

ESTATE LATE CLEMENCE ZEBEDIAH RANGANAYI
(DULY REPRESENTED BY KUMBIRAI MUGWAZIWENDOTA)
versus
CITY OF MASVINGO

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE 22 February & 12 April 2023

Opposed Matter

Mr *I Ndudzo*, for the applicant
Mr *G J Mpoperi*, for the respondent

MUCHAWA J: This is a court application for a declaratory order and consequential relief. The draft order sought is to the following effect.

“IT IS BE AND HEREBY ORDERED THAT

1. The cancellation of the Agreement of sale of stand number 27426 measuring six thousand six hundred square metres situated in the Charumbira Road commercial area of Masvingo signed between the Applicant and Respondent on the 13th of August 2004 by Respondent be and is hereby declared null and void.
2. The Agreement of Sale signed between the Applicant and the respondent on the 13th of August 2004 of stand number 27426 measuring six thousand six hundred square metres situated in Charumbira Road Commercial area of Masvingo be and is hereby declared to subsist and to be binding on the parties.
3. The respondent to bear the cost of suit on an attorney-client scale.”

The applicant is the Estate of the late Zebediah Clemence Ranganayi, duly represented herein by one Kumbirai Mugwaziwendota who holds a special power of attorney granted to him by the executor dative, Isaac Franklin Muzenda, and is the one who deposed to the founding affidavit.

The respondent, City of Masvingo, is a duly constituted local authority in terms of the Urban Councils Act, [*Chapter 29:15*]. It has capacity to sue and be sued in its own name.

The brief background to this matter is that on 13 August 2004, an entity called Pay and Collect Motor Spares & Hardware represented by the late Clemence Zebediah Ranganayi and the respondent entered into an agreement of sale for a piece of land known as stand number 27426 measuring six thousand six hundred square metres situated in Charumbira Road Commercial area of Masvingo.

On 10 September 2020 the respondent wrote a letter to the applicant cancelling the agreement of sale in terms of Clause 15 as read with clauses 5 and 6 of the agreement of sale alleging a failure to commence and complete the erection of buildings within the stipulated period and non-payment of the balance of the purchase price within the stipulated period. Thereafter, the respondent proceeded to advertise the sale of the very same piece of land on the basis of a Council Resolution of 27 October 2021. These are the factors which prompted the applicant to approach this court seeking the granting of the draft order set out above.

The respondent raised two points *in limine* in its notice of opposition and heads of argument. The first point is that the application has been brought to court by a person with no *locus standi* to institute proceedings on behalf of the Estate of the Late Clemence Zebediah Ranganayi. The second is that the Estate Late Clemence Zebediah Ranganayi has no *locus standi in judicio* to institute legal proceedings in a dispute between respondent and Pay & Collect Motor Spares and Hardware. I heard the parties on these two points and reserved my ruling. This is it.

Whether the court application is improperly before the court as it has been brought by a person with no *locus standi* to institute proceedings on behalf of the Estate Late Clemence Zebediah Ranganayi

Mr *Mpoperi* submitted that this application is improperly before the court as it has been instituted by one Kumbirai Mugwaziwendota who is not the holder of letters of administration but relies on a power of attorney granted to him by the executor dative, Isaac Franklin Muzenda who is now a judge of the High Court. It was contended that the executor dative should have approached the Master of the High Court in order to get a competent person appointed in his place rather than abdicating his responsibility. In relying on the case of *Sibanda v Moyo* HB 51/21, Mr *Mpoperi* argued that only an executor with letters of administration can competently institute proceedings. In that case it was held that:

“The position in our law is settled. In terms of section 25 of the Administration of Estates Act a deceased estate is represented by an executor or executrix duly appointed by the Master.”

This point was developed to say that even though an executor can, at law, delegate his functions, he cannot delegate institution of legal proceedings, which function falls to be done by the executor only as provided by s 25 of the Administration of Estates Act, [*Chapter 6:01*] and set out in the cases of *Mhlanga v Ndlovu* HB 54/04 and *Nyandoro v Nyandoro* HH 89/08.

Mr *Mpoperi* went further and analysed the wording of the Power of Attorney and averred that by authorising Kumbirai Mugwaziwendota to “oversee everything including transfer of property, application for title deeds, signing of cession documents and any such things as the attorney may deem necessary or expedient in or about my concerns”, the executor dative had abdicated his responsibilities which the law does not allow him to do.

Furthermore, Mr *Mpoperi* argued that had Mr Isaac Franklin Muzenda not abdicated his responsibility, then the action would have been instituted in his name. The fact that he is now a judge of the High Court was pointed to, to contend that Mr Muzenda can no longer be executor and therefore abdicated his responsibilities.

The failure to cite the executor was said to be fatal in an action involving a deceased estate as there is no legal entity by the name Estate Late Clemence Zebediah Ranganayi which can competently institute proceedings. For this contention the cases of *Estate late Ngavaite Jack Chikuni aka Ngavaite Jack Chikuni & 2 Ors v James Chikuni & 5 Ors* HB 143/21. It is prayed that this matter be dismissed with costs on an attorney-client scale. The cited case is however distinguishable as the first applicant therein was just the estate late Jack Chikuni and made no reference to any executor. That was found to be an improper citation. That is not the case *in casu*.

Mr *Ndudzo* countered these submissions by submitting that the applicant before me is the Estate Late Clemence Zebediah Ranganayi which is a registered estate. Mr Issac Franklin Muzenda was duly appointed executor and delegated some of his power to Kumbirai Mugwaziwendota in terms of a special power of attorney. Kumbirai Mugwaziwendota is alleged to have been acting on behalf of the estate all along in correspondence with the respondent as shown on pp 25, 27 and 28 of record and then in the institution of proceedings.

The cases of *Shata & Anor v Manase N.O & Anor* HH 44/03 was referred to, to argue that an executor can authorize some other person to carry out some of, or all his functions on his behalf. What is not allowed is abdication of responsibility. It was argued that *in casu*, Mr Muzenda gave Kumbirai Mugwaziwendota authority to act as he did but did not abdicate his responsibility as he verifies everything done by him and has not abandoned completely

overseeing the winding up of the estate. See also the South African case of *Bramwell and Lazar N.N.O v Lamb* 1978 SA 380.

Reference to s 25 of the Administration of Estates Act by the respondents was said to be misleading as there is nothing there precluding an executor from delegating all or some of his duties. Mr *Ndudzo* submitted that there is no prejudice to be suffered from having the matter come before the court on the affidavit of a person authorized by the executor. What the cases cited by the respondents was said to bar is for a person who is neither an executor nor authorised to come and institute proceedings.

Section 25 of the Administration of Estates Act simply provides for the appointment of an executor. It does not deal with whether or not an executor can delegate his functions. That issue is squarely dealt with by the cases of *Shata supra* and *Bramwell supra*. The point of law made is that an executor can authorize some other person to carry out some or all of his functions on his behalf and that what is prohibited is abdication not delegation.

A look at the power of attorney on p 14 of the record shows that Mr Muzenda did not abdicate his responsibility. He says:

“And we ratify, allow and confirm and promise at all times to ratify and allow and confirm all and whatever my said attorney, his substitute or substitutes shall lawfully do or cause to be done by virtue of these presents.”

This means that though he executed the Special Power of Attorney and gave Kumbirai Mugwaziwendota authority to oversee everything including the transfer of property, application for deeds, signing of cession documents and any such things deemed necessary or expedient in the administration of the estate late Clemence Zebediah Rangarirai, he was still involved and did not abandon the winding up of the estate.

It is my finding that the application has therefore been brought by a person with *locus standi* as he was authorised to so act by the executor dative. There is therefore no merit in this point.

Whether the executor of the Estate Late Clemence Zebediah Ranganayi has *locus standi in judicio* to institute legal proceedings in a dispute between respondent and Pay and Collect Motor Spares and Hardware.

Mr *Mpoperi* submitted that the executor of the Estate Late Clemence Zebediah Ranganayi has no *locus standi in judicio* to institute legal proceedings in respect of an agreement between the respondent and Pay and Collect Motor Spares and Hardware. Despite the applicant’s position that the late Clemence Zebediah Ranganayi was the sole proprietor of

Pay and Collect Motor Spares and Hardware which purportedly was a trade name and there is no distinction between the two.

Furthermore, Mr *Mpoperi* pointed to the contents of the agreement of sale wherein the late Clemence Zebediah Ranganayi signed as a representative or agent of Pay and Collect Motor Spares and Hardware and not trading as Pay and Collect Motor Spares and Hardware. His capacity is said to be very clear.

It was also stated that our law in fact recognises that a party can enter into a contract for the benefit of a third party or for a company not yet incorporated on the basis of the doctrine of *stipulatio alteri* as per *Gray & Anor v The Registrar of Deeds* HH 114/10. Section 32 of the Companies and Other Entities Act [*Chapter 24:31*] was pointed to as recognising pre-incorporation agreements. This is the route which the executor was urged to take instead of dragging the respondent to court in a case where the doctrine of privity of contract is violated as the applicant was not a party to the contract. It was prayed that this point be dismissed too with costs on a higher scale.

Mr *Ndudzo* countered these submissions by stating that Pay and Collect Motor Spares and Hardware was just a trade name used by the deceased and it was never an official registered company and does not have a separate legal personality. It is averred that Clemence Zebediah Ranganayi was a sole trader and exclusive owner of the business who was entitled to keep all profits after payment of tax had been paid and was liable for all losses.

The court was referred to the cases of *Patterson v V M Auto Body*, 63 Ohio St. 3d 573, 589 N.E 2d 1306 (Ohio 1992) and *Vernon v Schuster*, 179 Ill. 2d 338, 688 N.E 2d 1172 (Ill 1997) wherein it was discussed that a sole proprietorship has no legal identity separate from that of the individual who owns it and that the sole proprietor may do business under a fictitious name if he or she chooses. Doing business under another name does not create an entity distinct from the person operating the business.

It was contended that the late Clemence Zebediah Ranganayi was a signatory to the agreement and the rights of Pay and Collect Motor Spares and Hardware naturally accrue to his estate and the application is properly before the court.

Mr *Ndudzo* argued that the principle of *stipulatio alteri* does not arise as there was never a company and that doctrine only applies in company law.

The starting point is to go to the agreement of sale itself on p 15 of the record. The parties are identified as follows:

“MEMORANDUM OF AN AGREEMENT made and entered into by and between the City Council of Masvingo (herein after referred to as the Seller), of the one part, and

Pay and Collect Motor Spares & Hardware

P.O Box 926

Masvingo

Represented by Clemence Zebediah RANGANAI

(hereinafter referred to as the Purchaser), on the other part.

What is clear is that the purchaser was Pay and Collect Motor Spares & Hardware and as it was not a natural person it was represented by Clemence Zebediah Ranganai. The applicant’s attempt to plead that the respondent had the duty to prove that the applicant was a company is disingenuous. The respondent’s point is simply that it did not contract with the late Clemence Zebediah Ranganai but with Pay and Collect Spares & Hardware. That is what the contract reflects. It does not show that the late Clemence Zebediah Ranganayi was trading as Pay and Collect Motor Spares & Hardware as his chosen fictitious name.

Indeed the estate has no business prosecuting on the agreement of sale to which it was not a party. The sale agreement does speak for itself.

This point *in limine* is upheld.

Costs on a higher scale were however not motivated for and I will grant costs on an ordinary scale.

Accordingly, the matter is dismissed with costs on an ordinary scale.

Mutamangira and Associates, applicant’s legal practitioners
Saratoga Makausi Law Chambers, respondent’s legal practitioners