FAITH NYARAI MAPHOSA
versus
DORCAS MUKUCHA N.O
and
PATIENCE MANYARA
and
MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 18, 19 and 20 February 2019

OPPOSED APPLICATION – REVIEW

G.R.J Sithole, for the applicant
N. K Mazula, for the 2nd respondent
No appearance for the 1st and 3rd respondents

CHIRAWU-MUGOMBA J: This matter reminded me of "voodoo law brewed in an African pot" and it is important to set out its history from the start. It also reveals a shocking lack of knowledge and appreciation of the law of succession and inheritance. On the 22nd day of July 1996, one Efi Mukucha passed away. At the time of her death she owned the rights, title and interest in a property called Stand 2997 situated in the Glen View Township in Harare. In the preliminary inventory filed of record, it was described as a 7 roomed house measuring approximately 300 square metres. The value was left blank. On the death notice, the late Efi is said to have been single and to have had one daughter namely Agnes Mukucha who at the time of the registration of the estate was deceased having passed away on the 29th day of July 2002 but was survived by Faith Nyarai Maphosa the applicant in this matter. At an edict meeting held on the 15th of January 2015, the first respondent was appointed executor of the estate of the later Efi Mukucha on the 22nd of January 2019 as confirmed by letters of administration dated the 29th of January 2015. The executor's inventory filed by the first respondent dated the 28th of July 2015 shows the value of the Glen View property as $25 000.

The record reveals on page 18 that the property had been shown as being awarded to one Dambudzo Mukucha, who is the mother of Efi Mukucha. However, the third respondent advised the executor to correct this and indicate that the beneficiary is the applicant. The record shows that the first respondent prepared a summary liquidation and distribution account dated the 2nd of September 2015 which awarded the Glen View property to the applicant. On this estate account, there is a stamp by the third respondent showing that the account had been confirmed. There is no date though on the stamp. The record also shows that the third respondent accepted a plea by the applicant to pay his fees pegged at $1000 in instalments. The record reveals that Messrs Chatsanga and Partners by way of a letter dated the 9th of March 2016 addressed a letter to the third respondent stating that their client the second respondent and one Mavis Berejena had a claim against the estate in the amount of $20 000. In the claim, the second respondent averred that the Glen View property was developed by herself and Mavis. Further that the property was purchased by their maternal grandparents with the intention of making it their family home. Their grandfather had another house in Mbare and he could not own another property and that is why they decided that it was best to register it in the name of Efi Mukucha. She went on to outline the nature of the alleged developments effected on the property. She therefore claimed the sum of $20 000 being the value of the alleged developments. The third respondent referred the claim to the first respondent in her capacity as the executor. By way of a letter dated the 9th of May 2016, the first respondent accepted the claim. The second respondent as the claimant was quick to ask that she be given 'her' $20 000 and if that was not possible, she requested that the property be sold.

In her response to complaints raised by the applicant with the third respondent concerning the administration of the estate, the first respondent was quick to dismiss them but was also quick to support the second respondent on her request to dispose of the property to meet the $20 000 claim. Following a flurry of correspondence between the office of the third respondent, the first respondent and the second respondent's legal practitioners as well as the applicant's legal practitioners, the applicant finally decided to challenge the acceptance of the $20 000. I must hasten to state that the correspondence referred to as it appears in the record shows a lack of appreciation of the law of succession and inheritance. Different officers from the office of the third respondent wrote letters that can only be said to have added to the confusion surrounding the administration of the estate. In a letter dated the 13th of July 2016, the first respondent was 'advised' that she should not have accepted the claim without input

from the beneficiaries. The claimant was 'advised' to approach the courts for relief. The second respondent's legal practitioners responded to the aforementioned letter reiterating that the third respondent has no power to set aside the acceptance of a claim and they went as far as accusing the officer who authored the letter of having personal interests in the matter. They requested that the letter be retracted. Surprisingly the third respondent acceded to the request and 'withdrew' the letter dated the 13th of July 2016 and now 'advised 'the applicant to approach the courts for redress.

The second respondent's legal practitioners joined the bandwagon of disposal of the property by addressing a letter to the third respondent requesting that his office issues consent to sell the property in terms of section 120 of the Administration of Estates Act [*Chapter 6:01]*. Whilst addressing their concerns over the developments in the estate on behalf of the applicant, her legal practitioners also seemingly fell into the trap of addressing issues that were non-issues at all in the issue that was at stake. This related to the issue of rentals that the claimant was supposedly not paying for staying at the property which issue can only be described as an 'aside'. They also fell into the trap regarding the issue of section 120 which only deals with sale of property other than by public auction. They even went so far as to ask the second's legal practitioners whether their client intended to 'press for the sale of the property'. To add to the confused state of events in the estate, Dambudzo Mukucha also deposed to an affidavit claiming the sum of $10 000 being the value of alleged improvements that she effected on the property. I have highlighted these issues to implore the office of the third respondent and legal practitioners to familiarize themselves with the laws of succession and inheritance in Zimbabwe. Endless correspondences and 'special meetings' do not often resolve issues especially when there are deep –rooted disputes. Sight must not be lost of the fact that the registration and administration of estates often involves emotions and it is imperative that the office of the third respondent not only be knowledgeable but also be firm and make decisions. Anyone aggrieved can always challenge the decision made and that is why of all the branches of law, the law of succession and inheritance has safeguards in the sense that everything can be challenged, from the appointment of the executor to the final liquidation and distribution account. Finally the office of the third respondent stated by way of a letter dated that 24th of October 2017 that the consideration of claims is within an executor's jurisdiction and a meeting cannot be convened to consider same. One would have thought that this would at least indicate to the parties what direction to take but the letters continued with one dated the 26th of October 2017 from the

applicant's legal practitioners still requesting the third respondent's 'good' offices to address the issue after failure of parties to settle. Not to be outdone, the first respondent addressed a letter dated the 30th of January 2018 still insisting that the property be sold and that section 120 be applied. The last letter on record is that addressed to the third respondent by the second respondent's legal practitioners dated the 10th of April 2018. The apparent confusion perhaps explains why the applicant stated nine grounds for review.

At the hearing, the applicant's legal practitioner acceded to the oral application for upliftment of the bar operating against the second respondent for filing heads of argument two days out of time. The second respondent's legal practitioners however raised a point *in limine* averring that the application for review was out of time. This point had already been raised in the second respondent's notice of opposition in which she averred that the decision to accept the claim by the first respondent was made on the 9th of May 2016 and that the applicant had a period of eight weeks within which to apply for review. Therefore the application was made out of the stipulated eight weeks. In the answering affidavit, the applicant stated that the decision of the 9th of May 2016 to accept the claim was never communicated to her. What the applicant took issue with was the third respondent's letter dated the 20th of March 2018 which reiterated that the first respondent was within her rights as executor to accept the claim. The applicant implored the court in the event that she was out of time to exercise its discretion and condone the non-compliance.

N Mazula for the second respondent reiterated that the delay to file the application for review was inordinate given the fact that the decision being challenged was made in May 2016 and the application for review was made in February 2018. *G Sithole* did not address this point in response. It is also important to note that the applicant did not address this aspect in the heads of argument but took it for granted that she was not out of time.

As already stated, there was confusion on the part of the applicant as to which decision she wanted reviewed. As accepted by both the applicant and the second respondent's legal practitioners, the first respondent was well within her rights to accept or reject a claim. Section 43 of the act requires an executor to publish a notice in the gazette and in a newspaper published or circulating within a district in which the deceased lived to publish a notice to creditors and others to lodge their claims. Section 45 gives powers to an executor to rank and pay out claims. Section 47 of the act states that an executor may require a solemn declaration in support of a claim. These three sections reinforce the fact that it is the executor who has powers to receive, accept or reject a claim. Therefore the decision that was to be

reviewed was that of the 9th of May 2016. Labouring under a mistaken belief that the review related to a letter authored in March 2018, the applicant did not see it fit to properly apply for condonation first.

The starting point for any application that is filed out of time is that it is fatally defective unless a court is prepared to condone non-compliance and allow a proper application for review to be filed- see – *De Jager* v *Diner & Anor* 1957(3) SA 567(A) at 574C-D and *Jensen* v *Acavales* 1993(1) ZLR 216 (S) at 219H-220D.

Although the court can condone non-compliance with the rules in terms of R4C, I fully associate with the words of DUMBUTSHENA CJ (as he then was) in *S* v *McNab* 1986(2) ZLR 280 (SC) at 284E-

> "I have dwelt at length on this point because it is my opinion that laxity on the part of the court in dealing with non-observance of the rules that will encourage some legal practitioners to disregard the rules of court to the detriment of the good administration of justice." – See also *McFoy* v *United Africa Co Ltd* [1961] 3 ALL ER 1169 (PC) and *Hattingh* v *Pienaar* 1977(2) SA 182 (O). Further, GUBBAY CJ, in *Forestry Commission* v *Moyo* 1997(1) ZLR 254 (S), said at 259A-B-
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> "Insofar as the High Court Rules are concerned, rule 4C (a) permits a departure from any provision of the rules, where the court or judge is satisfied that the departure is required in the interests of justice. The provisions of the rules are not strictly peremptory; but as they are there to regulate the practice and procedure of the High Court, in general strong grounds would have to be advanced to persuade the court or judge to act outside them."
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> And at 259D-E the learned Chief Justice went on the say –
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> "Rule 259 of the High Court Rules, on the other hand, requires an application for review to be instituted within eight weeks of the termination of the proceedings in which the irregularity or illegality complained of is alleged to have occurred. Its proviso allows the court to extend the time for good cause shown. In other words, where the application for review has been brought out of time, condonation for the failure to comply with rule 259 must be sought. If authority is required for this self-evident concept, it is to be found in *Bishi* v *Secretary for Education* 1989(2) ZLR 240 (H) at 242D; and *Mushaishi* v *Lifeline Syndicate & Anor* 1990(1) ZLR 284 (H) at 288E-F. The court is entitled to refuse to review or may condone the omission. It exercises a judicial discretion while taking into consideration all relevant circumstances."

A litigant must file a proper application for condonation and not just to refer to it in a cursory manner as the applicant did in the answering affidavit. In this regard the learned Chief Justice, in the *Forestry Commission* v *Moyo* case *supra*, said at 260D-G-

> "I entertain no doubt that, absent an application, it was erroneous of the learned judge to condone what was on the face of it, a grave non-compliance with rule 259. For it is the making of the application that triggers the discretion to extend time. In *Matsambire* v *Gweru City Council* S-183-95 (not reported) this court held that where proceedings by way of review were not instituted within the specified eight week period and condonation of the breach of rule 259 was not sought, the matter was not properly before the court. I can conceive no reason to depart from that ruling. One only has to have regard to the broad factors which a

court should take into account in deciding whether to condone such non-compliance, to appreciate the necessity for a substantive application to be made. They are:-

(a) that the delay involved was not inordinate, having regard to the circumstances of the case;
(b) that there is a reasonable explanation for the delay;
(c) that the prospects of success should the application be granted are good; and
(d) the possible prejudice to the other party should the application be granted –

See *Director Civil Aviation* v *Hall* 1990(2) ZLR 354 (S) at 357D-G. How can a court exercise a judicial discretion to condone when the party at fault places before it no explanation for the delay? Moreover, in every such application the respondent is entitled to be heard in opposition. He must be permitted an opportunity to persuade the court that the indulgence sought is not warranted. Without hearing him how can a court, for instance, be satisfied that he will suffer no possible prejudice by the condonation."

I expected the applicant's legal practitioners who had the record of proceedings to carefully study it, familiarise themselves with the law and act accordingly. The view that the letter dated the 20th of March 2018 is the one that was supposed to be taken on review was erroneous. The letter was also very clear that the applicant should approach the courts for a review of the decision of the first respondent to accept the claim, and that decision was made on the 9th of May 2016.

Accordingly, in the absence of a proper application for condonation for late filing of the application for review, the matter cannot be decided on the merits. Let me hasten to add that this is not a blank cheque that the application will be granted but that the court seized with such application will properly apply its mind on the merits of such application.

The Registrar is directed to bring this judgement to the attention of the third respondent.

DISPOSITION

It is ordered as follows:-

1. The matter be and is hereby struck off the roll.
2. The applicant shall pay costs.

Mawere Sibanda Commercial Lawyers, applicant's legal practitioners
Chitsanga and Partners, 2nd respondent's legal practitioners