

PATRICK KUPENGA
versus
ESTATE LATE HLANGANISO MATANGAIDZE
and
THE EXECUTOR MR. OLIVER MASOMERA N.O
and
MATAN HOLDINGS (PRIVATE) LIMITED
and
PILLARTON ENTERPRISES (PRIVATE) LIMITED
and
VONGAI MATANGAIDZE

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 15 May 2023

Opposed Application

S. Chikamhi, for Applicant.
S. Chatsanga, for the 1st & 2nd Respondents.
A. Mutungura for 3rd to 5th Respondents

MUZENDA J: Applicant is seeking the following relief:

“WHEREFORE after reading documents filed of record and hearing counsel, IT IS ORDERED THAT:

- 1. The third, fourth and fifth respondents shall release the following partnership property namely: 1x Forklift, 1x Finger joint, 1x door press, 1x Kiln Unit, 1x Roller Table, 1x door presss, 1x vertical band saw operation board, 1x Dimensional saw, 1x Thicknessor, 1x Auto Ripsaw, 1x Finger Jointer profiler, 1x Multi-rip saw, 1x Finger Jointer press, 1x Thicknessor, 1x Dimension saw, 1x Quasi-Auc 3 Phase welding machine , 2x rolley lifter jacks, 1x Wooden office Desk and 1 Wooden file cabinet c/w sliding doors within 14 days of service of this order.*
- 2. If the 2nd, 3rd and 4th defendants (sic) fail to comply with the order the sheriff of the High Court of Zimbabwe or his deputy is authorised to seize the items listed in clause 1 above and deliver to the applicant.*
- 3. The 2nd respondent is ordered and directed that the partnership property be shared equally in terms of the Deed of Settlement as read with the Audit Report.*
- 4. The 2nd, 3rd, 4th and 5th respondents are to pay applicant's costs of suit at a legal practitioner and client scale if opposed”*

Facts

Applicant entered into an unregistered partnership agreement with the late Hlanganiso Thandiwe Matangaidze who died intestate on 29th December 2018. The partnership was quite decorated with numerous litigations and disputes criminal, civil and labour disputes, the last one being HC 5444/14 which culminated in a Deed of Settlement signed sometime in 2017 before the death of Mr Matangaidze. The partnership was dissolved.

After the death of Mr Matangaidze, the estate was registered at Mutare DRME 293/19 and Mr Oliver Masomera was appointed Executor of the Estate. Applicant wrote to the Executor dative claiming partnership property which he claims 50% share among other claims. The Executive dative could not accommodate it. Applicant wrote to the Master of High Court lodging grievances against the Executor, he was not happy with the response. He then issued summons against the Estate, 2 companies formerly directed by Mr Matangaidze and his surviving spouse, Mrs Vongai Matangaidze claiming various amounts arising out of the partnership. Applicant did so under case number HC 126/21. The matter proceeded to a set down date for a pretrial conference. The case under HC 126/21 relied to a great extent to an audit which was hotly disputed by the defendants in that case. On 27 June 2021 plaintiff withdrew the matter from the courts.

On 16 January 2023 he caused this application to be issued against the respondents. He wants this court to give effect to a deed of settlement granted under case number HC 5444/14 dated 10 October 2017. He specially seeks to rely further on the Audit dated 15 October 2020. He also seeks an order to compel the executor dative to distribute the “partnership property” on a 50-50 basis and picked the list from the Audit Report of October 2020. It is also not in dispute that the Executor Dative Mr O. Masomera has since wound up the Estate and the Master of High Court has already approved the Final Distribution Account.

The respondents are opposing the application and have raised preliminary points. They in turn pray for the upholding of the points *in limine* as well as an order of costs on a punitive scale, either *de bonis propriis* on legal practitioner and client scale.

Points *in limine*

Third to fifth respondents contend that the facts of the application and the relief sought by the applicant is exactly the same as that under case number HC 126/21. All parties are the

same and this court has since dismissed case No. 126/21 with costs. They thus raise a defence of *res judicata* and pray for the upholding of the preliminary point with costs.

The second preliminary point is that first respondent is not existent. The estate had since been wound up and final distribution account issued. Noone registered an objection to its confirmation and there is no property to talk about that belongs to the estate of the late Matangaidze. In any case 1st respondent is not legally cited for it lacks *locus standi in judicio*, it has to be represented and cited under an Executor. As a result third to fifth respondent aver that the application is fatally defective.

On the third *point in limine*, the 3rd to 5th respondents contend that there are material dispute of facts which can not be resolved on paper more particularly in relation to artificial bodies, for 3rd and 4th respondents. Both are incapable of physically holding property, they can only do so via a proxy or a director or agent. As such the application requires oral testimony.

In response applicant submitted that case Number HC 126/21 was not brought finality by any court. It was withdrawn by applicant. As such it was not given a judgment on merits. Applicant adds that the requirements of a *res judicata* are not met on a withdrawn action. On the citation of the Estate Late Hlanganiso Matangaidze, applicant contends that he is not claiming from the estate but claiming from respondents property seen by the auditor as amplified by the audit report of October 2020. To the applicant the executor is still in office that is why he opposed the application. Applicant opted not to respond on the legal capacity of first respondent.

On the material dispute of facts, in applicant's view there are none at all. Third and fourth respondents are registered companies in Zimbabwe with capacities to sue and to be sued. The argument by 3rd and 4th respondents about an artificial entity, to applicant is misplaced. The matter is capable of resolution on paper and to the applicant 5th respondent is the one who identified the property to the auditors and she is a co-director of 3rd and 4th respondents. In addition applicant pointed out that 3rd and 4th respondents came short to identify issues that are in dispute, their attack on the audit is unfounded. Applicant urged this court to proceed to deal with the matter on merits and prayed that the preliminary points be dismissed in their entirety.

Ruling on Preliminary points.

1. Whether the matter is *Res Judicata*

Res judicata is a term used for a matter already deliberated upon by a court and has final judgment and is not a subject of an appeal. The plea is basically of declaratory meaning that is meant to quash or put an end to the proceedings. Such a plea must meet the following requirements: *it must involve same parties, involve the same cause of action and plaintiff or applicant is seeking the same relief*¹.

Case number HC 126/21 was withdrawn by the plaintiff, the current applicant and apparently does not have a decision on merits or a judgment which was not appealed against. When a matter is withdrawn by a litigant, such a litigant is at liberty to revive it before the same court. The withdrawal does not shut the doors of justice to the plaintiff. I am constrained to uphold this specific preliminary point and it is accordingly dismissed.

2. *Whether there are material disputes of fact?*

The legal point on this topic is well chatted by our jurisprudence and both counsel herein cited identical case law authorities and they agree that a material dispute of fact arises when such material fact put by an applicant is disputed and transversed by the respondent in such a manner as to leave a court with no ready answer to the dispute between the parties in the absence of further evidence. Such a material dispute of fact can also arise when a respondent admits the allegations contained in the applicant's affidavit but alleges other facts which the applicant disputes².

Third and Fourth respondents did not specify the exact nature of the material dispute of facts. Such facts must go to the nature of relief sought by the applicant. In my view whether third and fourth respondents are artificial persons is irrelevant. The real issue is whether third and fourth respondents possess estate property which was properly identified by auditors to constitute subject for distribution between applicant and the estate if any. A material dispute of facts must not be merely alleged by a litigant, it ought to be specially particularised and pleaded to enable a court to decide accordingly. It is not a matter of making a statement and leave a litigant to guess and cause more confusion to the court.

¹ *Mundangapfupfu & Ano v Chisepo* 2017 ZWHHC 188

² *Supa Plant Investments (Pvt) Ltd v Edgar Chidavaenzi* 2009 (2) ZLR 132 (H) (per MAKARAU JP, as she then was)

Third and fourth respondents dismally failed to prove on a balance of probabilities the existence of material disputes of facts incapable of resolution on paper. The point *in limine* has no merit and it is dismissed.

3. *Whether applicant cited a wrong party to the application?*

Applicant cited *Estate Late Hlanganiso Matangaidze* as first respondent and then cited Mr Oliver Masomera N.O as second respondent. Applicant's cause of action is premised on a partnership agreement as well as a deed of settlement reached between him and the deceased. Upon the death of Mr Matangaidze and appointment of Mr Masomera as executor dative, all deceased's interests came under the management of the executor. In terms of s 25 of the Administration of Estate Act [*Chapter 6:01*] such a deceased estate is represented by an executor or executrix dative duly appointed and issued with letters of administration by the Master. Such an executor occupies the position of a legal representative of the deceased. He or she is legally the only person who has *locus standi in judicio* to sue or be sued on behalf of the estate. As such the citation of a deceased as party to litigation is wrong. The correct party to cite on behalf of the deceased estate is the executor or executrix by name with the appendix "*Nomino Officio*". Failure by a litigant to do so nullifies the application or action and makes the proceedings fatal³.

I am persuaded by third and fourth respondents' counsel's argument that the improper citation of the first respondent is fatal and incurable. Applicant was informed of this legal anomaly by respondents, he did not rectify the problem. He chose not to address same in his heads and the whole matter is centralised on the deceased estate inclusive of the relief sought where he wants the court to direct the executor to isolate property of partnership and distribute it.

Applicant had the duty under s 42 of the Act to identify partnership property to the Executor Dative and take appropriate action. Such property to be separated from that of the estate. It is not the duty of the executor to do that work on behalf of the aggrieved party. After isolating that property the applicant ought to have taken action during the period of the executor's mandate to exercise his rights before the winding up of estate.

³ Nyandoro & Anor v Nyandoro and Others 2008 (2) ZLR 219 (H) at 222-E-223C per KUDYA J (as he then was). See also M & Ors Estate Late KNM& Ors HH677/16

As it appears from the affidavits filed of record, the executor has since vacated office after a final distribution account was stamped and ascended to by the Master and indeed the executor is *functus officio*. It is not clear on papers as to who benefitted from the subject property but it is not the executor who will justify his joinder to the proceedings. I also accept the executor's position that there is virtually no partnership property identified in the estate more particularly during the time Mr Masomera was the executor. Applicant may have a genuine claim but the pleadings are muddled and unprofessionally prepared. The application is belated and confused and the errors by applicant compromise his application. There is no application to talk about.

On the question of costs, one would see total lack of professionalism and expertise on the manner the whole case was handled. It is not absolutely applicant's fault but his legal representatives. I am aware that applicant chose the lawyers to represent him and he must bear all consequences, but that will not be fair and just to him in my view. He has a genuine case but fuddled the whole process by failing to timeously take action and do the rightful thing in citing correct parties. I will not award costs as prayed for by the respondents.

Disposition

The application is struck off with costs on party and party basis.

Chikamhi Mareyanadzo Legal Practitioners, for the Applicant.
Chatsanga & Partners Legal Practitioners, for the 1st and 2nd respondents
Mutungura & Partners Legal Practitioners, for the 3rd, 4th and 5th Respondents