JOHN TENDAYI ELLIOT NYAKUNU
and
SAMUEL KUDIWA NCUBE
versus
THE MASTER OF THE HIGH COURT
and
OLIVER MASOMERA (In his capacity as Executor
Dative in the Estate of Late Ellen Hatinachedu Ncube DR 1390/16)

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 24 October 2017 and 6 February 2019

Opposed Matter

Z W Makwanya, for the applicants
B. Furidzo, for the respondents

NDEWERE J: On 21 December, 2016, the applicant filed what he called "Court Application for Review of the Master of the High Court's decision to refuse to revoke letters of Administration in terms of s 30 (2) of the Administration of Estates Act [*Chapter 6:01*] and condonation for late filing.

The grounds for review were as follows:

a) Procedural irregularity on the appointment of Mr Oliver Masomera of Obram Trust Company (Pvt) Ltd as the Executor Dative in the Estate of the late Ellen Hatinachedu Ncube; instead of appointing the nominated Executors Testamentary or their assumed qualified Executor.
b) Illegality of the decision refusing to revoke the appointment of Mr Oliver Masomera of Obram Trust Company (Pvt) Ltd as the Executor Dative in the estate of the late Ellen Hatinachedu Ncube on the basis that the Master's office is now *functus officio*.

The relief which the applicants prayed for was the revocation of letters of Administration granted to Mr Oliver Masomera of Obram Trust Company (Pvt) Ltd and the appointment of nominated Executors Testamentary or their assumed qualified Executor.

The applicants then attached what they called "Founding Affidavit" deposed to by both of them. The first paragraph says.

> "We, John Tendayi Elliot Nyakunu and Samuel Kudiwa Ncube, being blood brothers and in our capacity as the Nominated Executors Testamentary…. Confirm that we are familiar with the facts surrounding this deceased estate…."

On the last page of the affidavit, the applicants both signed one after the other and a commissioner of oaths signed and stamped the document which was dated 20 December, 2016.

The second respondent filed opposing papers on 6 January, 2017. He raised the following points in limine in his opposing affidavit:

The first point *in limine* raised was the irregularity by the applicants of combining an application for review and an application for condonation in the same papers. He said the applicants should have filed an application for condonation for late filing; wait for the decision and only after being granted condonation should they have filed the application for review.

Second respondent said since the applicants did not get a court order for condonation before approaching the court with the review; their application for review was not properly before the court and it should be dismissed on that basis alone.

Second respondent also took issue with his citation in his official capacity as executor; yet the applicants were seeking his removal from that office. He said in a suit for removal of an executor, the executor is supposed to be sued in his personal capacity. He said that improper citation was enough to warrant dismissal of the application.

The third point *in limine* raised by the second respondent was the combined affidavit filed by the applicants. He said such an affidavit was invalid and not properly before the court. He said the defective founding affidavit was sufficient reason to dismiss the application.

Thereafter, the second respondent addressed the merits of the application in his opposing affidavit.

In their combined answering affidavit filed on 1 February, 2017 the applicants maintained their position and said there was nothing amiss in what they did. The parties filed heads of argument in February, 2017.

On 24 October, 2017 when the matter was argued it was agreed by the parties that the court deals with the preliminary points first. The application was argued on the preliminary points only and judgment was reserved.

After considering the written and oral submissions, the court came to the conclusion that the application is fatally defective in relation to the combined affidavit.

The second respondent referred to the case of *Mpofu and Another* v *Qhakaza Investments (Pvt) Ltd t/a The Baby Shop and another* HB 103/10.

In that case, the court said the practice of the courts internationally is to deal with one affidavit at a time. The court also stated that an affidavit takes the place of oral evidence and in oral evidence, two witnesses cannot testify at the same time, but one at a time.

In addition, the court referred to the Rules which state that there should be one or more affidavits; thus making provision for more affidavits in support of the founding one. In the case referred to above, the court concluded that the combined affidavits were improperly deposed to and hence there was no proper application before the court since the application was based on defective affidavits. In my view, that is the correct position. When two persons give the same written statement, the chances are that only one of them has provided the facts in the statement and the other person is simply agreeing with the contents for convenience; to the prejudice of the proper administration of justice. Applicants should simply have complied with the High Court Rules which provided for one or more affidavits. Rule 227 (4) of the High Court Rules states that an affidavit shall be made by an applicant or respondent, or by a person who can swear to the facts. There is no provision for applicants or persons making one affidavit. Rule 230 gives the format of the application and provides for one or more affidavits. Rule 234 provides for one or more supporting affidavits. The applicants disregarded the rules at their own peril. The first point *in limine* concerning the defective combined affidavits is therefore upheld.

The second respondent also took issue with the fact that the applicants did not seek condonation first, but combined the application for condonation with the application for review. The usual procedure is to do a separate application for condonation and another one for review. At the hearing, the court will then determine the condonation application first. This is what happened in the case of *Paul Grey Friendship* v *Dick Jefferey* HC 12468/11. The application for condonation for late filing and the application for rescission were filed separately, but they were

heard on the same day. The judge in that case dismissed the application for condonation and had this to say,

> "Accordingly the application for condonation has no merit and must fail. The consequence of that is that the application for rescission of judgment equally fails as it cannot properly be before this court in the absence of an order condoning its late filing."

It is clumsy to combine the applications because their requirements are different. The authorities cited by the applicants themselves do not involve one combined application, but separate ones.

However, in view of the wording of Rule 259 of the High Court Rules, I cannot go to the extent of saying the applicant's approach when he combined the two applications is fatally defective. Rule 259 provides as follows:

> "Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred:
> Provided that the court may for good cause shown extend the time."

The above wording suggests that as long as good cause is shown, the court may extend the time. There is no reference to an application or format of that application. Indeed, the second respondent could not point to any authority which insists on a formal application and pre-set format in relation to Rule 259. Accordingly, the point *in limine* concerning the combined application for condonation and review is dismissed.

The last point *in limine* raised by the second respondent was about suing him in his official capacity instead of in his personal capacity.

The court's view is that the Estate is an interested party, so citing it as a party in a case where the application is to remove the estate's executor is proper. However, since the application is to remove the executor, the executor himself also ought to be cited in his personal capacity as well. The cases referred to by the applicant, of *Borima* v *Meakor NO & Others* 1973 (2) RLR 16, *Vermaak & Another* v *Nish NO* HH 166/188 and *Van Niekerk NO* v *Master of the High Court*, 1996 (2) ZLR 105 (SC) confirm this point.

Since misjoinder can be rectified at any stage in terms of Rule 87 (2) of the High Court Rules and since Rule 87 (1) provides that no cause or matter shall be defeated by reason of the misjoinder or non joinder of any party, the omission to cite the second respondent in his personal

capacity as well cannot be said to be fatal to the applicant's case as that can be rectified by an application for joinder of the executor in his personal capacity. The third point *in limine* is therefore dismissed.

To conclude, the upholding of the first point *in limine* concerning the combined affidavits means there is no valid founding affidavit and answering affidavit before the court. Since the founding affidavit is the basis of the court application, this means there is no proper application before the court. It is therefore ordered that the application for review be and is hereby struck off the roll.

On the issue of costs, a higher scale is not called for since two of the points *in limine* were dismissed. Therefore applicant shall pay the respondent's costs on the ordinary scale.

Murambasvina, Tizirai-Chapwanya, applicant's legal practitioners
Messrs Chitsanga and Partners, 2nd respondent's legal practitioners