

THE MASTER OF THE HIGH COURT

versus

SITHANDIZILE DHLAMINI MOYO (in her capacity as the executor dative of the Estate
Late Willas Mukati Moyo)

and

GERTRUDE MOYO

and

SITHEMBISO KUSODZA

HIGH COURT OF ZIMBABWE

GUVAVA J

HARARE, 23 January & 19 February 2009

Mr Mambara, for the applicant

Mr Musekiwa, for the 1st respondent

GUVAVA J: This is an application by the Master of the High Court for the removal of the first respondent as executor of the estate of the late Willas Mukati Moyo. The application has been filed in terms of s 117 of the Administration of Estates Act [*Cap 6:01*] (“the Act”).

The facts upon which the applicant bases this application are as follows. The respondents are the surviving spouses of the late Willas Mukati Moyo (the deceased). The estate was registered with the Assistant Master in Gweru by the first respondent. She received a Certificate of Authority from the Assistant Master dated 15 June 2006 which empowered her to withdraw the balance which was in a Kingdom bank Account belonging to the deceased. She was also authorized to take transfer of a residential stand known as Photo Studio Stand Number 822 Gweru Township and a Mazda B1800 Registration Number 352 551G. Following the registration of the estate, the applicant received complaints that the first respondent was benefiting in the estate to the exclusion of the other beneficiaries. It was also common cause that the first respondent was operating a lodge as a business on the property and was receiving all the proceeds from the business for her own use. There was also a complaint that she was disposing of the deceased's movable assets. The applicant on 31 August 2007 called a meeting at his office in order to resolve the dispute.

Following this meeting, the applicant decided that the first respondent should be removed as executor and approached this court by way of chamber application in accordance with the provisions of s 117 of the Act. The first respondent opposed the application and although such matters are normally dealt with by a judge in chambers it was directed that the matter be set down on the opposed roll.

In her opposing affidavit the first respondent raises the point that the application is defective as it cites her in her official capacity when she should have been cited in her personal capacity. On the merits, she denies that at the time of deceased's death the second and third respondents were still married to the deceased. She states that second respondent left the matrimonial home in 1993 and the third respondent in 1998. They did not attend the deceased's funeral and it was only after the estate was registered that she was approached by the respondents with proof of their existing marriages. She thus submits that her conduct is above reproach. She further states that her appointment was carried out by the Assistant Master in accordance with the Act and thus there is no basis for this application.

The first respondent also states that the business of the lodge which is being conducted on the premises was established by her after the death of the deceased. She states that she established the business on her own in order to maintain herself following the death of the deceased. She denied that she had disposed of any movable property of the estate. She further denied that she was benefiting from the estate to the exclusion of the other beneficiaries. She further states that the only dispute between her and the second and third respondents is over her vacation of the matrimonial home and her removal as executor of the deceased's estate.

At the hearing Mr *Musekiwa* for the first respondent in argument in respect to the preliminary point raised submitted that the applicant had wrongly cited the first respondent in her official capacity. He further submitted that on this basis the application should be dismissed. He relied on "The Law and Practice of the Administration of Estates" by Meyerowitz 5th ed at p90 where the learned author states as follows:

"An application for removal of an executor must be brought against him personally and not in his capacity as executor....."

In the case of *McNamee and Another v Executors Estate McNamee* 1913 NPD 428 this issue was determined by the South African courts. In dealing with an exception which had been filed to the declaration on the basis that the executors had not been cited in their personal capacities the court stated at page 432 as follows:

"It will be seen that the defendants, as executors and trustees, are not called upon in any way to restate or modify their accounts. The conclusions of the summons are all personal to themselves as individuals- removal from office, forfeiture and refund of commissions and fees. But as the action is laid out against them in their representative capacity it is an action against the estate and not against the individual who alone can satisfy the judgment."

Whilst the rationale for the decision is beyond reproach it should be noted the Zimbabwean courts do not appear to have made a determination on the matter. The various cases which have been brought before the court for the removal of an executor whether based on the common law or statute have cited the executor in both their official capacity and personal capacity. See *Bonma v Meaker N.O. & Ors* 1973 (2) RLR 16(R), *Vermaak & Anor v Nish N.O.* HH166/88 and *Van Niekerk N.O. v Master of the High Court* 1996 (2) ZLR 105. These should be contrasted with cases also from this court where the executor was not cited in his official capacity. See *Master of the High Court v Ferreira & Anor* 1965 RLR 341 (R), *Siziba v Siziba & Anor* HB 25/04 and *Katirawu v Katirawu & Ors* HH58/ 2007.

In this case although the point has been raised it was not fully argued by the parties. In my view it is not necessary to make a determination of the point in this case as the applicant is alleging that the respondent was appointed through an error of his office rather than any misconduct on her part. The citation of the respondent would not affect the relief being sought in this matter as all that is being claimed is her removal from office. Had the applicant been claiming some other relief which would require the respondent to do certain things to satisfy the judgment then it would have been fatal to the application. It seems to me however that the first respondent should have been cited in her personal capacity in this case.

The first respondent also raised a complaint regarding the representation of the applicant by Messers Mambara & Associates whom he stated are the second and third respondents' legal practitioner. The second and third respondents did not file opposing papers in this matter and I assume decided to abide by whatever decision is made by the court. Mr *Mambara* explained to the court that he only became involved in this matter as the applicants counsel following a request to do so by the applicant after he had received directions to file heads of argument. He stated that he accepted the brief as he saw no prejudice in the matter since the applicants claim was essentially the same as that of his clients.

The office of the Master is a public office which must and be seen to operate in an impartial, credible and transparent manner in order to engender confidence in the mind of the

general public. The representation by the Master by Mr *Mambara* in this case who is also the erstwhile legal practitioner of the second and third respondents, an impression of partiality on his part. It is for this reason that the representation of the Master by Mr *Mambara* was undesirable. Notwithstanding the absence of prejudice in this matter, such practice in my view should not be repeated.

I now turn to the merits of this matter. Section 117 of the Act provides as follows:

117 Master may apply for removal of executor, tutor or curator from office

(1) The Master may apply to a judge in chambers for the removal of an executor, tutor or curator from his office on the ground—

- (a) that he was not qualified for appointment to such office or that his appointment was for any other reason illegal; or
- (b) that he has failed to perform satisfactorily any duty or requirement imposed upon him by or in terms of any law; or
- (c) that he is mentally or physically incapable of performing satisfactorily his duties; or
- (d) that in his opinion such person is no longer suitable to hold such office;

and the judge may, upon such application, remove the executor, tutor or curator concerned from his office or make such other order as he sees fit.

(2) Where an executor, tutor or curator has been removed from his office the Master shall revoke any letters of administration or confirmation, as the case may be, which have been granted to such person.

It seems to me that in order for an application in terms of this provision to succeed the applicant must establish that it falls under any one of the grounds set out in subsection (1). In the case of *van Nierkerk NO v Master of the High Court* 1996 (2) ZLR 105 the court was faced with a similar application and the court held that the removal of an executor should never be undertaken lightly. The court held further that in order to justify a removal in terms of this section; the court must be satisfied that the executor had failed to perform satisfactorily any duty or requirement imposed on him by or in terms of the law.

The applicant in this case did not state in his application or heads of argument the grounds upon which he relied for the removal of the executor. Whilst it is not fatal to the application, as it can be ascertained from the facts in the founding affidavit, I would think that it is desirable to do so. During the hearing however, Mr *Mambara* submitted that he was relying on subsection (1) (a) of the above section.

Mr *Mambara* submitted that the first respondent should be removed from office on the basis that her appointment was not in accordance with the law as the estate was too large to be administered summarily in terms of s 32 (1) of the Act. Section 32 (1) of the Act provides as follows:

(1) If any person dies whose estate is unrepresented and, in so far as the same is in Zimbabwe, appears to the Master to be under the value of such amount as the Minister may specify in terms of subsection (2), the Master may—

- (a) cause such estate to be administered and distributed in accordance with by an executor dative, to be by him summarily appointed for that purpose; or
- (b) dispense with the appointment of an executor dative and direct how such estate shall be administered and distributed.

It seems to me that s 32 (1) allows the Master to deal summarily with an estate if he considers it to be a small estate. In other words where the Master determines that the estate is a small estate, an executor is appointed without following the normal procedures incumbent upon such appointment nor is the executor required to carry out a full administration of the estate. In this case the Assistant Master sitting at Gweru made such an appointment. It seems to me however that in making the appointment he failed to comply with the provisions of the Act. In deciding whether or not an estate falls within the ambit of this section the value of the estate must be below an amount which is prescribed by the Minister from time to time by statutory instrument. In terms of the Administration of Estates (Specified Amount) Notice 1994, published in Statutory Instrument 155/94 the prescribed amount is \$60 000. This statutory instrument has not been amended since 1994 in spite of the skyrocketing values of property in this country. It seems to me that in view of the values of the property market no estate would ever fall within the ambit of this section. In my view it is incumbent for the Minister to review the prescribed amount from time to time in the same manner that he reviews the value of an estate for which duty is payable. In this way an unnecessary burden is not placed on the Masters office and the public by being obliged to provide full administration in what is essentially a small estate which would not require full administration.

The estate before me involves an immovable property in the City of Gweru. It has been described as a residential property with a business of a lodge being conducted on its premises. It also involves a motor vehicle and some cash. Whilst no value of this estate has been given in the papers before me it is quite apparent that such an estate as described could not have been valued below \$60 000 even in 2006 when it was registered. Immovable property values at that time were already in the million dollar range. It seems to me that that such an estate cannot be defined as a small estate. The assistant Master should therefore not have proceeded in terms of s 32 of the Act. It was submitted on behalf of the first respondent that at the relevant time there was a circular from the applicant directing that all estates dealing with customary law marriages should be dealt with in terms of s 32. Unfortunately the circular was not placed before the court so that the court could determine the meaning of the circular for itself. It

however seems to me that even if such a circular does exist it would not be in accordance with s 32 of the Act. The appointment of the first respondent as executor of the estate of the late Willas Mukati Moyo thus in my view was unlawful.

In the result I make the following order:

1. The first respondent be and is hereby removed as executor dative of the Estate of the Late Willas Mukati Moyo.
2. The certificate of Authority granted to the first respondent on 15 July 2006 is hereby revoked.
3. That there be no order as to costs.

J Mambara & Partners, applicant's legal practitioner

Musekiwa & Associates, 1st respondent's legal practitioner