

THE EXECUTOR OF THE ESTATE LATE ROSEMARY MASHATA
and
REASON MASOMERA
versus
ELLIOT MASOMERA
and
MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE; 18 February & 13 March and 5 May 2024

Opposed Review

Applicant in person

1st Respondent in person

No appearance for 2nd & 3rd Respondents

TSANGA J:

The applicant, Reason Masomera, seeks a review of the Master of the High Court's decision in which he removed him as the executor of the estate of the late Rosemary Mashata. This is said to have been done un-procedurally and without consultation.

There are certain common cause facts. The late Rosemary Mashata died on 22 July 2009. Reason Masomera and Eliot Masomera, who are the applicant and the first respondent respectively, were her natural sons. Reason Masomera was appointed by the Master in 2010 as the executor of his late mother's estate. The Master is the second Respondent in this matter. Reason is the older of the two brothers. He was also to be the co-beneficiary of certain immovable property known as Stand No. 8056 Cold Comfort left by the deceased. It is not in dispute that the confirmed first and final distribution and administration account was confirmed on the 27th of September 2010. It is also common cause that for over fifteen years the property has not been transferred to either of the two beneficiaries by Reason.

Not surprisingly Elliot complained to the Master about this state of affairs. On 4 April 2024 the Master sent a letter of complaint authored by Elliot to Reason and asked for his comments. The letter in question was sent by the Master to an address in Belvedere suburb that Reason had always used for purposes of administering the estate. When Eliot unearthed that the letter was not being responded to on account that Reason was not staying at that address, he wrote to the Master giving him Reason's current contact details including his phone numbers. The Master then used those details to forward to Reason the letters of complaint from Elliot and his lawyers. Reason was requested for his comments to the complaints to which he was to respond to by the 15th of July 2024. Reason denies ever receiving or being made aware of any of these letters.

What Reason does not deny is that the Master called him by phone on the 26th of July 2024, enquiring why he had still not transferred the property. It was this call that prompted Reason to respond with a seven-page letter on the 29th of July 2024. In that letter he outlined in detail his own complaints against Elliot and the ways in which he was making it "impossible for the transfer to be finalised by refusing to assist financially in meeting the costs of administration and finalisation of the estate."

He further articulated that he had effected improvements to the house to make it habitable. He estimated these improvements to be in the region of US\$25 000.00. In addition, all costs for advertising the estate had been met by him. There were also conveyancing costs required which Elliot had not shown a willingness to contribute to. He said Elliot had flatly refused a physical meeting so that all information as well as receipts of expenditure could be shown to him.

Essentially he put forward his position that Elliot must participate in the evaluation of the house and pay half of the relevant fees. As regards transfer and change of ownership he intimated as follows:

"I am not saying that in the meantime change of ownership cannot be effected in the absence of the issue of change of ownership. I am still consulting my attorney to see if allowing ownership change before dealing with the issue of percentage ownership may affect the litigation and its outcome. Depending on the advice I get I will then be in a position to write again and advise you accordingly"

On the 16th of September 2024, Reason again wrote to the Master. This time he was requesting an extension of time to complete the process of transfer. He had become aware that his brother had been given letters of administration for the purpose of transferring the house. In his letter he indicated that he had become aware of these letters on the 13th of September

2024 whilst following up on his letter dated 29th July with the Master's Office. He indicated that he had only become aware of allegations that he was refusing to transfer the property upon perusing the file. He was also requesting an extension on account of the property needing to be evaluated as its circumstances had changed since 2010.

The gist of the applicant's complaints is that he did not receive actual written communication regarding the complaints. What he received was the telephone call. He therefore denied ignoring any correspondence since none was brought to his attention.

The grounds of review

There are nine grounds of review, namely, that:

- 1) There were gross irregularities in the proceedings in that a decision was made without conducting an inquiry into allegations against the executor.
- 2) The Master did not give the Applicant as executor an opportunity to be heard in accordance with the rules of natural justice and fairness.
- 3) The Master exhibited a considerable amount of bias in the proceedings by failing to advise the executor of three letters of complaint about his alleged conduct thereby denying him an opportunity to respond.
- 4) The Master only informed him about complaints a month after the decision had been made to remove him from office.
- 5) The decision was grossly unreasonable as it violated the Applicants rights in terms of s 58 and s 68 and it had the potential to cause financial prejudice.
- 6) The Master ignored a written request for the revocation or rescission of the letters of administration issued to the first respondent and to conduct a formal inquiry
- 7) A written copy of the decision under review was only furnished to the first Respondent only a month after it was made
- 8) The finding of the Master that the executor had not made any progress in the file since 2010 is irrational and arrived at after hearing only one side of the dispute with no proof of any requests of engagement ever being communicated.
- 9) The decision of the Master was induced by fraud and misrepresentation of facts by the 1st respondent who misrepresented that letters from his legal practitioner were not responded to when they were responded to by email.

The grounds for review are many and unnecessarily repetitive. But he is a self-actor, though clearly drawing on legal knowledge from someone. The basis of his complaint is that the Masters decisions made pursuant to Elliot's complaints against him as executor were not made procedurally. The decisions were made without an inquiry being conducted thereby violating the fundamental tenets of due process and the right to be heard.

THE LAW AND LEGAL ANALYSIS

Section 116 of the Administration of Estates Act is pertinent in that it deals with the supervision of executors, tutors and curators by the Master. In particular s 116 (1) requires the Master to inquire into a matter upon receiving a complaint and thereafter to take such action as he or she deems expedient. Section 116 (2) outlines the actions that the Master may take as part of that enquiry.

Section 116 (1) and (2) read as follows:

(1) If it appears to the Master that any executor, tutor or curator is failing or neglecting to perform satisfactorily his duties or to observe all the requirements imposed upon him by law or otherwise in regard thereto, or if any complaint is made to the Master by any creditor, legatee or heir in regard thereto, the Master shall inquire into the matter and take such action thereon as he shall think expedient.

(2) For the purpose of any inquiry under subsection (1), the Master may—

(a) require the executor, tutor or curator concerned or any other person to furnish him with such information as he may require and to produce for examination by the Master or by any person appointed by him for that purpose at a time and place specified by the Master any deeds, plans, instruments, books, accounts, stock lists or documents which the Master may specify;

(b) serve a written notice upon the executor, tutor or curator concerned requiring him to attend at a time and place to be specified by the Master for the purpose of being examined on oath by the Master or by any person appointed by him for that purpose respecting any transactions or matters affecting the estate which such executor, tutor or curator is administering.

In this particular instance the Master sent out letters asking for feedback on the transfer of the house which the applicant claims not to have received. It is doubtful that he did not receive the communication as he claims. The most likely explanation is that he ignored them given his reasons for not transferring the property. He responded fully to the telephone with a written response which showed that he was very much aware of the complaints against him. The heading read: *Re: Transfer estate in respect of Rosemary Mashata DRH 242/2020.*

He gave a blow by blow account of the impediments to transfer so the Master could make an informed decision on what action to take. As he explained in that letter of 29th July 2024:

“I am however alive to the fact that the submissions and averments do not necessarily address the question that you raised in the telephone conversation *regarding why the house has not been changed ownership*. The above has simply been necessitated by the need to paint a true and accurate picture of the current position and also to properly articulate the chronology of events as to where we are any why we are where we are in order to appreciate the way forward and also to assist you in making whatever decision from an informed position.”

The Master did action, and concluded that Reason ought to be removed and Elliot given letters of administration to complete the transfer. The error on the part of the Master was not in reaching that conclusion but in failing to take the prescribed steps for the removal of an executor and granting additional letters of administration.

The Master derives his powers from the Administration of Estates Act. In terms of s 117 of the Administration of Estates Act [Chapter 6:06] “the Master may apply to a judge in chambers for the removal of an executor on the ground that the executor has failed to perform satisfactorily any duty or requirement imposed on the executor in terms of any law”. Once an executor is removed then any letters of administration or confirmation that have been issued are revoked.

When it comes to removal of an executor by the court, the reasons for removal are aptly captured in terms of procedure and circumstances that may warrant such removal:

“117 (1) The Master may apply to a judge in chambers for the removal of an executor, tutor or curator from the 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 incapacitated 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.”

As CHITAPI J explained in *Tawoneyi Kunaka v Master of the High Court and Anor* HH298/23 with reference to the Master in that case as the first respondent:

“When ss 116 (1) and 117(1) are read in harmony, the correct construction to be given is that the express mention of the removal of the executor being granted to the judge upon application by the first respondent of necessity means that such power is excluded from any powers which the first respondent may exercise in terms of s 116(1) which provides that the first respondent may do anything expedient in the exercise of his supervisory power over matters therein provided. The expression or rule *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other) as an aid to try and establish the intention of the legislature when it is not clearly manifest comes into play. The first respondent can therefore in terms of s 116 do what he considers expedient in the exercise of supervisory power over an executor, curator or tutor. This however excludes removal of that person from office.”

Following the complaints received against Reason, what the Master explained as having been granted were additional Letters of Administration for the transfer of the house. Section 29 is particularly pertinent in that it addresses situations where an executor needs to be an appointed because the appointed executor has died, or has become incapacitated or has been removed for office by a decree of a competent court. It provides as follows:

“29. Appointment of new executor

When by reason of any testamentary or assumed executor whom letters of administration have been granted having died or become incapacitated to act as such or having been removed from his office by the decree of any competent court or a judge thereof, there does not remain for the administration of the estate any executor whatever, ... **and when it happens that any executor dative after letters of administration have been granted to him,** dies or becomes incapacitated or is removed in a manner aforesaid then and in every such case proceedings for the appointment of an executor in place of such executor so dying or so becoming incapacitated or removed shall be taken by the Master in like manner on all respects as provided in section twenty-five, twenty-six and twenty-seven.”

What emerges from this provision are the circumstances when a new executor may be appointed through the granting of additional letters of administration. These are namely

- a) Where an executor has died
- b) Where an executor has become incapacitated for whatever reason. An example may be an executor’s resignation.
- c) Where an executor has been removed by the court.

An important point is also that where an executor is no longer expected to act then his or her letters of administration must be revoked. As explained by TAKUVA J in *Maritha Mwinjilo v Lovie Charity Munyoro and Another HB 42/20*:”

“Granted there are strong grounds for where there is a need to appoint or add another person as executor, the previous letters of administration must be revoked. The reason is simple. It is not to permit two letters of administration in respect of one estate to co-exist in circumstances where it is not clear whether the new letters of administration automatically nullify the previously granted letters or whether they are to operate *pari pasu*”.

There is no doubt that the actual procedure for removing the applicant as executor was not followed by the Master. On the face of it, there are indeed strong grounds for his removal as he is failing to finalise the estate by mixing his duties as executor with his own interests as a beneficiary. The duties of an executor are captured in sections under Part III of the Act and they include gathering the assets of the deceased, advertising for debtors and creditors, drawing up and advertising the final liquidation account and distributing the estate. Clearly, improving the deceased's estate and holding a co-beneficiary to ransom by refusing to wind up the estate is not one of those expectations. The estate must be transferred with each contributing to the transfer and any claims between the brothers for improvements addressed thereafter between them. I do not think the Master was biased in any way but due to procedural irregularities in the removal of the executor, it is accordingly held as follows;"

1. The application for review of proceedings against the decision of the Master of the High Court in removing the applicant as executor un-procedurally is hereby granted.
2. The second Respondent is ordered to cancel the letters of administration granted to the first Respondent on the 11th of September 2024 and to follow proper procedures, if necessary, for the removal of the executor.
3. Each party shall pay its own costs.

TSANGA J:.....