

JOANA CHITIGA

and

PATRICIA MUDZVITI

and

ROSEMARY RASHAMIRA

and

PATRICIA MATSIKIDZE

And

IRENE MUTAIZA

versus

ELIZABETH DIANA MATSIKIDZE

(in her capacity as the Executrix Dative of the Estate of the late Sinai Alias Zinai and executrix Dative of the Estate of the Late Lucas Matsikidze)

and

CHIWORD INVESTMENT TRUST

And

MASTER OF THE HIGH COURT BULAWAYO N.O.

And

ASSISTANT MASTER OF THE HIGH COURT MASVINGO N.O.

And

REGISTRAR OF DEEDS HARARE N.O.

HIGH COURT OF ZIMBABWE

ZISENGWE J

MASVINGO, 23 March 2021 & 13 October 2021

Opposed Matter

E.Y. Zvanaka for the applicant

G. Nyoni for the respondent

ZISENGWE J: The Zinai family (or at least part of it) of the Mshagashe area of Masvingo is mired in an intractable dispute stemming from the following set of facts. The late Sinai Alias Zinai died almost half a century ago, in 1972 to be precise. He died intestate. For yet unexplained

reasons his estate remained dormant for some 44 years in the sense of it not having been formally registered and wound up in terms of the law. It was not until 2016 that his paternal granddaughter, Elizabeth Diana Matsikidze (the 1st respondent) approached the Assistant Master of the High Court at Bulawayo for its registration and winding up. The said estate was registered under cover DRB 1087/16. The said Elizabeth Diana Matsikidze is the daughter of one of Zinai's sons, Lucas Matsikidze.

Incidentally the said Lucas Matsikidze (hereinafter referred to simply as "Lucas") died sometime in 1991. He also died intestate. As with that of his father before him, his estate would also lie dormant for a considerable period of time and was also duly registered by the 1st respondent in 2015 with the Additional Assistant Master of the High Court at Masvingo. This was under cover WE 189/2015.

These two deceased estates mirror each other in many material respects. Firstly, in both instances they were registered at the behest of the first respondent. Secondly in both instances the 1st respondent was appointed executrix of the respective estates. Thirdly, in both instances the sole asset for distribution was the farm (or part thereof) left behind by the late Zinai and finally in both instances the 1st respondent was declared sole beneficiary of the estate.

The certificate of authority issued by the Additional Assistant Master of the High Court sitting at Masvingo in respect of the estate of the late Lucas Matsikidze in the course of the administration of that estate states as follows:

"Farm 235 Mushagashe is awarded to Elizabeth Diana Matsikidze daughter of the Deceased ID No. 08-024864C22."

The summary Liquidation and distribution Account in the estate of the late Sinai Alias Zinai on the other hand concludes as follows:

"AWARDED AS FOLLOWS TO ELIZABETH DIANA MATSIKIDZE IN TERMS OF THE GENERAL LAW OF INTESTATE SUCCESSION-

Proceeds from sale of a piece of land containing 438 Morgen 172 square roads (375,4004 hectares) being the farm Holding Mshagashe 235 situate in the district of Victoria.

Executors note:

A piece of land containing 438 morgen 172 square roads (375, 4004 hectares) being the farm holding Mshagashe 235 situate in the district of Victoria, to be transferred to CHIWORA TRUST in terms of the agreement of sale dated 16 May 2017."

In this latter regard, it is common cause that prior to the winding up of the estate of the late Zinai, the 1st respondent sold the farm to the Chiwora Trust which was cited in this application as the 2nd respondent. The purchase price was US\$90 000.

Enter the applicants. The five applicants all claim to be descendants of the late Zinai and therefore legitimate potential beneficiaries of his estate. They claim that the 1st respondent who was all along aware of their existence and entitlement to the estate of the late Zinai clandestinely and fraudulently registered both estates to their exclusion and prejudice. They all deposed to affidavits wherein they indicated that they were shocked to unearth the 1st respondent's deviousness and deceit in laying sole claim to the entire estate of the late Zinai. The 1st applicant Joana Chitiga claims to be the daughter of the late Zinai. She attached to this application a copy of her birth certificate indicating her name as Joana Zinai the daughter of Joseph Zinai and Elizabeth Machededze. She explained in the founding affidavit that the late Sinai alias Zinai was also known by the names Joseph Zinai and Sinai Matsikidze. She indicated that as per Roman Catholic church tradition Zinai acquired a Christian name at Baptism. To that end he adopted the name Joseph which explains the apparent disparity in the names appearing in the birth certificate.

The 2nd and 3rd applicants namely Patricia Mudzviti and Rosemary Rashamira, respectively, also claim to be the daughters of the late Zinai. Should this be true, this would make the first three applicants 1st respondent's paternal aunts. The 4th and 5th applicants namely Patricia Matsikidze and Irene Mutaiza respectively, on the other hand, claim to be paternal granddaughters of the late Zinai. According to them they are children of the late Zinai's sons David and Phillip both of whom, as with most of Zina's children are now deceased.

As stated earlier, the applicants' contention in the main is that their exclusion from matters attending to the registration of the estate of the late Zinai and the resultant distribution of the assets thereof was not only irregular but was downright fraudulent. Flowing from this basic premise is the contention that whatever processes that may have purportedly stemmed from or hinged upon that process constitute a nullity and should be declared as such by this Court. In the latter regard they chiefly seek the cancellation of the purported sale of the farm (or part of it) by the 1st applicant to the Chiwora Investment Trust and a nullification of the subsequent registration of the same with the Deeds Office. They therefore seek in the wake of such declaration of nullity a process of the administration and distribution of the estate of the late Zinai which includes them.

The terms of the relief they all seek are captured in the draft order attached to the application which reads as follows:

IT IS HEREBY ORDERED THAT: -

1. The estate of the late Sinai Alias Zinai registered under **DRB 1087/16** be and is hereby declared open.
2. The appointment of the 1st Respondent as executrix Dative in the Estate of the late Sinai Alias Zinai registered under **DRB 1087/16** be and is hereby set aside.
3. The approved Summary Liquidation and Distribution account of the late Sinai Alias Zinai **DRB 1087/16** be and is hereby set aside.
4. The estate of the late Sinai Lucas Matsikidze registered under **WE 189/15** be and is hereby declared open.
5. The approved Summary Liquidation and Distribution account of the late Lucas Matsikidze under **WE 189/15** be and is hereby set aside.
6. The agreement of sale between the 1st Respondent in her capacity as the Executrix Dative of the estate of the late Sinai Alias Zinai and the 2nd Respondent in respect of the property known as the **Remaining extent of farm holding Mshagashe 235 measuring 187. 1448 hectares** be and is hereby set aside.
7. The transfer of the **Remaining extent of farm holding Mshagashe 235 measuring 187. 1448 hectares** from the of the estate of the late Sinai Alias Zinai to the 2nd respondent on 27th June 2019 in terms of Deed of transfer **No. 3912/19** be and is hereby set aside.
8. The 5th Respondent be and is hereby ordered to reinstate title of the **Remaining extent of farm holding Mshagashe 235 measuring 187. 1448 hectares** to the estate of the late Sinai alias Zinai.

This application is resisted in its entirety by the 1st respondent. Likewise, it is vigorously opposed by the 2nd Respondent. The 1st Respondent's principal argument is that the first two applicants are completely unknown to her and as such, they cannot conceivably be her late paternal grandfather's children. She further claims that she only knows the 3rd applicant a person who resided at a farm adjacent to the one in question. She also questions the *locus standi in judicio* of the 4th and 5th applicants as they are not the children of the late Sinai Alias Zinai. Further it is her position that everything that she did in the registration and winding up of both estates was above

board. She denies making any false representations in the official winding up of those estates let alone having acted with fraudulent intent. She also vouched in her opposing affidavit that the farm which forms the subject matter of the dispute namely Remaining extent of farm holding Mshagashe 235 measuring 187. 1448 hectares was to the best of her knowledge sold by the late Zinai to her father Lucas and as such being the only surviving child of the latter she was entitled to the sole inheritance of the same.

The contention of the 2nd Respondent in opposing the application is that it cannot be deprived of property (namely the farm) which it purchased in the ordinary course of business pursuant to what it perceives to be a regular process of the winding up of a deceased estate. It was further averred on its behalf that it purchased the farm after conducting due diligence and after carrying out a physical inspection of the same. In a word therefore, it is contended on its behalf that as an innocent and *bona fide* purchaser of that property and no allegation of impropriety having been alleged let alone proved against it, it is entitled to its retention and the dismissal of the application.

Both 1st and 2nd respondents however raised a number of preliminary objections to the application which they consider as being dispositive of the matter and it is to these that I now turn.

The Question of the Citation 1ST Respondent

Here, the 1st Respondent questions in the main the propriety of her being cited as executrix dative of the estate of the late Sinai Alias Zinai when she has since been discharged from that role by the Master pursuant to the due winding up of that estate. Further it is contended that the estate of the late Sinai Alias Zinai not having been opened it was remiss on the part of the Applicants to pursue a claim against the 1st Respondent in her capacity as the executrix dative thereof. The corollary of the argument being that that legal entity no longer exists and that therefore renders the application fatally defective. According to the 1st Respondent the proper avenue open to the Applicants in these circumstances was to sue the 1st Respondent in her personal capacity. Authorities were cited for the general proposition that the citation of a non-existent person constitutes a nullity.

The Applicants presented what appear to be three complimentary contra-arguments. Firstly, they deny any remissness in citing the 1st Respondent in her capacity as Executrix Dative given that the raft of reliefs sought can only come into existence once she (i.e. 1st Respondent) is

ordered to vacate that position and the estate is re-opened. Secondly, they contend that the present application chiefly attacks the actions done by the 1st Respondent in her capacity as the executrix dative of the estate of the late Sinai Alias Zinai. Thirdly they contend that the citation of the 1st Respondent in her capacity as executrix Dative of the said estate does not prejudice her given that she would in any event be the same person to be served with (and required to respond to) the present application.

The sole issue for consideration therefore is whether the citation of the 1st Respondent in her capacity as the executor dative of the two estates and the concomitant failure to cite the 1st Respondent in her personal capacity renders the application fatally defective given that the two estates have since been wound up and the executor has since been discharged.

It is pertinent to note that the raft of reliefs sought, comprising the re-opening of the two estates, the removal of the 1st respondent as executor dative and other ancillary relief thereto are essentially against each of the two deceased Estates.

In Erasmus “Superior Court Practice” 2nd Edition at D1-199, the learned author had the following to say about the citation of deceased estates:

*“Deceased Estates. The executor is the representative of the deceased’s estate and he is the party to sue or be sued as representing the estate. It is not possible to issue process in the name of the deceased estate itself. **This continues to be position even after the executor has filed his account and distributed the assets, See Scheepers v Kerkraad of the DRC Alexandria EDL 66.**” (Emphasis mine)*

That puts paid to the argument that the citation of the 1st Respondent in her representative capacity as the executor dative of each of the two estates in question constitutes a nullity. I say this mindful of the fact that in *Katirawu v Katirawu and Ors* HH 58-2007 the court entertained a similar application where the Executor was cited in his personal capacity. Accordingly, I dismiss this first preliminary point.

The Question of the Citation of the Chiwora Trust (the 2nd Respondent).

The argument by the 1st and 2nd Respondents in this regard is that the application is fatally defective for want of legal personality (hence *locus standi in judicio*) on the part of the 2nd Respondent. The Applicants hold a contrary view and insist that the rules of court allow a departure from the common law position and permit a trust to be cited as a party to a civil suit.

The question of the legal personality of a trust if any is well trodden ground. The trite legal position under the common law is that a trust lacks legal personality and hence the capacity to sue

or be sued. In *Veritas v Zimbabwe Electoral Commission & Others*, *FIRINE Trust also known as Veritas v Zimbabwe Electoral Commission and Ors* SC 103/20, GOWORA JA (as she then was) referred to the following passage on the citation of trusts from the book Herbstein & Van Winsen, *Civil Practice of the High Courts of South Africa* by the learned authors Cilliers, Loots & Nel:

“A trust is not a legal persona, but a legal institution sui generis. Therefore, it must be sued in the name of the trustee or trustees. However, when the trust itself has been cited, the courts have allowed the correction of the citation. Unless one of the trustees is authorized to act by the remaining trustee or trustees, all the trustees must be joined in suing and all must be joined when an action is instituted against a trust. The trustee should be cited in their representative capacities.”

Similarly, in *Commissioner for Inland Revenue v MacNeillies’s Estate* 1961 (3) SA 833 (A) at 840 the following was said in relation to the legal nature of trusts:

“Like a deceased estate, a trust, if it is to be clothed with juristic personality, would be a persona or legal entity consisting of an aggregate of assets and liabilities. Neither our authorities nor our courts have recognised it as such a persona or entityIt is trite law that the assets and liabilities in a trust vest with the trustee”

See also *Crundall Bros (Pvt) Ltd v Lazarus NO & Another* 1991 (2) ZLR 125 (S); *Ignatious Musemwa and others v Estate Late Mischeck Tapomwa and other* HH-136-16, See *CIR v McNeillie’s Estate* 1961(3) SA 840; *Braun v Blann and Botha* 1984(2) SA 850, *CIR v Friedmann* 1993(1) SA 353(A). *Women & Law in Southern Africa Research and Education Trust and Elizabeth Shongwe and Ors* HH 202 /03.

The rigid common law position regarding a trust’s lack of capacity to sue has however since been altered by statutory intervention. The old High Court Rules (High Court Rules, 1971) which were applicable when this application was instituted provided in Order 2 rule 8 as follows:

8. Proceedings by or against associations.

“Subject to this order, associates may sue and be sued in the name of their association.”

Trusts and trustees are specifically provided in Rule 7 as being Associations and associates respectively.

Rule 8D on the other hand provides as follows:

8D. Order not to affect liability or non-liability of associates

This Order shall not be construed as affecting—

- (a) the entitlement of an associate to institute proceedings on behalf of his association or fellow associates;

or

- (b) the liability or non-liability under any other law of associates for the conduct of their association or of their fellow associates.

I briefly digress here to observe that the same provision has for all intents and purposes been carried forward to the new High Court Rules, 2021.

The following cases all echo the same interpretation of the above provisions namely that they permit a departure from the common law position by allowing the citation of a trust as a party to legal proceedings; *Benatar Children’s Trust* HH-124-17; *Ignatious Musemwa and Others v Estate Late Mischeck Tapomwa and Others (supra)*; *Women & Law in Southern Africa Research and Education Trust and Elizabeth Shongwe and Ors (supra)*.

In *Benatar Children’s trust (supra)* for example, the following was said per CHITAKUNYE J (as he then was) at page 2 of the cyclo-styled judgment:

“It must be apparent that the rules do give leeway for associates to sue in the name of their association or trust as is the case here.

In Gold Mining and Minerals Development Trust v Zimbabwe Miners Federation 2006(1) ZLR 174 the summons had been issued in the name of the Trust as is the case here. At page 178A-C MAKARAU J (as she then was) had this to say:

“As the law currently stands, a trust is not a legal person and therefore cannot be defamed. The trustees themselves retain the capacity to sue for damages for their injured fama collectively or individually.

In casu, I accept that in terms of the rules of this court, trustees may issue out process in the name of the Trust. The permission granted by the rules to use the name of the association where associates sue or are sued is merely for convenience and does not change the legal status of the association. Rule 8D clearly provides that the provisions of the order should not be construed as affecting liability or the non-liability of the associations for the conduct of their association or associates.” (Emphasis mine)

Similarly, in *Ignatious Musemwa and others v Estate Late Mischeck Tapomwa and other HH-136-16*, DUBE J (as she then was) had this to say:

*“These rules modify trust law to permit and create locus standi for a trust. The rules give a trust independent locus standi from its trustees... I also come to the conclusion that a trust is merely a legal relationship and is not at common law a legal persona. **Rules 7 and 8 permit a trust to sue and be sued in its own name.**”* (emphasis mine)

Finally, in *Women & Law in Southern Africa Research and Education Trust and Elizabeth Shongwe and Ors* HH202-03 CHINHENGO J. had this to say:

*“...the High Court Rules 1971 as amended by the High Court of Zimbabwe (Amendment) Rules 1997 (No. 33), (S.I. 192 of 1997), introduced a procedure where associates may, in terms of r.8, sue or be sued in the name of their association. **In terms of r.7 an association includes a trust and an associate, a trustee. The rules therefore permit a trust to be cited by name as a party to any proceedings.**”* (Emphasis mine)

The contention that this application ought to be dismissed for want of legal personality (and hence *locus standi*) of the 2nd Respondent cannot therefore be sustained.

Whether or not there are material disputes of fact

This was a question that I raised *mero-motu*. I enquired from the counsel whether or not there were material disputes of fact, particularly given that the 1st Respondent disputed that some of the Applicants were offspring of the late Zinai as well as the true ownership of the farm (or part thereof) which forms the main basis of the application. Whereas counsel for the 1st Respondent was somewhat ambivalent in this regard, counsel for the Applicant insisted that the factual disputes raised by the Applicant are a mere façade meant to obfuscate issues. I think not.

The test of whether or not there are disputes of fact rendering the case insoluble without leading oral evidence was succinctly laid out by MAKARAU JP (as she then was) in *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H) at 136 F – G where she said the following:

“a material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence”

In the same vein it has often been said that a real dispute of fact arises when the respondent denies material allegations made by the deponents on the applicants behalf and produces positive evidence to the contrary; see *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T); *R. Bakers (Pty) Ltd v Ruto Bakeries (Pty) Ltd* 1948 (2) SA 626 (T); *Plascon – Evans*

Pains Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623(A). Finally, whether or not a real and genuine dispute of fact exists is a question of fact for the court to decide, see *Ismail and Another v Durban City Council* 1973 (2) SA 362(N) at 374.

Without limiting the scope of factual disputation as between the parties I will only refer to two key factual disputes. Firstly, regarding the question of whether or not the Applicants are indeed the biological offspring of the late Zinai, the parties hold diametrically opposite positions. Whereas the 1st Respondent insists that the 1st two Applicants are impostors who literally surfaced from nowhere to lay false claim to an inheritance which does not belong to them, those applicants on the other hand maintain that they are legitimate offspring of the late Zinai. This is not an issue that can be resolved on affidavit evidence.

Secondly, the question of the allegation by the 1st Respondent that the late Zinai sold part of his farm to her (i.e. 1st Respondent's) father is fiercely disputed by the Applicants. There being no written agreement of sale to support the same and given the passage of time from the alleged sale, it is virtually impossible in my view to rule one way or the other on this crucial issue without the leading of evidence.

Ultimately, therefore I do find that there are material disputes of fact incapable of resolution without hearing further evidence.

In *Musevenzo v Beji & Anor* HH 26-13 MAFUSIRE J summarised the options available to the court when confronted in application proceedings with material disputes of facts. He synthesized these options thus:

- “[1] The court can take a robust view of the facts and resolve the dispute on the papers; see *Masukusa v National Foods Ltd & Anor* 1983 [1] ZLR 232 [H]; *Zimbabwe Bonded Fibreglass [Pvt] Ltd v Peech [supra]*; *Van Niekerk v Van Niekerk & Ors* 1999 [1] ZLR 421 [SC] and *Room Hire Co [Pty] Ltd v Jeppe Street Mansions [Pty] Ltd [supra]*
- [2] The court can permit or require any person to give oral evidence in terms of r 229B of the Rules if it is in the interests of justice to hear such evidence;
- [3] The court can refer the matter to trial with the application standing as the summons or the papers already filed of record standing as pleadings; see *Masukusa's* case above,
- [4] The court can dismiss the application altogether if the applicant should have realised the dispute when launching the application; see *Masukusa's* case above;

Savanhu v Marere NO & Ors 2009 [1] ZLR 320 [S]; *Plascon- Evans Paints Ltd v van Riebeeck Paints [Pty] Ltd* 1984 [3] SA 623 [A].”

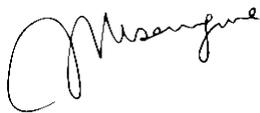
The present case to my mind does not fall into that category where the applicant ought to have realised that disputes of fact were inevitable and therefore should be punished by a dismissal of the application as did happen in the *Masukusa* case. The denial by the 1st Respondent, for example of applicants’ relationship to the late Zinai is in all probability one they (i.e. applicants) could not have reasonably foreseen. I also do not believe that this is a matter where the court can take a robust approach and try resolve the dispute on affidavit evidence. Such a course of action would require the court to make far too many assumptions and suppositions particularly on events which took place or did not take place decades ago.

Equally unsuitable as an option is to confining the leading of evidence to a specific aspect or aspects given the inter-relatedness and convoluted nature of the areas of dispute. Accordingly, the matter will be referred to trial and the following order is hereby given:

ORDER:

IT IS HEREBY ORDERED AS FOLLOWS:

1. The matter be and is hereby referred to trial
 - 1.1. Pursuant to 1. above the papers filed of record shall stand as the pleadings.
2. Matter to be set down for trial as directed by the court.
3. Costs are in the cause.



ZISENGWE J.

Saratoga Makausi Law Chambers, applicants’ legal practitioners
Moyo and Nyoni, 1st and 2nd respondents’ legal practitioners