*) that he has failed to perform satisfactorily any duty or requirement imposed upon him by or in terms of any law; or
>
> (*c*) that he is mentally or physically incapable of performing satisfactorily his duties; or
>
> (*d*) that in his opinion such person is no longer suitable to hold such office;

> and the judge may, upon such application, remove the executor, tutor or curator concerned from his office or make such other order as he sees fit.
> (2) Where an executor, tutor or curator has been removed from his office the Master shall revoke any letters of administration or confirmation, as the case may be, which have been granted to such person."

Section 30 of the Act provides letters of administration granted to any person as testamentary executor shall at all times be subject to be revoked and annulled by the decree of the High Court on the proof to the satisfaction of the High Court that the will or codicil, in respect of which such letters have been granted to such person, is null or has been revoked either wholly or in so far as it relates to the nomination of such executors. The section specifically sets out the circumstances under which the Master may revoke the letter of administration where such letters were issued by him. Any person aggrieved by such a decision may however appeal to the High Court within the times prescribed by the rules of Court. (s 30 (5). Conversely, the Master of the High Court has no power to revoke letters of administration issued outside his jurisdiction. The reason appears logical in that the validity of the will would have been upheld in that foreign jurisdiction and therefore the Master of the High Court of Zimbabwe does not have jurisdiction to inquire into issues of foreign law which would have been settled by a foreign court. His role, from a reading of the provisions of the Act is merely to enforce the decision of that court in terms of the provisions set out in ss 33-37 of the Act.

In *Drummond* v *Master of the High Court & Ors* 1990 (2) ZLR 227 (SC) the facts were that under a testator's last will and testament M was nominated as the principal executor with the provision that should he "be unable for whatsoever reason to act", L was nominated in the alternative. After the testator's death M formally renounced appointment as executor and a third party was nominated at M's behest. L, the alternate nominee objected to this appointment and, the Master having revoked the third party's appointment, M withdrew his previous renunciation and was granted letters of administration notwithstanding L's objection to this course and claim to entitlement to appointment as the alternate nominee on the basis that M was not entitled in law to retract his previous renunciation.

Counsel for Mervin submitted that such power on the part of the Master arises implicitly from the wording of s 25(1) or s 31(2) of the Act. Dismissing Mervin's appeal the court stated:

> "I am quite unable to agree with him. The former provision relates solely to the right of a person, duly appointed under a will or codicil as executor, to be granted letters of administration. It has nothing to do with a retraction by him of his renunciation as executor and the consequences thereof. Section 31(2) is even more remote. It empowers the Master to revoke or annul letters of administration granted to a person as executor dative where subsequently it becomes known to him, on production of a will or codicil, that another person was legally nominated as

> testamentary executor of the estate, and such person is capable, qualified and consents to act as such."

The court held that since the Master derives his power only from within the four corners of the Administration of Estates Act, acceptance by him of Mervin's purported retraction of his renunciation of appointment as testamentary executor was null and void. He had no discretion in the matter. In the premise, letters of administration were invalidly granted to Mervin.

Similarly in *Van Niekerk NO* v *Master of the High Court* 1996 (2) ZLR 105 (SC) the Master decided to seek an order for the removal of the executor in terms of s 117 (1) of the Act. The Court held that in order to justify such removal, it had to be shown that the executor had failed to perform satisfactorily any duty or requirement imposed on him by or in terms of any law and that the executor was no longer suitable to hold office as such. There was no finding adverse to the appellant on either of these grounds. The appeal was allowed. See also *Logan* v *Morris NO & Ors* 1989 (1) ZLR 42 where the powers and duties of the Master were discussed.

First respondent clearly overstepped his powers in respect of the estate. Once he accepted the letters of administration issued by the High Court of Ghana, the applicant acquired rights as an executor upon acceptance of the same. First respondent could not, for instance, call for an edict meeting for the purpose appointing an executor as that role had been assumed by the Ghana High Court. If for any reason, he felt that there was some perceived failure by applicant in respect of her duties under the Act, first respondent had it within his powers to act in terms of s 116 to conduct an inquiry and take the necessary corrective measures as he deemed fit. If he was unhappy or felt that he needed to remove her, his recourse is set out in s 117(1) which required him to be satisfied that the applicant had failed to satisfactorily perform her duties in terms of the Act. In my view, first respondent had no power to consider the question of whether the appointment of the applicant was valid. That was a question of law which the Ghana High Court had decided in terms of a will which first respondent had accepted way back in 2010. Anyone aggrieved with the Master's decision had to approach the High Court in Zimbabwe seeking a determination of that issue. The Act does not permit him to act in the manner he did when he surreptitiously convened edict meetings and appoint executors when the office of the executor was not vacant. Had he intended to get a directive on such a question of law, he should have laid a report on the matter before a judge. The court would have then guided him.

Consequently I find that the decisions by the first respondent on 3 August 2016; 19 August 2016 and 14 November 2016 were irregular and therefore unlawful. I therefore make the following order:

(1) The holding of edict meetings by 1st respondent is hereby declared illegal. The meetings held on 3rd August and 19th August 2016 and 14th November 2016 presided over by 1st respondent are hereby set aside.

(2) The 1st respondent's withdrawal of Letters of Administration issued in favour of applicant is hereby set aside.

(3) The appointment of 2nd respondent as executor of the Estate Late Edward Hekaku Boohene is hereby set aside.

(4) Applicant be and is hereby confirmed as the executor in the Estate Late Edward Hekaku Boohene and shall continue as such.

(5) Respondents to bear the costs.

.

Kamusasa and Musendo, applicant's legal practitioners
Dondo & Partners, 2nd respondent's legal practitioners