

SIKHETHINTOMBI NGWENYA
versus
M. L. MOTSI N.O
(IN HER CAPACITY AS THE EXECUTOR
OF THE ESTATE OF THE LATE RUTH GASELA)
and
NET SEVEN AGENCIES (PVT) LTD T/A
NET SEVEN REAL ESTATE
and
THE ASSISTANT MASTER OF THE HIGH
COURT OF ZIMBABWE, BULAWAYO N.O

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 10 FEBRUARY AND 3 MARCH 2016

Opposed Matter

Z. C. Ncube for the applicant
R. Dzete for the 1st respondent

MOYO J: This is a dispute centred on a deceased estate. It would appear the late Ruth Gasela left a will dated 25 June 1999. In that will she bequeathed various assets and specifically stand number 41 Gladstone Road (Bellevue) (which is the property at the centre of this dispute) to her children. Clause 2 of the will provides thus:

“I do further declare that my house should be jointly owned by all my children and the house should not be sold unless and until my (sic) all children have died. The one who remains can sell the house”

In the will she further appointed Langathani Dube as the Executrix testamentary.

It would appear this Langathani Dube was duly appointed and given letters of administration. She then without approval from the beneficiaries, and without seeking the Master’s consent in terms of section 120 of the Administration of Estates Act [Chapter 6:02] she then sold stand 41 Gladstone Road to applicant. It would appear such sale was made through second respondent and the monies paid through them. First respondent is the current executrix of the estate of the late Ruth Gasela, Langathani Dube having been removed by the third

respondent following issues with the irregular sale of stand 41 Gladstone Road Bellevue. First respondent alleges that part of the funds are still being held by second respondent. It is the first respondent's submission that in fact the previous executrix never remitted any funds to the estate of the late Ruth Gasela after the unauthorized sale. It is first respondent's argument that the sale of the house to applicant is null and void in that it contravened section 120 of the Administration of Estates Act, in that the previous executrix acted without the approval of the beneficiaries and the Master's consent was never granted on the sale, as well as that the sale flew in the face of the will of the late Ruth Gasela which specifically prohibited the sale until when all her children had died.

Section 120 of the Administration of Estates Act (*supra*) has been held to be peremptory in testate estates. Refer to the case of *Songore v Gweme* HH 90-08. There is a will in this case and therefore the estate is definitely testate. Section 120 of the Administration of Estates Act (*supra*) thus had to be followed to the dot. This was not done and in my view this on its own renders the sale null and void.

In the case of *Katsande v Katsande* HH 113/10 it was held that in terms of the law an executor is duty bound to administer and distribute an estate in accordance with the law and with strict adherence to the provisions of the will.

It was further held in that case that where an act is a nullity nothing follows from it. In that case the first respondent, who was in the same position as applicant, in this case, had pleaded innocence in purchasing the property. The learned judge noted that the transaction was a non-sale and nothing would flow from it with or without a party's innocence. The executor armed with the letters of administration had a duty to administer the estate in accordance with the law and adhering to the provisions of the will left by the deceased.

In this case the previous executor, although armed with the requisite letters of administration, had a duty to exercise her powers in accordance with the principal's mandate as given in the will as well as in accordance with the law.

Where an executrix although not an agent of the estate in the strict sense, being a fiduciary instead, the authority of the executor can still be equated to that of an agent in a practical sense and if he/she exceeds the authority given to him in terms of the will of the deceased such transaction is not binding on the estate.

In the case of *Clifford Horris Ltd v Todd NO 1955 (3) SA 302 SR at 302*, it was held that where an agent exceeds the express or implied authority in transacting, the principal is not bound by the transaction. Neither can the estate of the late Ruth Gasela nor first respondent be held liable to a transaction where in the purported agent (the previous executrix) exceeded their authority.

Since the agent was aware of the contents of the will, and was expected to be aware of the need to seek the master's approval but sought to act otherwise, she can perhaps be sued in delict. That seems to be the only way to proceed for applicant as definitely she cannot seek to involve the estate when the previous executor acted directly against the mandate that she had been given in terms of the will. Applicant's remedies are certainly not available on this platform. It is for these reasons that the application should fail.

Applicant's counsel contended that if the application fails, then first respondent should bear the costs as they did not alert applicant on time of the fact that late Ruth Gasela had died testate. Whilst such conduct by first respondent is not acceptable, applicant also had a duty to inform himself/herself fully of the circumstances relating to the estate of the late Ruth Gasela and all the information kept at the Master's office. Again, the first respondent represents a deceased estate and an award of costs against her would be an award against the deceased estate. Also, I cannot order personal costs against first respondent as she is cited in an official capacity.

Costs being in the discretion of the court, I am of the view that neither party in this matter should be ordered to bear the other's costs, for the simple reason that party is a deceased estate and the other party also could have made amends had they been made aware early enough of the existence of the will. I will accordingly order that each party bears its own costs.

I accordingly make the following order:

The application is dismissed with each party bearing their own costs.

Ncube and Company, applicant's legal practitioners
Maronedze, Mukuku and Partners, 1st respondent's legal practitioners