SIPHO LEONARD BULLE
versus
BEKITHEMBA BULLE
and
ABDULLAH ESMAIL KASSIM
and
MASTER OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 23 February & 26 May 2022

Opposed Application

Mr TZ Mazhindu, for the applicant
Mr T Mpofu, for the 1st respondent
No appearance by 2nd and 3rd respondents

1. TSANGA J: This is an application in which the applicant seeks to remove the first and second respondents as executors and testamentary trustees of the estate of the late Ernest Leonard Bulle who died in 1996. He also seeks the revocation of their letters of administration granted by the Master cited herein who is the third respondent. The applicant additionally seeks that the Master appoints two new executors to administer the estate.
2. The parties initially appeared before me for a hearing on the 29th of November 2021. At that hearing, a request was made to postpone the matter in order to allow the Master to file a report regarding the winding up of the now disputed estate. Indeed, the Master's report having been officially requested and availed, the matter was re-set down for hearing on the 23rd of February 2022.
3. At the resumed hearing, Mr Mpofu who appeared on behalf of the first respondent voiced his objections to the report because he deemed the Master to have taken a position in favour of the applicant instead of sticking to the factual averments

regarding the winding up process. To give context to the objection, suffice it to say that on the factual aspects, the report did indeed give a historical account of the estate and the steps taken to wind it up, including the properties which the Master had agreed that the Executor could sell. It also indicated that the estate having been wound up, the Master's office had become *functus*. However, in view of concerns raised by the applicant's lawyers in 2020, the Master had convened a meeting in December 2020 whereupon he had advised he parties to approach the court as the meeting had been unfruitful because the Executor, (being the 1st respondent) who resides in Australia, was not present. Further, in view of allegations now placed before him that the Executor had not discharged his duties properly, the Master now concluded that closure of the estate had not been achieved since no proof of transfer of inheritance had been furnished. Against this background, the Master had then indicated that there was no objection to the granting of the relief being sought by the applicant.

4. It is with respect to this purported conclusion that Mr Mpofu argued that the report was therefore of no use regarding the purpose for which it was sought, being that of assistance to the court from an independent source on the processes of estate administration that had taken place. He decried the practice where the Master is quick to adopt a position and urged the court to set out parameters as far as court's expectation on the discharge of the Master's duties when such reports are requested.

5. I am inclined to agree and comment that where the Master's report has been sought in circumstances which require him or her to outline what transpired in the official process with respect to the winding up of an estate, it is the factual processes and procedures that took place that should form the ambit of the report. Where such report is requested in view of a dispute already before the court, it is certainly not for the Master to conclude how a court should decide. It is for the court to reach its own informed conclusion based on the full averments of the factual circumstances and procedural processes that took place. It is not the opinion of the Master as to what should happen that is sought but rather an account of what actually happened.

6. Regarding the matter before the court, several points *in limine* were thereafter raised at the hearing. The first was that there was no valid service of the application on the first respondent who resides in Australia. An order on record that had been granted to the applicant in May 2021 before a different judge had not stipulated the manner of

service but had merely authorised that the first respondent who lives in Australia be served with an application for his removal as one of the executors. Mr Mpofu argued that service is only good if conducted according to directions given by a judge for service outside this jurisdiction. In this instance there was said to be no valid proof of service even though there was an affidavit of service by one Sarah Renee Bellchambers who had served the respondent with the application. Materially, Mr Mpofu's argument was not that the first respondent had not received the application. Indeed, every indication was that he had in fact received his application which is why he was able to respond to the application. The point *in limine* is purely technical and lacks merit in this instance and is accordingly dismissed.

7. Secondly, the applicant was said to have no *locus standi* to approach the court as he is not a beneficiary of the estate but is a beneficiary in testamentary trust created by the will. As such, he was said to have no right to deal with issues relating to the estate. The applicant's argument being that the application cannot be brought by the Trust because there is one Trustee, he argued that where a trustee is unable to act, the remedy is set out in the Companies and Trusts Act [*Chapter 24:04*] which provides in s 7 that if Trustees are unable to Act and there is no provision in the document creating the Trust, a party who desires to act must approach the court for the appointment of a trustee who would then litigate. Reference in this regard was made to the case of the *Trustees of the Leonard Cheshire Homes Zimbabwe Central Trust* v *Robert Chiite* HH 267/2010 in which this point was made in relation to the relevant section above. This court is inclined to agree with the point *in limine* as there is no reason why the section could not have been resorted to in order for a trustee to be appointed to fill the void that prevented the application from being brought by the Trustees as required on behalf of beneficiaries.

8. Thirdly, in so far as the applicant seeks the removal of an executor, Mr Mpofu pointed out that there are procedures to be followed as laid out in s 116-117 of the Administration of Estates Act [*Chapter 6:01*]. Essentially in terms of s 116, if a complaint is received concerning an executor, the Master is required to look into the matter and may require to be furnished with information. Additionally, in terms of s 117, the Master may apply to a judge in Chambers for the removal of an executor on grounds being shown why this is necessary. Further, what is taken on review is the

Master's failure to act. Mr Mpofu therefore highlighted from this that the Master is not taken to court for removal of an executor since it is only the decision of the master which could have been reviewed. Furthermore, he highlighted that the order granted on 13 May 202, alluded to above, had also directed the Master to appoint two executors to administer the estate of the late Leonard Bulle albeit incompetently so since the procedures of the removal of any executor had not at all been followed. His submission was that the order in question is in fact still extant however incompetent it may have been in ordering the appointment of two executors where the procedures for the removal of an executor were not followed. Mr Mazhindu's argument that this was an error. It does not help him. The fact is that this application in this regard purports to seek that which is contained in an order where nothing was been done regarding the defects in that order. The point *in limine* is therefore upheld that there are processes which were never observed herein regarding the removal of an executor and which make the present application incompetent.

9. Mr Mpofu also raised two other points *in limine,* one relating to prescription and the other relating to fatal non joinder of other interested parties. As regards, prescription suffice it to say the submission was that the applicant having become a major in 2004, there was no reason why he had not brought any litigation for a cause of action which he says arse in 2002. The estate was finalised in 2008. The time periods for complaints relating to the sale of various properties was thus said to have run out. Furthermore, the estate had been wound up and no complaints were received. However, in view of two crucial points *in limine* having already been upheld which non suit the applicant, it is not necessary to delve into these additional ones.

Accordingly:

The points *in limine* are up held and the application is dismissed with costs.

Mugomeza & Mazhindu, Applicant's Legal Practitioners
TH Chitapi & Associates, First Respondents Legal Practitioners