

TONDERAI BYRON RICE

Versus

SONENI NDLOVU

(In her capacity as executrix dative of the
Estate of the late Memory Ngwenya DRB 882/21)

And

THE ASSISTANT MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 27 APRIL AND 5 MAY 2022

Urgent Chamber Application

D Dube, for the applicant
S. Mawere, for the 1st respondent
No appearance for the 2nd respondent

KABASA J: This is an urgent chamber application wherein the applicant seeks the following interim relief:-

- “1. The 1st respondent be and is hereby temporarily interdicted in winding up and distributing the estate of late Memory Ngwenya DRB 882/21 pending the finalisation of HC 413/22 and HC 269/22.
2. Letters of Administration issued to 1st respondent under DRB 882/21 are temporarily suspended pending finalisation of the application under case number 413/22 and 269/22.”

The final order sought is to the following effect:

- “1. That the applicant and the respondents be and are hereby ordered to abide by the decision of this Honourable under (sic) case number HC 413/22 and HC 269/22.
2. The 1st respondents (sic) to bear costs of suit on attorney scale (sic)”

The brief background to the matter is this: - The applicant was staying with the late Memory Ngwenya who died on 18th July 2021. The applicant’s status as regards his relationship with the late Memory is a bone of contention between him and the late Memory’s family. Following Memory’s death, the 1st respondent was appointed as the executrix dative by the 2nd respondent. The date of appointment was not clear but it was said to be either September or November 2021.

There was discord between the applicant and the late Memory’s family from the time of her burial and correspondence between the applicant and 1st respondent filed of record showed that the 1st respondent had issues with the applicant relating to the estate property. This correspondence dates back to January 2022. On 8th March 2022 the applicant filed two applications, under HC 413/22 he seeks to have the 1st respondent removed as an executrix dative and in HC 269/22 he seeks to be confirmed as the late Memory’s customary law husband.

This urgent chamber application was filed on 15th March 2022 and the relief sought herein is premised on the allegation that the 1st respondent is biased and has vested interests in the estate assets thereby abusing her fiduciary duties.

Mr Thulani Ndlovu who filed a certificate of urgency certified the matter as urgent because he is satisfied the applicant is a surviving spouse and a potential beneficiary to the late Memory’s estate. He further states that the applicant will

suffer irreparable harm should the 1st respondent proceed to “distract” the estate before HC 413/22 and HC 269/22 are determined.

At the hearing of the application, I referred the parties to the decision of the Supreme Court in *Movement for Democratic Change and Others v Timveous and Others* SC 9-22 regarding seeking a provisional order pending the determination of cases with lives of their own and seeking a provisional order which is provisional in name only but final in its effect. *Mr Dube* was of the view that the MDC case (supra) was distinguishable and equally that the order sought was not final in nature but sought to provide interim relief.

I then asked the parties to address me on the preliminary points only as I regarded these as being dispositive of the matter. This being so because, in opposing the application, 1st respondent raised points *in limine*. The first was lack of urgency and the second defective certificate of urgency.

This judgment is concerned with these points *in limine*. *Mr Mawere* contended that there is no urgency. 1st respondent was appointed executrix dative last year in 2021 and has been executing her duties without any constraints. The applicant has not chronicled the time lines which show when and what harm he is apprehensive about and whether he acted when such harm became evident. After the issuance of Letters of Administration in November 2021 there is nothing to show what it is the 1st respondent did or when she engaged in conduct meant to infringe on the applicant’s rights. The applicant’s founding affidavit does not lay this out and the certificate of urgency merely regurgitated the founding affidavit.

The applicant rushed to court when the 1st respondent discovered an illegal allotment of shares from one of the late Memory’s companies and reported the

matter to the police. Hitherto there had been nothing suggestive of interference of applicant's rights by the 1st respondent.

In response *Mr Dube* submitted that whatever criminal allegations there are, such do not attach to the applicant in his personal capacity as such shares are in respect of a company which has a separate legal persona.

The certificate of urgency confirmed that there is pending litigation challenging the validity of 1st respondent's appointment and that should she proceed with the winding up of the estate, the pending litigation will be rendered a *brutum fulmen*.

Has the applicant made a case for urgency entitling this matter to jump the queue?

In *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188 the learned Judge had this to say:-

“What constitutes urgency is not only the imminent arrival of the day of reckoning. A matter is also urgent if at the time the need to act arises, the matter cannot wait, urgency which stems from deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules.”

In *Documents Support Centre P/L v Mapuvire* 2006 (2) ZLR 240 at 244 C-D MAKARAU JP (as she then was) put it thus: -

“... urgent applications are those where if the court fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant.”

In casu the applicant in his founding affidavit was at pains to show the discord that was there between him and the late Memory's family and in particular the 1st respondent who did not recognize him as husband to the late Memory. The parties tussled over the deceased's body, clearly showing that their relations were not cordial. The 1st respondent was subsequently appointed executrix dative by the 2nd respondent and commenced the process of coming up with an inventory of the property left by the late Memory. A curator was appointed and prepared a report detailing the property which was to form the estate property. Such inventory shows that there are a number of properties which were said to have been purchased by the late Memory but which she was yet to get title to.

On 17 January 2022 the 1st respondent wrote to the applicant requesting him to surrender a trunk in which the late Memory kept "important documents." This was followed up by another letter dated 21 January 2022 requesting the trunk and the original documents which the applicant had in his possession. In that letter there was mention of the fact that the applicant was of the view that the 1st respondent was biased and the issue of the discord concerning applicant's status with regards to his relationship with the late Memory.

What is clear from the foregoing is that the parties' differences right from the time of the late Memory's death to the appointment of the 1st respondent as executrix dative had not abated.

It is therefore not correct, as submitted by Mr. Dube, that it was only in March 2022 that the applicant became apprehensive that the 1st respondent was biased and his interests were in jeopardy.

Why then does the applicant give the impression that he only became apprehensive in March 2022 and so filed this urgent application that same month? A litigant who fails to take the court into his confidence and seeks to mislead cannot expect sympathy from the court.

This brings me to the issue of when the need to act arose. It was not in March 2022 as the applicant would have the court believe.

The applicant filed applications to be declared a spouse and also to have the 1st respondent removed as an executrix as a result of the differences the parties had regarding the applicant's status. In a letter dated 31 January 2022 the extent of the parties' discord was laid bare. In it the executrix chronicled what she believed were acts of impropriety on the part of the applicant with regards to the property which was left by the late Memory. There are allegations of misappropriation of funds and properties. The applicant was also informed that he was no longer allowed to carry out any duties at a company called BDP where it was alleged he had imposed himself as operations manager and was not submitting financial statements to the 1st respondent in her capacity as the executrix dative.

If there was need to act it was then and the applicant did act months later by filing applications seeking to remove the 1st respondent from the position of executrix dative and to be declared a spouse. The reason for such action appears to me to be more to do with control than anything else

The papers do not show that there was anything that happened over and above the issues which were evident right from the time of the late Memory's death, through to the appointment of the 1st respondent and the January impropriety allegations which would justify inaction then and action in March

2022. The harm sought to be averted is not clear or evident. It can therefore not be said the applicant will be justified to say if the court does not act it may as well not act subsequently because irreversible harm would have occurred.

The certificate of urgency does not say much either and that is telling. Self-created urgency is not the urgency contemplated by the rules. By self-created here I mean urgency which is motivated by a need to be in control without showing any harm such lack of control will have.

In *Gwarada v Johnson* 2009 (2) ZLR 159 the court had this to say:-

“Urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. The applicant must exhibit urgency in the manner in which he has reacted to the event or threat.”

What event occurred *in casu* which the applicant contemporaneously sought resolution of? What prejudice which is extreme is the applicant to suffer when one considers the papers filed of record which speak to a methodical manner in which the 1st respondent is seeking to ensure all the assets of the estate are accounted for and this can only be with a view to protect the interests of the beneficiaries.

Mr Dube referred the court to CHIRAWU-MUGOMBA J’s judgment in *Juliet Kadungure and 2 Others v Patricia Darangwa and Another* HH 85-21 in which the learned Judge considered that the matter in which the applicants were seeking a provisional order to interdict the 1st respondent from administering or dealing in the estate of Genius Kadungure on allegations that the will which had purportedly appointed her as executrix was fake and she was already disposing of property without a proper liquidation and distribution account, was urgent and deserving of an order interdicting the executrix pending the determination of an

application for review, as authority to the appropriateness of granting an interdict pending the resolution of some other litigation.

The learned Judge was satisfied the facts called for an urgent resolution as the applicants had made a case for urgency. The facts therein can be distinguished from the ones *in casu*. The allegations of impropriety in that case which were prejudicial to the interests of the beneficiaries were clearly articulated, unlike *in casu*.

The 1st respondent has demonstrated what she has done so far in ensuring that all the deceased's assets are accounted for and the steps taken to ensure any impropriety regarding the handling of such assets is addressed. The appointment of a curator who also made an inventory of all the deceased's property speaks to a process that does not support any fears of irreparable harm to the applicant, warranting treating the matter with urgency.

There is nothing on the papers remotely suggesting the improprieties that the learned Judge found in the Kadungure case (*supra*). The urgency in that case was therefore clear but not so *in casu*.

I am therefore not persuaded to accept that this matter must be allowed to jump the queue.

For completeness sake I will also look at the interim order being sought. The interim order has all the hallmarks of a final order. The use of the word "temporarily" just before the word "interdicted" does not change the fact that the effect of the relief sought is final in nature.

In *Movement for Democratic Change and Others v Timveous and Others* (*supra*) CHITAKUNYE JA had this to say:-

“The order granted did not require a return day and had no incentive for the parties to seek to come to court on a return date as it was granted pending the conclusion of other cases with their own procedures that were yet to be finalized. The effect of the order is that the first and second respondents obtained a final order, in this matter, on merely establishing a *prima facie* case. There was nothing to return to court for at all. Where the order does not provide for a return date, it is a final order as regards those proceedings and such must only be granted where a clear right has been established on a balance of probabilities.”

In casu the applicant seeks a provisional order to interdict the 1st respondent pending the finalisation of HC 4131/22 and HC 269/22 and for the Letters of Administration to be suspended pending the finalisation of the same 2 cases.

The final order only says the parties are to abide by the decision in the 2 cases, HC 413/22 and HC 269/22.

There is absolutely nothing provisional about the provisional order. It is final in effect and the parties have no reason to want to come back to court as such “provisional order” is meant to be so until the finalisation of cases which one does not even know at what stage they are. Whether it takes another 2 years or so before their resolution, the provisional order will be in place and once decided there is no reason to come back to court as the final order simply says the parties are to abide by such order. If it is a court order it is a given parties abide by it, otherwise they risk being held to be in contempt. There is therefore nothing in that final order that the applicant would be desirous to secure by returning to court after the granting of the interim relief.

In *Blue Ranges Estate (Pvt) Ltd V Muduviri* SC29/09, the Supreme Court had this to say:

“For an order to have the effects of an interim relief it must be granted in aid of, and as ancillary to the main relief which may be available to the applicant on final determination of his or her rights in the property”

The relief sought is therefore incompetent and I do not see how I can panel beat it so it becomes interim. I am not inclined to exercise my mind in trying to amend an order that ought not to have been so couched in the first place. The applicant is seeking a final order on the basis of *prima facie* proof and that is incompetent.

For the foregoing reasons I come to the conclusion that this matter is not urgent. I am however not persuaded to award punitive costs. I am unable to hold that applicant’s conduct is deserving of censure.

In the result I make the following order:-

1. The point *in limine* on lack of urgency be and is hereby upheld.
2. The matter be and is hereby struck off the roll of urgent matters.
3. The applicant shall pay costs of suit at the ordinary scale.

Mathonsi Ncube Law Chambers, applicant’s legal practitioners
Morris-Davies & Co, 1st respondent’s legal practitioners