

REPORTABLE (130)

PATRICIA DARANGWA
V
(1) JULIET KADUNGURE (2) ANDERSON KADUNGURE (3)
NERIA KADUNGURE (4) MASTER OF THE HIGH COURT OF
ZIMBABWE

SUPREME COURT OF ZIMBABWE
MAKONI JA, MATHONSI JA & MWAYERA JA
HARARE: SEPTEMBER 30, 2021

S.M. Hashiti, for the appellant

S. Ushewokunze, for the first, second & third respondents

No appearance for the fourth respondent

MATHONSI JA: This is an appeal against the whole judgment of the High Court delivered on 5 March 2021 interdicting the appellant, in the interim, from administering the estate of the late Genius Kadungure among other relief.

After hearing submissions from counsel we dismissed the appeal with costs and stated that the reasons for doing so would follow. What follows hereunder are those reasons.

THE FACTS

During his lifetime Genius Kadungure was a colourful and prominent businessman with business interests in Zimbabwe, Botswana and South Africa. He died tragically in a motor vehicle accident on 8 November 2020 at the age of 36. At his funeral, the appellant, who is an

administrator of deceased estates at Regional Executors & Trust (Pvt) Ltd, approached the first, second and third respondents brandishing an unsigned “will” allegedly prepared by herself on the instructions of the deceased a few weeks before he died.

The first and third respondents are the sisters of the deceased while the second respondent is his father. They shall be referred to either as the deceased’s relatives or as the respondents. The appellant persuaded the relatives of the deceased to accept the unsigned document as the last will and testament of the deceased. She also persuaded them to accept her appointment as the executrix of the deceased estate. In due course and following a meeting convened by the Master of the High Court, who is the fourth respondent herein, the appellant was appointed as the executrix. She was issued with letters of administration on 1 December 2020.

Meanwhile, the unsigned “will” was also accepted and registered by the fourth respondent. The deceased estate of the late Genius Kadungure was then to be administered and wound up in terms of that document. The appellant hit the ground running as she immediately entertained a claim of a Lamborghini Aventador Roadster Motor Vehicle registration number ZM03 belonging to the estate from one Nomatter Zinyengere.

I mention in passing that that name does not appear anywhere in the unsigned will. In fact that motor vehicle, which for some unclear reason is the only property specifically mentioned in that document, was bequeathed to one “Kit Kat”. Without reference to the Master and without submitting any liquidation and distribution account for approval by the Master, the appellant sent what she called the “first interim liquidation and distribution account” to

Zinyengere's lawyers in which she demanded a payment of \$48 230.00 from him in return for the release of the Lamborghini motor vehicle.

That interim account only contained the Lamborghini motor vehicle and no other property of the deceased. It also did not take into account any liabilities of the estate. Zinyengere must have paid the appellant what she demanded because by letter dated 27 January 2021, addressed to one Michael Mubaiwa at the deceased's mansion in Domboshava, the appellant directed that the motor vehicle be handed over to his lawyer.

It is then that the deceased's relatives sought legal advice. As up to then they had not been furnished with a copy of the will, they unsuccessfully requested one from the appellant including the minutes of the meeting held on 25 November 2020 at the Master's Office. They only got copies from the fourth respondent.

PROCEEDINGS IN THE COURT A QUO

The respondents brought an urgent application before the court *a quo* for interim relief interdicting the appellant from dealing with or administering the estate. On the return date they seek a review of the fourth respondent's decision to accept the unsigned document as the will of the deceased. They also seek the reversal of the appellant's appointment as the executrix testamentary of the estate.

The respondents' case was that the appellant used undue influence to persuade them to accept the unsigned document as the deceased's will and to accept her appointment as the executrix. She had dissuaded them from seeking legal counsel regarding the will. She had claimed to be their lawyer who would handle the estate when she is not even a lawyer.

According to the respondents, they reluctantly worked with the appellant even though they had questions about the will. Their fears were confirmed when the appellant had, with indecent haste, proceeded to attempt to dispose of the Lamborghini motor vehicle during the lockdown period without following due process. The whole exercise was suspicious given that there was no detailed inventory of the estate property and no distribution account was submitted and approved by the Master.

The respondents also complained about the manner in which the appellant was handling the estate in Botswana. To them, the matter was urgent as the appellant had to be stopped in her tracks before causing more damage, especially as there are trucks in South Africa belonging to the estate which were in danger of disappearing if the issue of executorship remained unresolved.

In opposing the application, the appellant's case was that the matter was not urgent because the facts complained of occurred four months earlier. Her contention was that the respondents voluntarily consented to the Master's decision to accept the unsigned document as the deceased's will knowing it did not meet the requirements of the Will's Act [*Chapter 6:06*]. The appellant insisted that the respondents also consented to her appointment as the executrix of the estate. In her view, the requirements of an interim interdict were not met.

Regarding the issue of the Lamborghini motor vehicle, while admitting that she had initially approved its release, the appellant contended that she later realised that she had not advertised the interim distribution account. For that reason, she had rescinded her decision to release the motor vehicle. The appellant admitted further that her decision to do so was also informed by the reprimand she got from the fourth respondent.

It was the appellant's contention that the application was without merit. She sought its dismissal with costs.

The court *a quo* acknowledged that the respondents should have filed a separate application for review. It however took the view that the matter was so urgent that the court had to dispense with most of the formalities provided for in the rules. This was so because of the then prevailing Covid 19 lockdown and Practice Direction number 4 of 2021 which proscribed the filing of new cases and only permitted the filing of urgent cases.

The court *a quo*'s view was that urgency stemmed from the appellant's rush to conclude part of the administration of the estate. In addition, she had advertised the estate in newspapers which action amounted to legal processes with legal consequences in the event of failure to act upon them.

Given the nature of the document being used to administer the estate, its emergence at the funeral and the circumstances of its acceptance raised a red flag, the court *a quo* found that the respondents had a cause of action against the appellant. It found that, by her own admission, the appellant had tried to jump the gun in allowing the release of the Lamborghini motor vehicle. Accordingly, the risk of irreparable harm was palpable and the balance of convenience favoured the beneficiaries. The court *a quo* then granted interim relief aforesaid.

PROCEEDINGS ON APPEAL

The appellant was riled by the judgment of the court *a quo*. She noted this appeal on the following grounds.

1. The court *a quo* erred in determining that the first to third respondents' cause was deserving of an urgent hearing when the facts actuating the first to third respondents' complaint had subsisted for well over 4 months.
2. The court *a quo* also erred in granting the first to third respondents an interdict in circumstances where such respondents had other satisfactory remedies available to them in terms of s 8 of the Wills Act and s 30 of the Administration of Estates Act.
3. The court *a quo* further erred in granting audience to a party which had by express words and direct acts accepted the appointment of the appellant and decision of the fourth respondent. In consequence the court *a quo* erred in exercising jurisdiction in a matter redolent with material disputes of fact not resolvable on the papers.
4. The court *a quo* grossly misdirected itself in holding that it had the jurisdiction to bar the appellant from the administration of the estate of the late Genius Kadungure in South Africa when the court *a quo* has no jurisdiction over the South African assets of the deceased.
5. The court *a quo* erred in finding that the appellant used undue influence to compel the first to third respondents to accept the deceased's will absent any evidence disputed by the appellant. (*sic*)
6. On a point of law, the court *a quo* erred in its formulation of the order it handed down on the 5th of March 2021. In the court *a quo*'s reasoning it postulates the granting of interim relief. However the order handed down is final in nature.

On the foregoing grounds, the appellant moved for the success of the appeal with costs and dismissal of the application *a quo* with costs. I must say that the appellant's grounds of appeal could have been couched in more elegant terms. As it is, they are all argumentative in nature. They contain arguments in support of the appeal.

In terms of r 44(1) of the Supreme Court Rules, 2018, grounds of appeal must be clear and concise. The court must not be made to guess what it is the appellant is challenging. It needs no repeating that grounds of appeal must be clearly set out to enable the respondents and indeed the court, to be fully informed of the case of the appellant. See *Chikura N.O & Anor vs Al Sham's Global BVI Ltd* SC 17/17.

Be that as it may, this is not a case in which the grounds are completely defective as to attract the striking off of the appeal from the roll.

ISSUES FOR DETERMINATION

Although there are six grounds of appeal, only 2 issues commend themselves for determination in this appeal. They are:

1. Whether the court *a quo* erred in finding that the application was urgent.
2. Whether the court *a quo* erred in granting an interim interdict prohibiting the appellant from administering the deceased estate.

SUBMISSIONS ON APPEAL

Mr *Hashiti* for the appellant initially anchored his argument solely on two technicalities. He submitted firstly, that the form used by the respondents in approaching the court *a quo* was a new invention of their own which is fatally defective. The respondents combined an urgent chamber application with a review application, and in counsel's view, this rendered the whole application irregular. He entreated this Court, bearing in mind that the issue was not covered in the grounds of appeal, to invoke its review powers in terms of s 25 of the Supreme Court Act [*Chapter 7:13*] to set aside the proceedings on that basis.

In response, Mr *Ushewokunze* for the respondents submitted that the issue of the form used was not raised by the appellant in the court *a quo*. It can therefore not be taken for the first time on appeal regard being had that this Court is not one of first instance. In addition, so counsel continued, the court *a quo* gave the reasons why it allowed the procedure adopted by the respondents. The appellant filed her appeal on 12 March 2021 to which was attached the judgment sought to be impugned. Accordingly, she had all the time and opportunity to challenge the decision of the court *a quo* to allow the application in the form it was made.

The second technicality raised by Mr *Hashiti* relates to the non-joinder in the application of other beneficiaries of the unsigned will who also have an interest in the dispute. He did not mention them by name but a reading of the document shows that, other than the deceased's family members, a person called "Kit Kat" is mentioned as a beneficiary.

Again, as correctly observed by counsel for the respondents, the issue of non-joinder was not taken *a quo* wherein the proceedings remain unterminated. The court *a quo* still has to pronounce itself on the return date of the provisional order it granted. As with the issue of the form used, the non-joinder is only raised in the heads of argument and not in the grounds of appeal.

On the merits, Mr *Hashiti* submitted, in the main that the court *a quo* dealt with an application for an interdict which was based on a past infraction which the appellant had corrected. In his view, the appellant's decision to issue an interim liquidation account dealing only with the Lamborghini motor vehicle and to attempt to release the vehicle to "Kit Kat", had been reversed following the intervention of the fourth respondent.

It was submitted further that the court *a quo* erred in granting an interdict based on what had already transpired. Apart from that, so it was argued, there is a procedure to be followed by a person aggrieved by the decision of the Master. The procedure was not engaged by the respondents who obviously had other remedies available to them.

In conclusion, Mr *Hashiti* submitted that there were triable issues which could not be resolved on the affidavit and documents filed by the parties. In counsel's view, the circumstances relating to the drafting of the unsigned will, its acceptance by the respondents themselves at the edict meeting and the allegations of duress were all disputed facts which the court could not resolve on the papers.

In response, Mr *Ushewokunze* maintained that the respondents made a case for the grant of an interim interdict which is the sole subject of this appeal. Until such time that the validity of the unsigned will has been interrogated, the court *a quo* had to interdict its use in the administration of the estate. He craved the dismissal of the appeal with costs on the admonitory scale.

ANALYSIS

The question of urgency cannot possibly be a live issue on appeal. This is so because the judge *a quo* was imbued with judicial discretion whether to hear the matter as urgent or not. Having exercised her discretion in favour of the respondents given the appellant's conduct of disposing of the property of the estate without following the proper liquidation process, that became water under the bridge.

Without satisfying the requirements for interference, on appeal, with the exercise of discretion, the appellant cannot pursue the question of urgency before this Court. Happily Mr *Hashiti* for the appellant did not motivate that issue at all before this Court.

Regarding the form in which the application was made, there is no doubt that combining an urgent application with a review application would not meet the requirements of the rules of the court *a quo*. A review application is made in terms of Order 33 and should be by court application.

However rules are made for the benefit of the court. The court *a quo* had power in terms of r 4C of the then applicable rules to condone a departure from the rules. It did just that. On that issue the court commenced its judgment by stating:

“The applicants through the urgent chamber application seek an interdict and on the return date a review. Ordinarily an application for review should be filed separately but given the prevailing COVID lockdown and Practice Direction number 4 under which ordinary applications were not accepted for filing, I accepted the urgent application hence gave directives. Let me hasten to say that this case is peculiar and should not be viewed as setting a precedent that review applications can be commenced through an urgent application.”

Indeed to illustrate that the judge *a quo* was conscious of the nature of the case, as part of the interim relief she granted, she added paragraph 4:

“4. The Registrar of the High Court of Zimbabwe at Harare is directed to expedite the return date (of) hearing.
The Registrar is directed to bring this judgment to the attention of the second respondent (The Master).”

In my view the conduct of the judge *a quo* was informed by the exigencies of the matter and the prevailing Covid 19 conditions which inhibited the filing of court process. She properly applied her mind and excused a departure from the court rules. Nothing

whatsoever, has been said to suggest that this was an unreasonable or indeed irrational exercise of judicial discretion.

The rules of court are designed for the benefit of the court and the proper administration of justice. As has been said, they are “not laws of Medes and Persians”. See *Scottish Rhodesian Ltd v Honiball* 1973(2) SA 747 (R) at p 748. The rules are just the court’s tools fashioned for the court’s own use and are not an end in themselves to be observed for their own sake. See *Federated Trust Ltd v Botha* 1978(3) SA 645 at 654.

In my view, there is therefore no basis for interfering with the manner in which the judge *a quo* applied the rules. Equally, there is no legal foundation for invoking s 25 of the Supreme Court Act [*Chapter 7:13*] in the circumstances of this case.

An attempt was also made on behalf of the appellant to introduce a new case on appeal. In heads of argument filed for the appellant and in submissions made by counsel the issue of non-joinder of other interested parties was raised for the first time. It is an issue which was neither pleaded nor taken *a quo*. More importantly, it was not canvassed in the grounds of appeal.

This Court has repeatedly discouraged litigants from treating it as a court of first instance because it is not. A litigant who has not made a case in the court below will not be allowed to smuggle such case in on appeal. As stated in *Kearns v Walter Enterprises* SC 160/90, the court will not set a precedent for litigants to treat the Supreme Court as a second court of first instance where issues can be tried afresh.

See also *Mutasa & Anor v The Registrar of the Supreme Court & Ors* SC 27/18.

Accordingly, the appellant is restricted to its case as pleaded, *a quo* and in this Court.

On the merits, I do not agree with Mr *Hashiti* for the appellant that the judge *a quo* granted an interdict solely on the past infraction of the attempted release of the Lamborghini motor vehicle. Of course that conduct served as a sharp warning of what the appellant was capable of and the need to protect the deceased estate.

However, this is a case in which an unsigned document, purportedly prepared on the instructions of the deceased, was being used to administer a huge estate straddling the borders of three countries. Its authenticity has to be investigated. The beneficiaries questioned its origins and the involvement of the appellant as executrix of the estate. If indeed the appellant was administering the estate for the benefit of none other than the beneficiaries, surely she should not have any problems submitting herself to judicial scrutiny.

The fact that the respondents initially accepted the unsigned document as the will and the appointment of the appellant as executrix is of no moment in the inquiry on the authenticity and validity of that document. This is not a “touch-is-a-move” game of draft in which the stakes turn against the player once he or she touches the lid. Where new facts have emerged the court should be engaged to solve the issues.

I also do not agree that there was another effective alternative remedy available to the respondents other than interdicting the administration of the estate until the validity of the unsigned will has been dealt with. Accordingly, the judge *a quo* cannot be faulted for finding that all the requirements for the grant of a temporary interdict were satisfied.

The appeal has no merit. Regarding the question of costs, no foundation was laid for an award of costs on an admonitory scale of legal practitioner and client. However there is no reason why costs should not follow the result as usual.

It is for these reasons that this Court dismissed the appeal with costs.

MAKONI JA

I agree

MWAYERA JA

I agree

Rufu-Makoni Legal Practitioners, appellant's legal practitioners

Ushewokunze Attorneys, respondent's legal practitioners