SCHOLASTICA ZVANDAITA BHETA
and
NICHOLAS JINGO
versus
GRACE BHETA
and
THE EXECUTOR ESTATE LATE EMMANUEL BETA (OBRAM TRUST CO.)
and
THE MASTER OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 27 October 2015

Application for condonation for the late noting of an application for review

J. Chivhanga, for the applicants
A. Chambati, for the 1st respondent

CHITAKUNYE J: On 25 February 2015, I dismissed the above application for condonation for late noting of an application for review with applicants' legal practitioners to pay costs *de bonis propriis.* These are the full reasons for my decision.

The first applicant alleged that she was married to the late Emmanuel Beta. The date and type of the marriage were however not disclosed in the founding affidavit.

The second respondent was born out of that marriage.

In the late 1960s the first applicant and the late E. Beta (her husband) separated. Before separation they had acquired Stand no.6307 Highfield Township Harare.

In the 1970s the late Emmanuel Beta married the first respondent.

The first applicant said she later reconciled with her late husband but she did not disclose when exactly the reunion took place. Apparently, this was after the Late E. Beta had already married the first respondent.

The first applicant argued that at the time of deceased's death in 2006 both herself and the first respondent were married to the late Emmanuel Beta.

It is apparent from the papers filed of record that after deceased's death applicants had the second applicant appointed as executor and the property in issue registered in the name of the first applicant. The circumstances of such appointment and registration were such that the first respondent successfully applied for the setting aside of the appointment of the second applicant as executor and the reversal of the registration of the property into the first applicant's name back into the late Emmanuel Beta's name.

An independent executor was thereafter appointed in terms of the law. That independent executor was the late Israel Gumunyu. Upon his demise the second respondent was appointed executor dative.

It appears common cause that during the administration of the estate by the late Gumunyu an affidavit purporting to be a Will by the late Emmanuel Beta was produced. It is that Will that the late Gumunyu used in preparing the interim administration and distribution account. That Will was accepted by the third respondent as a valid Will for the purposes of administration of the estate late Emmanuel Beta in terms of s 8(5) of the Wills Act, [*Chapter 6:06*]

The first applicant alleged that she only became aware that the former executor had gone on to prepare the interim administration and distribution account in terms of the Will in the meeting of 11 February 2011. This had been done despite the fact that herself and other members of the Beta family had disputed the validity of the Will. The administration and distribution account awarded the property in question to the first respondent.

The first applicant also stated that her legal practitioners advised her of the above position in March 2011 after which she instructed them to challenge the Will.

I am of the view that the applicants were not being candid with court on this aspect. This is evident from the fact that in a letter dated 29 June 2009, addressed to the late I. Gumunyu, the first respondent's then legal practitioners indicated to the executor that the Will had been accepted by the Master and that all parties had been aware of this. This letter was copied to the applicants' legal practitioners and was received by them on the same date.

In another letter dated 18 January 2010 addressed to the late I Gumunyu and copied to the applicants' legal practitioners, the first respondent's then legal practitioners outlined what they said were the resolutions of a meeting held at the Master's office with all the interested parties present. The resolutions include, *inter alia*, the following from para 4 thereof:

> "That the deceased had written a Will and that the Will was duly accepted in September 2007, by the Master of the High Court and that the Will had not been formally challenged nor set

> aside and therefore the deceased died testate and the Executor in the absence of an agreement amongst the parties is bound by the Will's contents in administering the estate.
>
> That on Monday 18 January 2010 the Executor will be paying the Government Gazette and the Herald for an advert calling upon anyone with an objection to the final distribution plan to lodge his/her complaint with the Master within 21 days from flighting of the advert.
>
> That by the end of business on the 29th of January 2010 the Executor would have lodged the account for the estate with the Master of the High Court."

This letter was duly received by applicants' legal practitioners on 18 January 2010. It is thus clear that the applicants and their legal practitioners knew about the acceptance of the Will and the fact that the executor was proceeding to administer in terms of the will well before the meeting of February 2011which is being referred to by the first applicant.

Despite such clear knowledge as to when the Master had accepted the Will and that the Executor was proceeding in terms of the Will the applicants did not challenge the decision of the Master to accept the Will.

Apparently no challenge of the Will was initiated and even as at the time of this hearing no challenge of the Will had been filed with any Court.

The applicants opted to apply for a review of the distribution account/plan in terms of Order 33 Rule 259.

Rule 259 of the High Court Rules 1971, as amended provides that:-

> "Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceedings in which the irregularity or illegality complained of is alleged to have occurred:
> Provided that the court may for good cause shown extend the time."

Upon realising that the eight week period within which to file an application for review had lapsed applicants seek this court to extend the time within which such application should be made.

In terms of the proviso to r 259, Court may grant such extension upon being satisfied that good cause has been shown for the extension. The *onus* is thus upon the applicant to show such good cause.

The issue is thus whether applicant has shown good cause for the extension of the time within which to file an application for review.

In *Bishi* v *Secretary for Education* 1989(2) ZLR 240(H) the factors that court should consider in determining whether good cause has been shown were summarised as follows:

> "(a) the degree of non-compliance with the rules;

(b) the explanation thereof;
(c) the prospects of success on the merits;
(d) the importance of the case;
(e) the convenience of the court; and
(f) the avoidance of unnecessary delay in the administration of justice."

In *Vrystaat Estate (pvt) Ltd* v *President, Administrative Court and Others* 1991 (1) ZLR 323(S) at 329G-H McNally JA had this to say on the issue:

> "I turn then to consider the question of delay. But I pause to observe that in deciding whether or not to condone delay the courts traditionally consider not only the reasonableness of the explanation for the delay but the prospects of the applicant on the merits."

A perusal through various cases on the issue of condonation shows that courts have granted condonation even where the explanation for the delay was unreasonable or just not good enough as long as there were clear prospects of success on the merits. (*Moyo* v *President, Board of Inquiry & Others* 1996(1) ZLR319).

Clearly therefore the factors should not be considered in isolation.

In *casu,* the applicant's founding affidavit was not clear on the explanation for the delay or even the extent of the delay. For instance in para(s) 13, 14 and 15 of the founding affidavit, the applicant states that she was shocked to learn during the meeting of 11 February 2011 that the late I Gumunyu as executor had gone on to prepare the interim administration and distribution plan using the Will when herself and other children of the late Emmanuel Beta had disputed its validity. She also states that her legal practitioners only advised her of the position in March 2011 after which she instructed them to challenge the Will. One is left unclear as to whether she knew of this for the first time in the meeting of February 2011 or when her legal practitioners informed her of the position in March 2011.

Apart from the failure to clearly state when she became aware that the Master had accepted the Will, it is pertinent to note that applicants were also not clear on the explanation for the delay. The applicants' explanation for failure to comply with the rules was in my view highly inadequate. The applicants referred to their first such application which was struck off the roll in June 2013. This first application was in fact struck off the roll for non compliance with the rules. The applicants had pursued such a defective application for about two years despite their attention having been drawn to the defective nature of their application by the respondent.

It may also be noted that in their founding affidavit the applicants do not explain the delay in filing the 1st application. In this case, applicants do not explain the nature and extent

of the delay either. In explaining why they had to make this application the first applicant in para 16 of her founding affidavit stated that:-

> "I am thus making an application for the Review of the said distribution plan in terms of Order 33 Rule 259. I am advised that in terms of the law I am required to make such application within eight (8) weeks of the irregularity or illegality complained. In the same rule the court may on good cause shown extend the time. I verily believe that I have shown good cause in my application to be granted."

The above quoted paragraph does not provide an explanation for the delay in filing this application outside the 8 week period.

Apart from the lack of a plausible explanation for the delay, a careful analysis of the applicant's founding affidavit does not show that the applicants have any prospects of success in the main matter.

The applicants' problems are compounded by the fact that the administration and distribution plan they wish to have reviewed was prepared in terms of a Will that was accepted as valid by the Master in September 2007.

In this regard s 8(5) of the Wills Act, (*supra*), states that:-

> "Where the Master is satisfied that a document …… which was drafted or executed by a person who has since died was intended to be his will….. the Master may accept that document, …. As a will for the purposes of the Administration of Estates Act [chapter 6:01] even though it does not comply with all the formalities……."

Section 8(6) then states that:-

> "Any person who is aggrieved by a decision of the Master may appeal to an appropriate court within thirty days of being notified of the decision of the Master."

In *casu*, it is common cause that the Master accepted the Affidavit by late Emmanuel Beta as his Will. That meant the estate had to be administered in terms of that Will unless the validity of that Will was successfully challenged. It is common cause that the Will was not and has not been challenged to date. The late Israel Gumunyu was thus required to administer the estate in terms of the accepted Will. The second respondent upon taking over the administration of the estate from the late I Gumunyu was also required to administer the Estate in terms of the Will.

In as far as the estate was to be administered in terms of the Will it follows that the Master's discretion to consider other outside factors in deciding to accept and confirm the distribution plan was limited. I am of the view that as long as the administration and distribution plan was in accordance with the provisions of the Will the Master cannot be faltered for accepting the distribution plan.

In fact, s 68A (2) of the Administration of Estates Act states that:-

> "This part, other than section *sixty-eight* C, shall not apply to any part of an estate that is disposed of by Will."

I am thus of the view that the considerations that the applicants say the Master should have taken account of are not applicable in this case.

Further, an application for review seeks to correct an illegality or irregularity. In this case the applicants do not with certainty point at any irregularity or illegality. The acceptance by the Master of a distribution plan prepared in terms of a Will cannot be said to be an illegality or irregularity. Without alleging or establishing any irregularity or illegality it is difficult to understand how the applicants hope to succeed in the main case.

I am of the view that the applicants ought to have challenged the decision to accept the Will as valid. To seek to challenge the consequences of the acceptance of the Will without challenging the Will itself is in my view an exercise in futility. As the time within which such challenge should have been done has lapsed it follows that the applicants' case has no prospects of success.

Upon considering other factors relevant to the determination as to whether the applicants have shown good cause for condonation, I am of the view that the circumstances do not warrant a grant of the application.

Costs.

The respondent's legal practitioner submitted that this is a proper case wherein the applicants' legal practitioner should be ordered to pay costs *de bonis propriis* at a higher scale. He argued that the application was frivolous and the legal practitioners should have known at the time of filing the application that it was bound to fail. He alluded to the fact that in his view the applicants' legal practitioner failed to properly advise their client and so the law firm Mabuye Zvarevashe should pay the costs. He strongly contended that justice demands that the legal practitioners pay the costs and not their clients. The applicants' counsel counter argued that they should not be made to pay the costs as prayed for by the first respondent's counsel.

I however did not find much merit in the applicants' counsel's submissions.

I was of the view that the applicants' legal practitioner be ordered to bear the costs of this application as submitted by the first respondent's counsel. The legal practitioner ought to have properly advised applicants on the insurmountable obstacle of seeking to apply for

condonation of the late noting of an application for review of the administration and distribution plan and the Master's decision to accept the administration and distribution plan. The legal practitioner should have realised that the defining decision was the acceptance of the affidavit as a Will. That defining decision has not been challenged and the Master was only expected to accept the distribution plan as long as it effected the intention of the late Emmanuel Beta as reflected in the Will. As already alluded to above, to seek to challenge the consequences of the acceptance of the Will without challenging the Will or its acceptance by the Master is an exercise in futility and a sheer abuse of court process.

Having filed a fatally defective first application for condonation, which the legal practitioner pursued for two years only for it to be struck off the roll for none compliance with the rules, one would have expected the legal practitioner to be wiser in this second application. This, the legal practitioner was not as evident from the contents of the applicants' affidavits and the submissions made. I was thus of the view that it would be unjust to continue to saddle the applicants with punitive costs. The legal practitioners failed their clients and led them on a wild goose chase.

In deciding on this I was mindful of the need to only resort to costs *de bonis propriis* in rare instances and only where the justice of the case calls for such form of censure on the legal practitioner. I believe this is one such case where the applicants must be spared the ineptitude of their legal practitioner. The applicants' legal practitioners must therefore be ordered to pay costs *de bonis propriis* on the attorney client scale

See *Techniquip (pvt) Ltd* v *Allan Cameron Engineering (pvt)Ltd* 1994(1) ZLR 246(S) and *Matamisa* v *Mutare City Council* (A-G intervening) 1998 (2)ZLR 439 (S).

The application was accordingly dismissed with applicants' legal practitioners to pay costs *de bonis propriis* on the *attorney* - client scale.

Mabuye Zvarevashe, applicants' legal practitioners
Chambati Mataka & Makonese, 1st respondent's legal practitioners