DISTRIBUTABLE

CISMO CHIMUKWITA
versus
NOREEN CHIKAKA
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 8 March 2018 & 25 April 2018

Opposed Application

M Hungwe, for the applicant
D. V Kufaruwenga, for the 1st respondent

MUSAKWA J: In this application the applicant is seeking relief to the effect that-

1. "The Sheriff for Zimbabwe shall appoint an independent valuer from his panel who shall value improvements effected on stand no. 3378, also known as no. 55, 5th avenue, Mbare, Harare and the applicant's salvage lien per annexure "A" hereto.
2. The independent valuer shall submit his valuation report to all parties to this matter.
3. Applicant's claim shall proceed in terms of the independent valuer's report.
4. First respondent shall pay the costs of this application on an attorney-client scale."

In his founding affidavit the applicant avers that he has a claim against the estate of the late Dinemu Tambala who died in 1991. The claim is for $15 770. In 2016 he caused the registration of the estate with the second respondent. At an edict meeting there was no consensus on the appointment of an executor and the first respondent was appointed by the second respondent.

The basis for the claim is explained in a letter dated 2 June 2016 which was addressed to the second respondent by the applicant's legal practitioners. According to the letter, the applicant and the late Dinemu Tambala were 'cousin brothers' (sic). There was no elaboration on the exact nature of the relationship. The letter chronicles the background to the claim. Essentially it explains that the applicant paid bills that had accrued on the property that became vacant upon the demise of Dinemu Tambala. The applicant is also said to have renovated and fenced the property.

In the First And Final Liquidation and Distribution Account, the first respondent awarded the applicant $500 to which the applicant objected. Hence the present application that is erroneously sought though.

In opposing the application, the first respondent avers that the applicant's claim has not been proven. This is because the first respondent appointed Panavest Properties (Private) Limited to conduct a valuation of the improvements on the property. A valuation report was then compiled. It is further contended that it is not the Sheriff but the second respondent who has power to appoint a valuer in terms of s 40 of the Administration of Estates Act [*Chapter 6:01*]. It is further contended that the second respondent does not disagree with the valuation that was done.

Section 40 of the Administration of Estates Act provides that-

> "When any executor fails to place any value upon the assets or any portion thereof, or places a value on them which does not meet with the approval of the Master, the Master may cause the value of such assets to be appraised by any impartial person or persons and the value so ascertained shall be taken to be the true value of such assets for the purposes of this Act."

In the context of the above provision, the value placed on the improvements claimed by the applicant was approved by the second respondent. There can be no question about having another valuation by an independent valuer. I agree with the submission made by Ms *Kufaruwenga* that the Sheriff cannot usurp the functions of the second respondent. She further submitted that the applicant did not cite a provision that allows the Sheriff to conduct a valuation relating to a deceased estate. Mr *Hungwe* submitted that all the applicant wants is an independent valuation to be conducted. He further submitted that the second respondent cannot be expected to appoint another valuer when it is clear he has accepted the present valuation.

The remedy for the applicant lies in s 52 (9) of the Act which provides that-

> "The Master shall consider such account, together with any objections that may have been duly lodged,
> and shall give such directions thereon as he may deem fit:

> Provided that—
> (i) any person aggrieved by any such direction of the Master may, within thirty days after the date of the Master's direction, and after giving notice to the executor and to any person affected by the direction, apply by motion to the High Court for an order to set aside the direction and the High Court may make such order as it may think fit;
> (ii) when any such direction affects the interests of a person who has not lodged such an objection, the account so amended shall again lie open for inspection in the manner and with the notice aforesaid unless the person so affected consents in writing to the account being acted upon."

Therefore a decision by the Master in terms of s 52 (9) is challenged by way of review. This was held to be the case in *Van Niekerk v Master of The High Court and Others* 1998 (1) ZLR 418 (H). That decision was upheld on appeal in *Van Niekerk v Van Niekerk and Others* 1999 (1) ZLR 421 (S).

Concerning the Master's decision, the first issue is whether he made a direction in terms of s 52 (9). Following the preparation of the First and Final Liquidation and Distribution Account by the first respondent on 31 October 2016, the applicant's legal practitioners addressed an objection to Reign Management Consultancy (Pvt) Ltd on 15 November 2016. Although the sequence of correspondence is somewhat blurred, on
11 November 2016 Reign Management Consultancy (Pvt) Ltd responded to another letter from applicant's legal practitioners dated 8 November 2016. In the letter of 11 November 2016 Reign Management Consultancy (Pvt) Ltd insisted that they were accepting the applicant's claim for $500 in terms of the valuation. They also pointed out that the applicant was expected to vacate the property by the end of November 2016. Then on 15 December 2016 the second respondent responded to a letter by the applicant's legal practitioners dated 28 November 2016 and stated that if they were aggrieved by the executor's decision they could approach the court for appropriate relief. It can be taken then that the second respondent made a direction that if the applicant was aggrieved he could approach the court for relief. By implication, the second respondent was satisfied with the valuation of the property.

It is also clear from s 52 (9) (i) of the Act that a challenge to the Master's decision must be done within thirty days. On the other hand an application for review in terms of Order 33 of the Rules of the High Court must be instituted within eight weeks. The present application was filed on 26 April 2017, well after the time prescribed by the rules. The only remedy available for the applicant was to apply for condonation. Instead of seeking condonation, the applicant then mounted the present application under the guise of seeking to have an independent valuer appointed by a party who has nothing to do with deceased estates. Either way, the application is ill-conceived and must fail.

In the result, it is ordered that the application be and is hereby dismissed with costs.

Hungwe & Partners, applicant's legal practitioners
Dzimba Jaravaza & Associates, first respondent's legal practitioners