

ESTATE LATE TAWURAYI JOSEPH PUNUNGWE BENEFICIARIES  
versus  
OLIVER MASOMERA (N.O.)  
and  
THE MASTER OF THE HIGH COURT (N.O)  
and  
IGNATIOUS MAHWITE  
and  
TAPIWA KOMBORERAI PARIRENYATWA

HIGH COURT OF ZIMBABWE  
FOROMA J  
HARARE, 2 and 24 June 2021

**Opposed matter**

*L. Ziro*, for the applicants  
*B. Maruu*, for the 1<sup>st</sup> respondent  
*C. Chipuru*, for the 4<sup>th</sup> respondent

FOROMA J: This is an application for a review in terms of s 27 of the High Court Act [Chapter 7:06]. The applicants are beneficiaries in the Estate of the Late Taurayi Joseph Punungwe wherein the first respondent was appointed an independent Professional Executor dative in terms of s 26 (ii) of the Administration of Estates Act [Chapter 6:01]. Applicants brought a complaint to the second respondent against the first respondent in terms of which they sought the removal of the first respondent on the broad basis that the first respondent was not acting in the interest of both the Estate and the beneficiaries. The applicants' complaint was detailed in an application filed with the second respondent on the 28<sup>th</sup> August 2017 headed "Application for the removal executor". Although the index to the application refers to the application as "Court application for removal of Executor" the official heading reflects that the application was filed not in the High Court but in the Master of High Court's Court. Clearly therefore the application made to the Master cannot be regarded as an application to the High Court. Besides the case number allocated to the applicants' application aforesaid is DR No. 2910/16 and not the normal High Court Registry

number which is pre-fixed as HC. For this reason among others the first respondent's objection *in limine* that applicants had no *locus standi* to apply for the removal of the Executor in terms of s 116 as read with 117 of the Administration of Estates act could not be sustained.

Besides this argument is not legally supportable in light of the reasoning of MAKARAU J as she then was in the case of *Malyam Matsinde v Patricia Nyamukapa* HH 102/2000 wherein she opined as follows- "I pause here to observe that the removal of an executor dative in my view should primarily be done by the Master on good grounds shown. The appointment of an executor is an administrative function in the hands of the Master. It is therefore to him that allegations of unbecoming conduct by an executor should be made in the first instance. The decision of the Master to remove or retain the executor after complaints have been lodged with him is then brought on review to this court on the recognized grounds of review of an administrative decision." This clear procedural exposition has not to my knowledge been challenged in this jurisdiction and I have no reservations in accepting it as a correct statement of the law. Applicants are therefore correct in the manner they have sought to have their grievances with first respondent addressed. Indeed the Master of the High Court (2<sup>nd</sup> respondent) was not persuaded by the first respondent's objection *in limine* as he proceeded to conduct an inquiry into the complaints raised by the applicants on the 9<sup>th</sup> October 2017 the result of which inquiry is the subject of this application for a review. Pursuant to the said inquiry, second respondent made the following findings "Resolutions – Given the above mentioned submissions there is no substantial evidence that would warrant the removal of the executor. As such the executor should continue with the administration of the estate." Aggrieved by this result to their application applicants proceeded to file this application for review whose grounds for review were given as

- (1) The Master of High Court had an interest in the cause and or was biased against the applicants.
- (2) There were gross irregularities in the decisions made.
- (3) The Master of High Court did not act in a manner that was fair to the applicants and the Estate thereby prejudicing the beneficiaries.

In the founding affidavit in support of the application for review Muchineripi Punungwe (on behalf of the rest of the applicants) complained that First respondent sold the residential property in the estate being Stand 208 Malvern Township of Waterfalls Villa of Waterfalls (hereinafter called 208 Malvern Road) to one Tapiwa Komborerai Parirenyatwa for the sum of \$75

000.00 to the prejudice of the Estate and the beneficiaries who had come to know that one Ignatious Mahwite (third respondent) had offered to buy the said property for \$85 000.00. As it happened both third and fourth respondents had not been joined in the review proceedings as interested parties. Realizing that the third and fourth respondents including Malvern Dzvairo a trustee of the Falklands Family Trust which had allegedly purchased a farm from the late Punungwe (the deceased) but had not taken transfer were interested parties who had not been joined in the review proceedings the court directed that the said interested parties be joined in the review proceedings so that if advised to do so they could each file any documents to protect their interest. To this end the court postponed the review application *sine die* with the direction that once the 10 days dies had passed from the date of service of the review application on each of them the matter would be re-set down for hearing. The interested parties were duly served with the court application for review and only third and fourth respondents filed opposing documents. The matter did not get set down until recently for reasons that are not germane to this judgment. It is significant to note that despite being served with the court application for review Malvern Dzvairo did not participate in the review proceedings. In addition to filing a notice of opposition fourth respondent also filed a counter court application in terms of which he sought to eject applicants and those claiming occupation of the stand 208 Malvern Road through applicants from the said property. Fourth applicant eventually withdrew the counter court application which the applicants had opposed. Third respondent filed an opposing affidavit in which he expressed disappointment for being deprived the opportunity to purchase stand 208 Malvern Road for reasons not explained to him. He had however come to know much to his disappointment that the said property had been sold to another (fourth respondent) for \$75 000 despite his higher offer of \$85 000. Fourth respondent in its heads of argument initially raised points *in limine* which it abandoned at the hearing on the basis that they did not arise from the second respondent's inquiry. It however continued to participate in the proceedings opting to abide the decision of the court.

A perusal of the record of inquiry into applicants' application for the removal of first respondent from his position as Executor of the Estate of the late Punungwe reveals that:

- (1) the first respondent in his opposing affidavit to the application for his removal stated under oath that he sold the Waterfalls property to fourth respondent (Parirenyatwa) because the offer that third respondent made to purchase the Stand

208 Malvern Road which was made through Rawson an Estate Agent had not been followed through. First respondent repeated this contention in his opposing affidavit to the application for review - which he addressed as follows:

Ad Paragraph 3 “According to records there was never an agreement of sale entered into between me as the executor and Mr Mahwite. The purported agreement of sale was never perfected as it never materialized by reason of Mr Mahwite not complying with the terms of the said agreement. The purported agreement was considered invalid for failure to meet the time lines stipulated in finalising the deal. Mr Mahwite did not sign the agreement and same was not forwarded to my attention and upon inquiring from the estate agents I was advised that Mr Mahwite wanted a survey plan for cluster houses which we did not have because of the existence of a caveat encumbering the property in question. The property was never for cash because Mr Mahwite wanted to purchase through a mortgage bond.” (the underlining is for emphasis). For the avoidance of doubt this response was given by the first respondent in response to applicants’ complaint to the second respondent framed as follows:

3(iv) **“Applicants are at a loss as to the logic of preferring a buyer of a lesser offer on terms three days after the cash buyer of \$85 000 had signed the agreement of sale. All these stage managed tactics prejudiced the applicants. Applicants on this basis cannot resist harbouring the assumption that respondent (first respondent in the review application case) is connected to Tapiwa Komborera Parirenyatwa. In fact the applicant’s father’s property was sacrificed to nurture the relationship of the executor and his friends”**. The respective positions apparent from the passages quoted from the first respondent and applicants disclose deep rooted mistrust which second respondent needed to carefully investigate before he could come up with a conclusion one way or the other to the inquiry. There is however no evidence that the parties were allowed to put questions to each other’s witnesses in order to refute or prove the serious allegations made against the other. The agent whom the first respondent claimed he was in communication with on behalf of third respondent was not called at the inquiry to verify what transpired in the negotiation of the offer to purchase Stand 208 Malvern Road by third

respondent. There is no knowing whether what first respondent attributed to Rawson Properties was factually correct or not. It is worth noting that three apparently contradictory explanations were given in first respondent's opposing affidavit as to why the potential deal with third respondent collapsed and they are-

- (i) Mahwite was unable to comply with the terms of the said agreement
- (ii) Agreement was considered invalid for failure to meet the time lines stipulated in finalizing the deal
- (ii) Mr Mahwite would not sign the agreement and send it to first respondent because he wanted first to be furnished with a survey plan for cluster houses which first respondent did not have because of the existence of a caveat encumbering the property in question.

A perusal of the annexure C to applicants' application to second respondent for the removal of first respondent as executor raised an important point. Annexure C (on p 24 of the bundle of the application for review) is an irrevocable offer and acceptance by third respondent to purchase an immovable property being 27 A Cassino Avenue Waterfalls. For the avoidance of doubt 27 A Cassino Avenue in third respondent's irrevocable offer and acceptance is the same property referred to as Stand 208 Malvern Township of Stand 27 Malvern Township of Waterfalls Villa of Waterfalls in the draft Agreement of Sale between first respondent and third respondent. The important point raised and made in Annexure C reads as follows:

"The purchase price being offered is US85 000 (Eighty Five Thousand Dollars and payable as follows, (Please complete the applicable one) Conditional Mortgage/Loan from FBC within 30 working days from the date of signature of agreement of sale by both parties or full."

It is clear from this clause that third respondent could not have failed to meet this condition as suggested by first respondent herein above i.e. that third respondent failed to keep time lines as after third respondent signed the agreement on the 14 July 2017 as first respondent never signed the agreement of sale. This puts paid to any suggestion by first respondent that third respondent failed to meet time lines stipulated in finalizing the deal. It is also apparent that reference by first respondent to time lines stipulated in finalizing the deal is ample proof that first respondent was aware of the third respondent's irrevocable offer and acceptance signed on the 25 June 2017. By parity of reasoning first respondent could not have objected to signing the agreement with third respondent on account of his alleged insistence that he be furnished with a survey plan of cluster

houses as there was no reference to such condition in the irrevocable offer and acceptance document aforesaid. It is not clear how the second respondent resolved the dispute of fact in relation to the positions adopted by the applicants and first respondent regarding why sale of the Stand 208 Malvern was not made to third respondent without calling further oral evidence from the Estate agent which at any rate was first respondent's agent as is apparent from para 1 clause 14 of the draft agreement of sale on p 25 of the bundle which incidentally encompasses the condition of the irrevocable offer and acceptance quoted herein above. A reading of the record of inquiry also shows clearly that the second respondent did not make any reference to or seek to comment on the parties conflicting versions in respect of what had actually transpired in relation to the purchase of 208 Malvern Road property. In the absence of reasons justifying preference of one party's version to the other (rejection of the other) it is difficult to blame applicants for the inference of bias raised against the second respondent. Put differently it is grossly irregular to find in favour of one party without giving reasons for the rejection of the evidence led by the party contesting such finding. *In casu* it was grossly irregular for second respondent to find in favour of first respondent without hearing Rawsons and also without giving the reasons for rejecting applicants' evidence. Applicants also argued that second respondent's decision was based on a total misunderstanding of the applicants' case which is apparent from what the second respondent recorded as Surrounding Circumstances. Second respondent misunderstood one of applicants' complaints by finding that Hungwe Legal Practitioners acted in circumstances giving rise to a conflict of interest i.e. between their role in HC 4337/17 wherein they instituted an action in the name of first respondent for the ejection of Dzvairo from the late Punungwe farm and their representing applicants in the application for the removal of the first respondent. There is no conflict at all in fact as in both cases Hungwe Legal Practitioners were acting in the interest of both the Estate of the Late Punungwe and its beneficiaries. Besides such a finding had no relevance to the application for the removal of first respondent nor was the issue of conflict of interest raised by first respondent. The finding of a conflict of interest when none of the parties raised it as an issue shows that second respondent was acting on a frolic of his own which made it irresistible for applicants to infer bias on the second respondent's part. Such conduct is unfair on the part of an administrative functionary. It is also a violation of the applicants' right to administrative justice

conferred in terms of s 68 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 which reads as follows:

“Every person has a right to administrative conduct that is lawful prompt efficient, reasonable proportionate impartial and both substantively and procedurally fair”

The second respondent also found as one of the bases for the conclusion he reached at the inquiry that the independent executor was not imposed on the parties as the provisions of s 26 of the Administration of Estate Act [*Chapter 6:01*] were the ones followed in first respondent’s appointment. This finding is another illustration of gross irregularities as the second respondent either misunderstood applicants’ or again went on a frolic of his own. None of the applicants had complained that second respondent imposed first respondent on them as executor dative of the Estate Late Punungwe. A perusal of the record of the inquiry conducted by second respondent shows the following submission as having been made by applicants’ counsel (Mr Zenda). “He (Mr Zenda) also submitted that the Masters office is a statutory board (*sic*) created to assist vulnerable person(s) as such the Master should not impose an executor who is being refused by all beneficiaries”. It would appear that the finding under discussion was a misunderstanding of applicants’ counsel’s submission which when properly understood was a plea by counsel on behalf of his clients/ (beneficiaries) that the second respondent ought not retain the first respondent as Executor in the Estate of late Punungwe as to do so would be tantamount to imposing first respondent on the applicants when the applicants no longer found him acceptable. Clearly therefore applicants are justified in their grievance that the second respondent had committed gross irregularities by making findings on matters which were non issues before him.

The second respondent also found that Messrs Hungwe Legal Practitioners had no mandate to institute the action for the ejection of Dzvairo from the Late Punungwe’s farm. This finding arose from the fact that Hungwe and Partners had instituted eviction proceedings against one Dzvairo (an interested party) who purportedly bought a farm from the Late Punungwe directly during his life time at a time the deceased was under a legal disability as a result of which a curator *bonis* had been appointed to manage his affairs. Dzvairo had since moved onto the farm and was now demanding transfer of the farm from first respondent as Executor. Mr Zenda had indicated at the inquiry that indeed Hungwe and Partners had instituted the said proceedings in the name of the Executor on the instructions and at the instance of the beneficiaries as this matter had been under

his charge before the deceased's death as deceased's legal practitioners. It was common cause at the inquiry that although first respondent had not expressly instructed Hungwe Legal Practitioners to seek Dzvairo's eviction first respondent had been informed of the circumstances surrounding the legal practitioners' role in the institution of the eviction proceedings which he (first respondent) did not disown. In fact but for Hungwe and Partners legal action first respondent would have instructed his own legal practitioners to take the same legal action against Dzvairo. Second respondent showed apparent bias by suggesting that the action taken by Hungwe and Partners Legal Practitioners was not within their mandate in the circumstances as there was no prejudice to either first respondent, the Estate or the beneficiaries arising from the action taken by Hungwe Legal Practitioners who at any rate had been authorised by the beneficiaries to protect the interest of both the Deceased Estate and beneficiaries. Beneficiaries would not have taken kindly to first respondent's uncalled for remark in his letter dated 11 August 2017 to Hungwe and Partners wherein he said --- "Kindly let us have the said Court order and we put it on record that legal costs incurred during the process shall not be borne by the Estate but by the beneficiaries who instructed you"- this as if the work done was unlawful or prejudicial to the deceased estate. It was this kind of attitude on first respondent's part which worsened an already poisoned relationship which had developed between applicants and first respondent which second respondent did not seem to have appreciated.

Lastly second respondent found that the beneficiaries were interfering with the mandates of selling estate assets. This finding is not only not supportable on the evidence but unfortunately a misinterpretation of the position of the applicants (or at the very least some of them). By insisting on the higher offer of \$85 000 for the Stand 2008 Malvern Road applicants were not interfering with first respondent's mandate to sell the property but seeking the best deal in their interest and that of the Deceased Estate. There was nothing wrong with the idea of offering to buy out other beneficiaries if that was acceptable to the rest. First respondent does not appear to have appreciated the need to save some of the estate assets from disposal to 3<sup>rd</sup> parties if that could be achieved by agreement of the other beneficiaries through buying others out as suggested. First respondent does not appear to have given any of the applicants intending to buy others out an opportunity to provide evidence that there was no objection by other beneficiaries to the idea before dismissively requiring them to make offers to purchase the house like any other interested 3<sup>rd</sup> party. This finding by

second respondent of interference by beneficiaries in the disposal of state assets not being supportable on the evidence can well justify applicants' feeling of being hard done unfairly by the second respondent and their suspicion that the second respondent's findings can only be explained on the basis of bias in favour of first respondent.

The second respondent in his ruling at the end of the inquiry said the following- "In view of the aforesaid observations and for the purposes of s 116 of the Administration of Estates Act, from the submissions made there is not enough evidence to warrant the removal of the executor." Having found herein above that the findings by second respondent under surrounding circumstances per record of inquiry to a large extent are a result of the second respondents misunderstanding of the issues and/or having gone on a frolic of his own the court is satisfied that applicants have successfully demonstrated that the second respondent's decision was influenced by bias and a result of gross irregularities.

#### Disposition

In the result it is ordered that

1. 2<sup>nd</sup> respondent's determination that 1<sup>st</sup> respondent be retained as the Executor Dative in the Estate of the late Tawurayi Joseph Punungwe DR 2910/16 be and is hereby set aside.
2. 1<sup>st</sup> respondent be and is hereby removed as executor in the Estate of the Late Tawurayi Joseph Punungwe
3. 2<sup>nd</sup> respondent shall appoint another independent professional executor complete the winding up of the Estate of the Late Tawurayi Joseph Punungwe
4. 1<sup>st</sup> respondent shall pay the costs of this application.

*Dzoro and Partners*, applicants' legal practitioners

*Zuze Law Chambers*, 1<sup>st</sup> respondent's legal practitioners

*Messrs Charamba and Partners Legal Practitioners*, 4<sup>th</sup> respondent's legal practitioners