NOMUSA NCUBE

Versus

ESTER MOYO N.O
(In her capacity as the executor of estate late
Nhlanhla Gumbo DRB 3891/21)

And

MASTER OF THE HIGH COURT

And

SANDRA MAKARANGE

And

YVONNE MATIZA

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 27 FEBRUARY AND 20 MARCH 2025

Opposed Application

M. Sibanda, for the applicant
N Ndlovu, for the 1st respondent
No appearance for the 2nd respondent
L Mpofu, for the 3rd respondent
No appearance for the 4th respondent

KABASA J: This application is anchored on s 4 of the Administrative Justice Act, [Chapter 10:28]. The applicant is one of the two surviving spouses of Nhlanhla Gumbo who died on 3 October 2021.

Following the death of Nhlanhla the estate was registered with the second respondent. An edict meeting was held and after it became apparent that the applicant had not revealed the existence of a second wife and three other children who were born of the second wife and the fourth respondent, an independent executor was preferred. The third and fourth respondents (who are the second wife and the woman with whom the deceased had a child) were happy with the appointment of an independent executor. Upon such appointment the executor, who

is the first respondent prepared an inventory. Money was required for the expenses which come with the administration of any estate. An agreement was reached to sell a vehicle which formed part of the estate. After the executor prepared the liquidation and distribution account it became clear that the estate had more liabilities than assets necessitating sale of some assets in order to meet the liabilities. The third and fourth respondents consented to such sale. The applicant did not. A section 120 authority was subsequently obtained listing several assets and effectively authorising their sale. The s120 authority was granted on 31 October 2023 and among the property to be sold was a Toyota Hiace Registration Number AEO 6393 which was subsequently sold as already alluded to earlier on in this judgment.

The applicant is unhappy with the issuance of the s120 authority giving rise to this application. At the hearing of the application the order sought was amended. The following order, as amended, is what the applicant seeks:-

> "The consent to sale granted to the 1st respondent by the 2nd respondent on 31st October 2023 be and is hereby set aside."

A reading of the founding affidavit reveals that the applicant was unhappy with the appointment of an independent executor, the sale of the motor vehicle at US$8000 when she was expecting more and the issuance of s120 authority, more particularly the fact that no inquiry was held before the s120 authority was issued.

The applicant's grievance is primarily that the process prescribed by section 120 of the Administration of Estates Act [Chapter 6:01] was not followed.

The application is opposed by the first and third respondents. The second respondent did not file any papers apart from the Master's report, giving insight into the appointment of an independent executor and the issuance of s120 authority. The fourth respondent did not file any opposing papers and did not participate in these proceedings. She can be taken to have decided to abide by the decision of the court.

In opposing the application, the 1st and 2nd respondents took points *in limine*. At the hearing of the matter the 1st respondent's counsel abandoned some of the preliminary points, so did counsel for the 3rd respondent. I therefore will only make reference to the points which were argued. These are:-

1) The applicant has failed to exhaust remedies available to her. The complaint regarding failure to follow the procedure set out in s120 raises a review issue and so in accordance with s7 of the Administrative Justice Act, the court should decline to exercise its jurisdiction. The applicant must exhaust domestic remedies. In essence the s4 application is a review disguised as an application in terms of s4 of the Administrative Justice Act.

The 3rd respondent associated herself with this point and further contended that:-

2) The non-joinder of the purchaser of the motor vehicle is fatal as such non joinder seeks to divest the buyer of a property duly paid for and taken delivery of almost 2 years ago.

I asked the parties to argue the points *in limine* as I entertained the view that they were dispositive of the matter.

Mr Ndlovu, counsel for the 1st respondent contended that s7 of the Administrative Justice Act allows the court to decline to entertain an application made under s4 if the applicant is entitled to seek relief under any other law, whether by way of appeal or review or otherwise, and the court considers that any such remedy should first be exhausted.

Counsel further submitted that the applicant's primary complaint is hinged on procedural issues. The complaint is that the second respondent failed to follow the stipulated procedure set out in s120. In the founding affidavit the applicant does not establish any substantive complaint except the failure by the second respondent to follow procedural steps. Section 5 lists the factors the court considers in deciding whether an administrative authority failed to comply with s3 of the Act and failure to follow procedural steps is not one such factor.

The second respondent in lawfully exercising the discretion bestowed on him issued s120 authority. A complaint that the necessary procedure was not followed should be attacked by way of review. The applicant was served with the s120 authority when it was issued at a meeting held at her erstwhile legal practitioner's offices. No action was taken. The applicant has sought to bring an action under the Administrative Justice Act to evade the consequences of her inaction. She should exhaust available domestic remedies, so counsel argued.

Counsel for the third respondent associated with the foregoing argument and emphasized that the court should decline to exercise its jurisdiction as envisaged by s7 of the Act.

Counsel further argued that the motor vehicle which was sold is included on the s120 authority. The said purchaser was not cited so as to defend his interests.

Ms Sibanda, counsel for the applicant held a different view. Counsel argued that the applicant had the right to seek recourse by invoking s4 of the Act as the cause of action is anchored on a failure to comply with s120 provisions.

Section 5 of the Act does not disqualify the applicant.

As regards the non-citation of the buyer, counsel contended that if the s120 authority is vacated, everything that flowed from it will stand to be vacated and whoever bought property listed on the s120 authority will be affected by the nullification of the authority and need not be cited as a party.

In considering whether to exercise my jurisdiction over this matter I am guided by the decision in *Master of the High Court N.O* v *Takaendesa & 5 Others, Rugare Mandima N.O* v *Takaendesa & 4 Ors, House of Sari (Pvt) Ltd* v *Takaendesa & 5 Ors* SC 101- 22.

In that case the complaint against the issuance of a s120 authority was premised on the fact that the Master had acted unlawfully, unreasonably and unfairly in granting a s120 authority for the sale of three farms to settle estate liabilities of US$14 047,00 when there was a butchery which could have been sold to cover these liabilities.

In casu, there is no dispute that the liabilities were such as to render the estate almost insolvent. The beneficiaries were unable to raise any money towards settling the estate's liabilities. The liquidation and distribution account was made available to the beneficiaries and the Master was of the view that the sale of the assets was necessary in order to settle its liabilities. When the s120 authority was sought the third and fourth respondent consented to the s120 authority whilst the applicant withheld her consent. When the s120 authority was granted the applicant was made aware and it was served on her at a meeting held with her erstwhile legal practitioners.

GUVAVA JA in the *Takaendesa* case (supra) had this to say:-

> "An application made in terms of the Administrative Justice Act seeking the setting aside of a decision of an administrative authority must allege and prove that it has acted unlawfully, unreasonably and in an unfair manner."
>
> A decision that breaches s 4(1) of the Act empowers a court to set it aside.

The learned Judge proceeded to pose the question as to whether the Master conducted himself in a lawful, fair and reasonable manner when he exercised his power under s120 of the Administration of Estates Act. Reference was made to CHITAKUNYE J's (as he then was) decision in *Madzingaidze NO* v *Katanga Service Station* HH 256-13 where the court considered what the Master should look at when presented with a s120 request to sell.

> "1. The Master has to formulate his own opinion.
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> 2. The opinion has to be formulated after a due inquiry and
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> 3. The opinion has to be in furtherance of the advantage of the persons interested in the estate, in this case the beneficiaries.
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> The section does not *per se* require that all the interested parties must agree. It is the opinion of the Master, after due inquiry that is crucial. The fact of the interested parties all agreeing may only be one of the considerations to be taken into account by the Master as he carries out due inquiry. A due inquiry may be described as a fitting or appropriate investigation or research on the subject matter before arriving at a decision. This necessarily involves a consideration of submissions made by all interested parties, including the beneficiaries and an assessment of what would be appropriate given the circumstances of the matter. The Master will want to know the reasons why the property has to be sold and how the sale will be advantageous to the beneficiaries."

Whilst I am alive to the fact that I am considering the points *in limine* and not the substantive application itself, I quoted extensively from the *Takaendesa* judgment for the simple reason that I am called upon to decide whether I should ask the applicant to look elsewhere for recourse and not anchor the application on the Administrative Justice Act.

It is therefore important to note that, whilst the *Takaendesa* facts are very different from the ones *in casu*, in so far as the appropriateness of the grant of the request for s120 authority is concerned, the crucial question here is whether a litigant who alleges that the Master did not lawfully grant the s120 authority because of a failure to follow the procedure stated therein can only impugn the process by way of review and not *via* the Administrative Justice Act?

I find the answer to this question in the following remarks by GUVAVA JA:-

> "It appears to me, from the above, that in order for the Master to lawfully grant a consent to sell in terms of s120 of the Administration of Estates Act, he must comply with the requirements of the Administrative Justice Act."

The issue now is not whether the Master did comply but whether in seeking to attack the manner in which the Master came to the decision to grant the s120 authority, the applicant can only come to court by way of a review and not the Administrative Justice Act?

I find myself unable to agree with the submissions by counsel for the 1st and 3rd respondent. The s120 authority was issued on 31/10/23 and this application was filed on 17/11/23. It therefore cannot be said the applicant chose to utilise the Administrative Justice Act because she was out of time to file an application for review.

Whether the applicant is able to show that the Master failed to comply with the requirements of the Administrative Justice is a different inquiry altogether. She may very well fail to substantiate the complaint but the bringing of the complaint through the Administrative Justice Act vehicle is a recourse available to her.

Contrary to *Mr Ndlovu's* assertion that s5 of the Act does not include failure to follow procedure as one of the factors a court considers in a matter brought under the auspices of the Act, s5 (0) of the Act provides that:-

> '5 For the purposes of determining whether or not an administrative authority has failed to comply with section three the High Court may have regard to whether or not –
>
> ….
>
> (0) the procedures specified by law have been followed."

It follows therefore that where a litigant's bone of contention is that procedure was not followed, such litigant can come to court through the Administrative Justice Act.

It cannot be argued that the relief sought herein is not available under the Act. The *Takaendesa* decision is authority which shows that such relief is available. I was referred to the case of *Songore v Gweme & Ors* HH90-2008, a matter which sought a review of the Master's decision approving the sale of a house which formed part of the deceased estate. Granted, the Master's decision was being impugned through the review process but the case cannot be taken as authority that a litigant who utilises the Administrative Justice Act is to be non-suited for failure to utilise the review process.

As to the non-joinder of the purchaser of the motor vehicle, in the *Takaendesa* matter, the purchaser of the farms was a party to the proceedings, duly represented before the Supreme Court by *Mr Nyamakura*. It is therefore not correct, as argued by *Ms Sibanda*, that the

purchaser of the motor vehicle's non citation is neither here nor there. He has an interest in the matter which he should be allowed to defend, should he so choose.

Whilst the Master's report appears to suggest that the sale of the Toyota Hiace Registration Number AEO 6893 was before s120 was granted, the s120 lists that vehicle as one of the assets to be sold. I do acknowledge that the Registration Number is given as AEO 6393 therein but counsel for the 3rd respondent confirmed that the vehicle listed in the s120 is the one that was sold. This must therefore be an error in capturing the correct Registration Number by the Master. There is no other vehicle with the same description, which means this vehicle is the same and there must be an error in the manner the registration number was captured.

That said, the purchaser of that motor vehicle ought to be cited. I however do not take the view that the failure to cite him renders a fatal blow to the application. He must however be joined as he has a real and substantial interest, having bought an asset of the estate which is included in the s120 authority the applicant is impugning.

I therefore propose to follow the decision by NDOU J in *Anabas Services (Pvt) Ltd* v *Ministry of Health & Ors* 2003 (1) ZLR 247 (H) and order that the purchaser of the motor vehicle in question be joined as 5th respondent.

That said, I hold the view that the points *in limine*, had they succeeded, would have been dispositive of the matter. They have however not succeeded for the aforementioned reasons.

In the result, I make the following order.

1. The point *in limine* on lack of exhaustion of domestic remedies is hereby dismissed.

2. The point *in limine* on non-joinder of the purchaser of the motor vehicle succeeds.

3. The purchaser of the motor vehicle shall be joined to the proceedings as the 5th respondent.

4. The application shall be served on the purchaser, who shall, if so inclined, file opposing papers, within 10 days of service of the application.

5. In the event that opposing papers are not so filed, the Registrar shall set down the matter for hearing on the merits.

6. Costs shall be in the cause.

Nkomo and Sibanda, applicant's legal practitioners

Cheda and Cheda associates, 1st respondent's legal practitioners

Malinga and Mpofu, 3rd respondent's legal practitioners