

FIDELIA NCUBE

Versus

NKANYISO SIBINDI (EXECUTOR DATIVE)

And

**MRS ROSE DUBE N.O
ADDITIONAL MASTER OF THE HIGH COURT**

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 18 FEBRUARY AND 10 MARCH 2022

Opposed Application

G. Sengweni, for the applicant
Ms N. Mathumbu, for the 1st respondent

MOYO J: This is an application for condonation of the late noting of an application for review. Applicant seeks a review of the decision of the Master of the High Court to confirm the first and final liquidation and distribution account in the estate of the late Theminkosi Sibindi DRB 346/17 handed down at Bulawayo on 14 November 2014.

The applicant avers that she was customarily married to the late Theminkosi Sibindi without knowledge that he was already married. That together they acquired stand No. 5 York Road Hillside in Bulawayo and that she personally contributed \$23 000 USD being USD \$15 000 for the purchase of the property and that she also contributed \$8 000 USD towards the renovation of the house and improvements which included the erection of a perimeter wall. She says she also contributed US\$5 000 for funeral expenses. She avers that she thus has a claim for unjust enrichment against the estate. She thus seeks to file an application for review out of time, to set aside the decision of the Master to confirm the final liquidation and distribution account excluding her claim when in fact her claim was known to the respondents.

She submits that the cause of the delay in filing this application is that she was not aware that the respondents have since gone behind her back and finalised the estate.

Amongst the considerations to be taken into account in such an application are the prospects of success of the intended application for review.

The 1st respondent has opposed the application for condonation citing that the estate of the late Thembinkosi Sibindi was registered in 2017, and that applicant knew of its registration and should have acted to lodge her claim. 1st respondent contends that it could not have taken applicant 4 years to register her claim against the estate. 1st respondent also contends that applicant is not being truthful as at the meeting held with the Master she stated that she contributed \$10 000 and now before this court she is claiming that the amount she contributed is US\$23 000-00. Looking at what took place at the Master's office *vis avis* applicant's claim

- She was declared by the 2nd respondent as not being a surviving spouse and rightly so.
- She stated that she contributed US\$10 000 to the acquisition of the Hillside house and was mandated to bring her proof by 31 August 2019. She never presented any proof to the Master and to date there is no proof even to this court. The claim that she is laying before this court is at variance with the claim she laid before the Master.

At the hearing of this application, 1st respondent's counsel also submitted that there is no decision of the Master made on 14 November 2019 as claimed and that therefore applicant cannot seek to set aside a non-existent decision as the Master's decision to confirm the liquidation and distribution account is dated 3 March 2020 and not 14 November 2019.

No effort was made by the applicant to make an application for an indulgence to amend the draft order.

Clearly, the pertinent requirement that there must be prospects of success in the intended application for review has not been met in this case for the simple reason that up to now applicant does not present any proof of the unjust enrichment, neither does applicant provide flesh in her founding affidavit, to explain how much the property was bought for, how much the late Thembinkosi Sibindi contributed, when the property was purchased, the particulars of the transaction if any. It cannot be adequate in a claim for unjust enrichment involving an immovable property to simply state that during the subsistence of the marriage the parties purchased stand No. 5 York Road Hillside and that applicant contributed \$15 000-

00 towards its purchase and \$8 000 towards improvements. If the applicant was indeed involved in the purchase, she should certainly provide flesh to these averments even without receipts. The claim is just too vague and unconvincing.

A precise narration of how, when, from whom the house was purchased would have given some credence to her claim. What makes matters worse is that her letter of demand dated 8 September 2017 at page 52 of the bound record does not talk of her having personally contributed to the acquisition of the property. At the meeting with the Master of 8 August 2019 at page 46 of the bound record she stated that the house was bought in 2007 and that she contributed \$10 000 USD. The Agreement of Sale at page 43 of the bound record however shows that it was bought in 2011. However, she did not mention any improvements. In this application she now claims to have contributed \$15 000 USD towards the purchase of the house and an additional \$8 000 USD in improvements and renovations including a durawall. We are not told in precise terms what those improvements and renovations were. She further claims funeral expenses in the sum of \$5 000 USD. However, the Doves tax invoice at page 54 of the bound record which applicant's counsel pointed the court to as proof of the funeral expenses, paid by applicant firstly does not bear applicant's details where the customer's particulars are entered. It refers to one Mthokozisi Sibindi. Again, the sum stated therein is not USD\$5 000-00 as claimed by applicant but it is USD \$2 500-00.

The applicant has clearly failed to show this court that there are prospects of success in the intended application for review as it is riddled with factual inconsistencies and no plausible narration on the facts laying the foundation to the claim of unjust enrichment as well as lack of proof. The intended application for review is therefore hopeless in my view. There are clearly no reasonable prospects of success on review.

It is for these reasons that I find that the applicant has failed to make a case for the relief that she seeks and that therefore she is not entitled to it.

I accordingly dismiss the application with costs.