

PRECIOUS VANDIRA
versus
ESTATE LATE GEORGE WILLIAM NOBLE
and
ENERST ALBERT NOBLE
(In his capacity as Executor Testamentary
of Estate Late George William Noble)
and
MASTER OF HIGH COURT N.O

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 21 November 2022 & 26 April, 2023

Opposed Application

G. Chizhande for the Applicant
P. Chimwaradze, for the 2nd Respondent

ZISENGWE J: The late George William Noble (*“the deceased”*) died on 12 March 2019. He left behind a will apparently bequeathing, a piece of land to his children, among them Ernest Albert Noble. I use the word “apparently” because that particular bequest is disputed and forms the subject matter of the present matter. That piece of land is situated in the district of Kwekwe and was identified by the parties as Lot 1 Rolling River Ranch, Kwekwe (*“the property”*). In the wake of the demise of the deceased, the said Ernest Albert Noble was appointed executor testamentary of his estate and it is in that capacity that he was cited in this application as the 2nd respondent. For administration and winding up purposes, the estate in question was registered with the Master of the High Court at Masvingo (hereinafter referred to as *“the Master”*)

The applicant on the other hand is the deceased's sister in law, i.e. a sister to the deceased's wife and therefore the 2nd respondent's maternal aunt. All that the applicant seeks via this application is the "unwinding" of the deceased estate which had been duly wound up by the Master. Much to the consternation of the 2nd respondent, she terms her application "an application for the re-opening of the estate". Her quest for the re-opening of the estate stems from what she terms a fraudulent inclusion among the list of the deceased's assets, the aforementioned property which she claims belongs to her. Consequent to the re-opening of the estate she seeks an order permitting her to file an objection with the Master against the inclusion of the property. In a word, her claim is based on the assertion that she purchased the property from the deceased in 1998 although she never proceeded to obtain title thereof.

She claims that the 2nd respondent with the full knowledge of the sale of the property by the deceased to her fraudulently included the property as part of the deceased's assets. She further avers that the 2nd respondent used an old will left behind by the deceased which had since been overtaken by events in the sense that she had in the intervening period purchased the property. She further asserts that consequent to and evidence of having sold the property to her, the deceased vacated the property and relocated to the town of Kwekwe. She chronicled how the registration and winding up of the estate was done clandestinely and behind her back. She further asserts that in order to conceal the registration and administration of the estate leading to its winding up from her, the 2nd respondent opted to register the same with the Master in Masvingo- instead of Bulawayo as is the standard practice with estates originating from the district of Kwekwe. This, according to her, was designedly to ensure that she would in the ordinary run of things not become aware of such registration with the result that she would not be able to lodge her objection with the Master.

She avers that she only learnt of the registration and winding up of the deceased's estate upon receiving a notice to vacate the property from Messrs Marufu Misi Law Chambers at the instance of the 2nd respondent. She immediately sprang into action in a bid to ward off the imminent threat of eviction. She further avers that she is gripped by anxiety as she believes the 2nd respondent is actively attempting to dispose of the property as evidenced by the flurry of activity involving prospective buyers who come to view the same.

Most importantly for purposes of this application, the applicant avers that the 2nd respondent acted deceitfully by including the property in the inventory of deceased's assets knowing fully well that same was no longer part of the deceased's estate. According to her, this incidentally was the sole asset constituting the estate. She further avers that the 2nd respondent was equally aware that the sale of the property by the deceased to the applicant was facilitated by their common legal practitioners Messrs Wilmot and Bennett of Kwe-Kwe and that the transfer of the property was only stalled for her want of the requisite funds. She therefore seeks an order in the following terms:

"IT IS ORDERED THAT:

- 1. Application for reopening of Estate Late George **William Noble DRMS 14/20** be and is hereby granted.*
- 2. The applicant, be and is hereby ordered to lodge her objection with the 3rd Respondent within (10) days from the date of this order.*
- 3. 2nd Respondent be and is hereby ordered to pay costs of this application on an Attorney and client scale.*

The application stands sternly opposed by the 2nd respondent. The opposing affidavit was deposed to by one Detail Noble who identified himself as the 2nd respondent's brother. In this regard he filed a Power of Attorney granted in his favour by the 2nd respondent. In that opposing affidavit, the 2nd respondent vehemently denies that the deceased had at any point during his lifetime sold the property to the applicant. To the contrary, he alleges that the conduct by the applicant in this present application amounts to an attempt at reaping where she did not sow. According to him the applicant never purchased the property not least because she lacked the financial wherewithal to do so. He claims that her conduct snacks of ingratitude as she was literally rescued by the deceased from virtual destitution hence her residence with the deceased's family on the property.

Ostensibly to buttress their respective positions each party claims credit for salvaging the property from compulsory acquisition under the government's land reform programme. The applicant claims that she did so after enlisting the assistance of the then Resident Minister of the Midlands province, the late Cephass Msipa. The 2nd respondent on the other hand claims it was

though the representations made the deceased to the relevant government entities which saw the property being rescued from the brink of compulsory acquisition. They both attached letters apparently buttressing their respective positions.

The 2nd respondent however raised a slew of preliminary points lining up an impressive array of eight points *in limine* in the process which according to him are each independently dispositive of the matter. Each of these will be addressed in turn.

The propriety or otherwise of citing a deceased Estate as a party to legal proceedings

In this regard the 2nd respondent correctly observes that it is incompetent to cite a deceased estate as a party. A deceased estate is merely a collection of rights (i.e., assets) and liabilities of the deceased. A deceased estate is therefore not a legal persona. Such legal personality reposes on the executor of the deceased estate in his representative capacity having been duly appointed by the Master. He bears the responsibilities of the administering the estate by collecting all the assets and by paying the debts of the deceased and by distributing the balance of the estate assets to the beneficiaries entitled thereto: Only the executor, therefore, can sue or be sued in respect of estate matters. See *Estate Hughes v Fouche* 1930 TPD 41 at 42, *Haarhoff's Executor v De Wet's executor* 1939 CPD 271 at 273 & *Gross v Pentz* 1996 (4) SA 617 (A).

However, in terms of Rule 32 (11) of the High Court Rules, 2021 a misjoinder of a party to civil proceedings is not fatal. The said provision reads:

“No cause or matter shall be defeated by reason of the misjoinder as non-joinder of any party and the Court may in any cause as matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who ...parties to the cause as matter.

Accordingly, this application cannot fail solely on the basis of the incompetent citation of the first respondent which is a non-existent legal persona.

The citation of the Master of the High Court.

The 2nd respondent also takes issue with the citation of the Master of the High Court. What probably eluded the 2nd respondent was that the duties and functions of the Master *vis-a- vis* the administration of deceased estates are inextricably interwoven. The Master Superintends the administration of every deceased Estate registered with him or her. Any litigation regarding the administration of any deceased estate must of necessity include the Master not least to execute

whatever decision the court might arrive at. This explains in part why Rule 61 (1) (a) of the high Court rules mandates that the Master be notified of any litigation in connection with a deceased Estate. It reads:

61. Deceased estates, person under disabilities, minors etc.

1. In the case of an application in connection with

a) the estate of a deceased person, or

b)

a copy of the application shall be served on the Master not less than ten days before the date of set down for his or her consideration and for report by him or her if he or she considers it necessary as the court requires such a report.

As a matter of fact, the Master did file such a report briefly stating the history of the estate culminating in its winding up. This preliminary point is equally without merit and is accordingly dismissed.

The admissibility of Melina Matshiya's supporting affidavit

Here, the 2nd respondent impugns the propriety of applicant attaching the supporting affidavit by one Melina Matshiya, a legal practitioner in the employ of Messrs Wilmot & Bennett, to her answering affidavit. He avers that the said supporting affidavit ought properly to have been attached to the applicant's founding affidavit. He therefore seeks its expungement from the record on that very basis. He claims that the failure to attach the supporting affidavit to founding affidavit rendered it incompetent and inadmissible to attach it to any subsequent affidavit because of the trite position that an application stands or falls on its founding affidavit.

In my view, this particular point should not have been raised as a preliminary point as it impacts on the merits. It will be dealt with at the appropriate stage should the points *in limine* not succeed in disposing of the matter.

Alleged conflict of interest in respect of Applicant's Legal practitioner

In this respect the 2nd respondent moves for the recusal of applicant's counsel. The request is primarily predicated on the latter's alleged relationship to the applicant who according to him is his (i.e., counsel's mother in law). Secondly, the 2nd respondent alleges that applicant's counsel was responsible for the collection and possible disappearance of some of the documents which were on the possession of Messrs Wilmot and Bennett and were meant for conveyancing purposes.

In her answering affidavit the applicant confirmed that her legal representative is indeed her son in law. There is nothing, however, that precludes a legal practitioner representing a close relative although ethically speaking it might be unwise to do so.

As for the alleged upliftment on the part of Mr Chizhande, of the documents relating to the conveyancing of the property, I find that there is insufficient evidence was placed on record to justify the drastic action of ordering counsel's recusal. The circumstances surrounding the alleged removal of the documents and the reasons thereof were not sufficiently canvassed in the papers before me to take the action the action sought by the 2nd respondent. Accordingly, this point *in limine* is hereby dismissed.

Competence of the relief sought

The 2nd respondent in this respect launches a double pronged attack on the propriety of the application. Firstly, he alleges (although he did not say so on terms) that an application for the re-opening of a deceased estate is alien to both our substantive and adjectival law and should therefore on that basis be dismissed. Secondly, he contends that the Master has no power to make a determination as to ownership of the property subject to a dispute for to do so would amount to a usurpation of the court's judicial function.

There is abundant authority on the subject to support the proposition that the re-opening of a deceased estate is a remedy available to an interested party after the winding up of such an estate. A few examples will suffice. In *Chipo Zvavanondiita v Runiya Ndlovu and Others* HB 82-16, MATHONZI J (as he then was) granted an application for the re-opening of a deceased estate which has been administered by the respondents to the improper exclusion of the applicant. In *Muzungu & Others v Muzungu and others* HH 172-15, CHITAKUNYE J (as he then was) granted an application for the setting aside of a First and Final Distribution account and a re-opening of a deceased estate at the instance of the applicant. The applicant was one of the deceased's surviving spouses in a polygamous set up yet she had been excluded from the administration of the estate. In *Chirisa v Mugadzaweta and Others* HH 323-14, MWAYERA J (as she then was) similarly granted an application for the re-opening of a deceased estate which had been wound up and whose assets had been distributed without the involvement of all interested parties. Authority therefore abounds for the proposition that in appropriate cases, an estate may be reopened, pursuant to an application thereto, should the prerequisite for such re-opening be satisfied. See also *Ncube v*

Ncube and others HB 19/16 and *Sibanda v Moyo* HB 51/21. In this case, the relief sought is a narrow one, the applicant merely seeks the re-opening of the estate of the deceased for purposes of filing an objection thereto. I don't see how, should the applicant succeed in having the estate re-opened, as foresaid cannot be allowed to lodge an objection in terms of S43 of the Administration of Estates Act [*Chapter 6:01*].

Lis pendens

It is common cause that under Kwekwe magistrates Court case *No 155/21* the Respondent instituted an action for the eviction of the applicant from the property. The basis of the claim being that the applicant (then as respondent) remained in occupation of the property despite allegedly not having any right, claim or title on her part to so remain in occupation. In the plea disputing the claim, the applicant averred then as she does in the present matter, that she purchased the property from the deceased.

In order to succeed on a plea of *lis pendens* four requirements must be satisfied namely

- a) *There is a pending litigation*
- b) *Between the same parties or their privies*
- c) *Based in the same cause of action; and*
- d) *In respect of the same subject matter*

See *Mhungu v Mtindi* 1986 (2) ZLR 171 at 172; *DW Hattingh & Sons (Pvt) Ltd v Cole* NO 1991 (2) ZLR at 176 at 179-180 & *Quest Motor Corporation (Pvt) Ltd v Nyamakura* 2000(2) ZLR 84 (H)

Whereas the first, second and fourth requirements are clearly met, the 3rd requirement is not satisfied. This present matter concerns the quest for the re-opening of a deceased estate with a view to filing an objection under Section 43 of the Administration of Estates Act. The matter before the Magistrate on the other hand relates to the eviction of the applicant from the property. Though related the two causes of action are separate and distinct. An order for the eviction of the applicant the property, for example will not necessarily extinguish her quest for the re-opening of the Estate of the deceased.

Even if one were to adopt the stance that the two causes of action are similar, (which clearly, they are not) the court has a discretion to either proceed with the matter notwithstanding its pendency elsewhere or to stay the proceedings pending the outcome of the other matter, *Quest*

Motor Corporation (Pvt) Ltd v Nyamakura (supra); *Williams v Shub* 1976 (4) 567 (c). Further, it is not an immutable rule that the court will decide that the matter which was first to commence should be the one to proceed. Considerations of convenience and fairness are decisive in determine this question, See *Osman v Hector* 1933 CPD 503.

Whether application has prescribed

With respect, this particular point *in limine* is virtually incomprehensible. The 2nd respondent appears to suggest that the applicant's inaction in the wake of her knowledge of the winding up of the estate in 2021 and the very fact that the Master is now *functus officio* should act as a bar to the application. However, for the reasons already articulated, it is legally competent to have a deceased estate re-opened should the requirements thereof be satisfied. In *Sibanda v Moyo* (*Supra*) the court remarked as follows:

“The stated position is that any claim or challenge against the distribution of estate property in the First and Final liquidation and Distribution Account must be brought within 3 years of the Master’s certification of the said account otherwise it becomes prescribed”

The cause of action only arose upon the confirmation of the liquidation and Distribution account on the 22nd of October 2020 according to the Master's report. The application was therefore well within the prescribed time having been filed on the 31st of August 2021.

Equally untenable is the 2nd respondent's contention that since the applicant's alleged purchase of the property took place in 1998, therefore her claim thereto has since prescribed. In *Nan Brooker v Mudhanda & Anor, Pierce v Mundanda & Anor* SC5/18 GOWORA JA clarified the position regarding prescription where no date for performance is fixed by the parties to a contract. The following was said:

*Generally, the making of a contract of sale does not per se pass ownership in the thing sold. The authorities are clear that the signing of an agreement does not automatically translate to the transfer of property but that transfer can be effected at an agreed time or upon demand. In Smart v Rhodesian Machine Tools Ltd 1950 (1) SA 735(SR), TREDGOLD J (as he was then) accepted the general rule that where a contract fixes no time for performance, the debtor is not in mora until a reasonable time for performance has elapsed **and** the creditor has demanded performance.*

This principle as stated above was also highlighted in Asharia v Patel & Ors 1991(2) ZLR 276(S), wherein GUBBAY CJ outlined the applicable principle where the time for performance in an agreement has not been agreed in the agreement itself. He stated:

*“The general rule is that where the time for performance has not been agreed upon by the parties, performance is due immediately on conclusion of their contract or as soon thereafter as is reasonably possible in the circumstances. But the debtor does not fall into mora ipso facto if he fails to perform forthwith or within a reasonable time. He must know that he has to perform. This form of mora, known as mora ex persona, only arises if, **after a demand has been made calling upon the debtor to perform by a specified date**, he is still in default. The demand, or interpellatio, may be made either judicially by means of a summons or extra-judicially by means of a letter of demand or even orally; and to be valid it must allow the debtor a reasonable opportunity to perform by stipulating a period for performance which is not unreasonable. If unreasonable, the demand is ineffective.”*

Further down in the same judgment, the court in the Nan Brooker case concluded as follows:

*“The court a quo found that the parties had not made it clear in the agreement of sale as to when transfer was to be effected. The court was correct. However, it then went onto to find that the purchaser should have put the seller in mora by demanding transfer and that that is the date from which the debt would have become due. I think the court a quo cannot be faulted in concluding as it did that **the cause of action as related to the obligation to transfer where an agreement of sale does not specify a time, such obligation only arises upon demand by the purchaser.**” {emphasis added}*

In the present matter, firstly the issue of applicant having to compel deceased to effect transfer of the property never arose. According to the applicant, the deceased was quite willing to facilitate the same and that as a matter of fact both of them initiated the process only for same to be stalled by the unavailability of funds. Secondly, there is no evidence that the applicant never put the deceased in mora by demanding transfer of the property for prescription to start running. For this reason, this particular point *in limine* is accordingly dismissed.

Disputes of fact

Here, the contention is that the application is replete with material disputes of fact not least the question of whether as not the applicant purchased the property from the deceased. According to the 2nd respondent therefore, material disputes of fact, the existence of which the applicant was aware or ought to have been aware lends the application to being dismissed on that basis. Further according to him this is particularly so in light of the litigation pitting the parties over the same subject matter in case *No KK 155/21*

The implied contention by the 2nd respondent is that the applicant should have proceeded by way of action proceedings. In *Supa plant (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H) MAKARAU JP (as she then was) held that in application proceedings a material dispute of fact

arises when the material facts alleged by the application and disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.

When faced with material disputes of fact, in application proceedings four basic options are available to the court. These are, to dismiss the application should the applicant have known or foreseen the existence of material disputes of fact, refer the matter to trial in terms of r46 (10) hear evidence on a particular disputed fact in term of r58(12) or take a robust approach and decide the matter on the available affidavit evidence. In *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (SC) at 339 C-E of GUBBAY JA had this to say:

“It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common-sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently, there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a bona fide and not merely an illusory dispute of fact.”

I believe this matter is capable of resolution on the available evidence despite the heated contestation on whether or not the applicant purchased the property from the deceased as she claims or that she was merely resident on the property having been at the benevolence of the deceased and now wants to bite the hand that fed her, so to speak, as alleged by the 2nd respondent. I believe there is sufficient evidentiary material of record for the court to take a robust and common-sense approach and resolve the apparent factual log jam between the parties.

The merits

All the preliminary issues having thus fallen by the way side I now turn to the merits of the application. The application for the re-opening of the estate is predicated on two broad premises which according to applicant point towards fraudulent intent in the registration and administration of the estate. The first relates to the procedural steps undertaken by the 2nd respondent which the applicant claims were irregular. The second concerns the very inclusion of the property as an asset accruing to the deceased's estate.

The test

An application for the re-opening of an estate is not there for the asking, it can only succeed if there are special circumstances justifying such re-opening. The existence of acts of fraud or misrepresentation being examples of such special circumstances, See *Ncube & Anor v Ncube & Others* HB 19-16. Material non-disclosure in turn is a form of misrepresentation, *Chirisa v Mugadzaweta (supra)*; *Muzungu and Others v Muzungu and Others* HH172-15; & *Zvavanondiita v Ndlovu Others* HB 82-16.

If the application for re-opening is premised on fraud or misrepresentation, it is incumbent upon the applicant to allege and prove specific acts of fraud, See *Stanbic Zimbabwe Ltd v Duran* HH-54-2007 as cited with approval in *Chirisa v Mugadzaweta (supra)*.

In the present case the applicant alleges that with the full knowledge of her purchase of the property the 2nd respondent falsely misrepresented to the Master that that asset was part of the deceased's estate. Further, according as her as evidence of his fraudulent intent, the 2nd respondent proceeded to have the estate registered in Masvingo designedly to conceal its registration and administration of the estate from her. This was followed up by the failure on the part of the 2nd respondent from having the estate account lie for inspection at an office of the assistant Master in the district where the deceived resided or carried on business, (in this case Kwekwe) or where he ordinarily resided or Bulawayo where he was confined to an old age home immediately prior to his demise, as required by S52 (5) of the Administration of Estates Act [Chapter 6:01].

Section 43 of the Administration of Estates Act, Chapter 6:01 permits a third party to lodge with the executor upon the publication of a notice, a claim against an estate.

It reads:

“43 Public notice by executors to creditors and others to lodge their claims

“Every executor shall, as soon as he has entered on the administration of the estate, forthwith cause notice to be published in the Gazette and in some newspaper published as circulating in the district as when the deceased ordinarily resided, calling upon all persons having claims due, or not yet due, as creditors against the deceased as his estate, to lodge the same with such executor within such period from the date of publication thereof as is therein specified, not being less, save except as in Section sixty-six is provided, than thirty days as more than three months, as in particular circumstances of each case is by the executor deemed proper. All claims in which would be capable of proof in case of the insolvency of the estate shall be deemed to be claims of creditors for the purposes of this Act.”

Sections 44 to 47 *inter alia* deal with the procedure of dealing with claim lodges against an estate”

Earlier in this judgement I reserved the question of the admissibility or otherwise of the affidavit of Melina Matshiya it having been attached to the applicant’s answering affidavit. Its admissibility or otherwise is critical and is arguably one of the most important considerations upon which this application turns.

The general rule is that the necessary allegations upon which an application relies must appear in his/her founding affidavit, as he/she will not generally be allowed to supplement the affidavit by adducing supporting facts in his answering affidavit; See *Manerberger v Manerberger* 1948 (3) SA 731, *Schrender v Viljoen* 1965 (2) SA 88(O) & *Titty’s Bar and Bottle Stove (Pvt) Ltd v ABC Garage (Pvt) Ltd* 1974 (4) SA 362 (T) at 368H- 369B among a host of authorities on the subject. This has often been captured in the phrase “an application stands as falls on the founding affidavit”, See *Mangwiza v Ziumbe N.O & Another* 2000 (1) ZLR 489, *Milrite Farming (Pvt) Ltd v Porusingazi* HH 82/10 & *Muchini v Adams 7 Others* SC 47/13. This however is not an absolute rule. The court has a discretion to allow new matter in an answering affidavit giving the respondent an opportunity to deal with it in a supplementary affidavit should he so wish. See *Bayar v Hansa* 1955 (3) SA 547 (N) at 553 C- G *Dawood v Mahomed* 1979 (2) SA 361 (D) at 364 E, *Shatok Investments (Pvt) Ltd v Town Council of the Borough of Stanges* 1976 (2) SA 701 (D) AT 704 G -H.

Generally, the court will not permit an applicant to make a case on reply when no case at all was made in the original application. There are circumstances, though limited, where an applicant may be allowed to introduce additional facts via an answering affidavit. An applicant, for example, is entitled to introduce further corroborating facts by means of an answering affidavit should the contents of the opposing affidavit call for such facts. Ultimately, however, a common-sense approach based on want of prejudice should be applied in deciding to allow the further corroborating facts to be set out on the answering affidavit; See *e Botswana (Pvt) Ltd* 2013 (6) SA (GSJ) AT 336 G-H.

I am of the view that the supporting affidavit of Melina Matshiya who is a legal practitioner in the firm of *Wilmot and Bennet* is admissible. Not only is it critical in the resolution of the dispute between the parties, but its absence from the applicant’s founding papers is sufficiently explained. The sale of the immovable property having been allegedly facilitated by the law firm

Messrs Wilmot and Bennet and an attempt at the transfer of the property having been equally facilitated by the same law firm, it is only just and proper that the said law firm be allowed to comment on such averments. In explaining the absence of that supporting affidavit from the applicant's founding affidavit, Matshiya states that she failed to file her supporting affidavit at the time the applicant filed her founding affidavit despite having been requested by applicant's counsel to do so. This, according to her was due to a personal crisis that dogged her at the time. She indicated in this regard that the COVID-19 pandemic wreaked havoc on members of her family and that eight of them, herself included, were afflicted resulting in her losing her father to the disease. I therefore do not believe that the failure by the applicant to attach Mtshiya's supporting affidavit was due to want of care or that the applicant intends to unprocedurally smuggle additional evidence through the back door, so to speak.

In that supporting affidavit Matshiya confirms that on 15 January 1998, she drafted an agreement of sale in respect of the property between the deceased and the applicant at the behest of the deceased. She indicates that the purchase price was \$120 000 payable in monthly instalments of \$2 500 commencing the 31st of January 1998. She also confirms the presence of the witnesses to that agreement. Most importantly, she avers that in April 2010, the deceased returned to her in the company of the applicant to confirm that the purchase price had been paid in full and that he (i.e., deceased) sought the transfer of the property to the applicant. Finally, she confirms that her law firm drew up the requisite transfer documents and that the only thing that held up the completion of the transfer was lack of the funds required for conveyancing on the part of the applicant.

DISPOSITION

Despite the 2nd respondent's protestations to the contrary, I am satisfied that the applicant has on a balance of probabilities made a good case to be permitted to lodge a good case with the master objecting to the inclusion of Lot 1 of Rolling River Ranch, Kwekwe in the estate in question. She has also managed to show on a balance of probabilities that there was a material misrepresentation on the part of the 2nd respondent in including the same in the estate account of the late George William Noble. Accordingly, the application stands to succeed. I must however hasten to add that the re-opening of the estate cannot be effectual when not preceded by the setting aside of the Masters certificate. An order to that effect will of necessity be included.

Costs

The applicant seeks costs on the punitive attorney- client scale. I don't see any justification for an order of costs on the higher scale.

Accordingly, the application succeeds and following order is hereby made;

IT IS ORDERED THAT:

1. The 3rd Respondent's confirmation of the Liquidation and Distribution Account of Estate Late George William Noble DRMS14/20 is hereby set aside.
2. The Estate in question is hereby re-opened to allow the Applicant to file her objection to the liquidation and Distribution Account.
3. The applicant be and is hereby ordered to lodge her objection with the 3rd Respondent within ten (10) days from the date of this order.
4. The 2nd Respondent to pay costs of this application.

*Makonese, Chambati and Mataka; Applicants legal practitioners
Chitsa and Masvaya Law Chambers; 2nd Respondent's legal practitioners*