ATALIA MUKANGANISE

And

GRACE MUKANGANISE

And

SAMUELMUKANGANISE

And

LILIAN MUKANGANISE

And

LOVENESS MUKANGANISE

Versus

SIMANGELE MWALE

And

THE DEPUTY MASTER

And

THE REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 17 JUNE 2021 & 15 JULY 2021

Opposed Application

Ms. *Mkwananzi*, for the applicant
1st respondent in person

DUBE-BANDA J: This is a court application for a declaratory order. Applicant seek an order couched in the following terms, that:

1. The registration of the estate of the late Maxwell Joseph Mukanganise under DRBY 1744/01 is declared null and void.

2. The transfer of the house number 76-2332 Mpopoma, Bulawayo effected into the 1st respondent's be and is hereby reversed to the estate late Maxwell Joseph Mukanganise.
3. The 2nd respondent be and is hereby ordered to reopen the estate of the late Maxwell Joseph Mukanganise for the executor dative and the administration of estate with the involvement of all of all interested parties within 3 days.
4. The 1st respondent pay costs on an attorney-client scale.

The application is opposed by the 1st respondent. The Deputy Master and the Registrar of Deeds are cited as the 2nd and 3rd respondents respectively. They are cited in their official capacities because the implementation of the order sought by the applicant, if granted may require their services.

Factual background

This application will be better understood against the background that follows. Mr Maxwell Joseph Mukanganise (deceased) died on the 17th September 2001. During his lifetime he was first married to Dorothy Mukanganise, whom he divorced by an order of this court on the 21st March 1986. Dorothy Mukanganise is the mother of the 1st, 2nd, 3rd, 4th and 5th applicants. He was again married to Sheila Mukanganise, whom he divorced by order of this court on the 3rd December 1993. 1st respondent contends that she was customarily married to the deceased, although the applicants contend that she was a girl-friend to the deceased.

On the 26 October 2001, 1st respondent, pursuant to the provisions of section 5 of the Administration of Estates Act [Chapter 6:06] filed a death notice of Maxwell Joseph Mukanganise. She filed the death notice in her capacity as the customary law wife of the deceased. In the death notice she indicted two minor children of the deceased. Applicants contend that they were not listed in the death notice as the children of the deceased. In her submissions, 1st respondent informed the court that she listed the names of the applicants in a separate piece of paper and attached it to the death notice. According to her the reason for doing this was that the space provided in the death notice for the listing of the children was insufficient to include all deceased's children. This was disputed by the applicants.

An edict meeting was held. On the 15th October 2001, the 2nd respondent appointed one Jackson Mukanganise as the executor of the estate of the deceased. Letters of Administration was issued in the name of Jackson Mukanganise. The executor has since died. He died in July 2017. On the 15 October 2002 the 2nd respondent confirmed the final distribution account in the estate of the late Maxwell Joseph Mukanganise. The certificate was signed by 1st respondent as the executrix. It is against this background that applicants on the 15 August 2019, launched this application seeking the relief mentioned above.

In her notice of opposition 1st respondent took preliminary points. The points taken are these: - the first is that applicants filed a similar application, seeking identical relief and such application is still pending before this court. The second is that this is a review application disguised as an application for a declaratory order. In this matter I took a holistic approach. This approach avoids a piece-meal treatment of the matter, and the preliminary points are argued together with the merits, but when the court retires to consider the matter it may dispose of the matter solely on preliminary points despite that they were argued together with the merits. I now deal with these preliminary points.

Preliminary points

The first preliminary point taken is that applicants filed a similar application, between the same parties, seeking the same relief and that such application is still pending before this court. In essence this is a defence of *lis alibi pendens*. 1st respondent refers to case number HC 409/09 as the pending case, and applicant refers to HC 409/17. Both these files relate to different parties, and have no relevance to this application. I take the view that there is an application that was filed by the applicants, speaking to the same parties and same dispute as in this case. The failure to provide a correct case number is just lack of paying attention to detail. Briefly, the principles surrounding a plea of *lis alibi pendens* were aptly summarised as follows in *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA), that:

> As its name indicates, a plea of *lis alibi pendens* is based on the proposition that the dispute (lis) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation

where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years.[1]

In their answering affidavit, applicants contend the application was withdrawn and is not pending. Once an application is withdrawn it is no longer pending. On the facts of this case, the preliminary point of *lis alibi pendens* has no merit and is refused.

The second preliminary point taken is that this is an application for review disguised as a *declaratur*.[2] Interconnected with this preliminary point is the contention that applicants are merely aggrieved by the decision of the Deputy Master in confirming the distribution account, and are out of time allowed in terms of section 52(9)(i) of the Administration of Estates Act [Chapter 6:01] (Act) to challenge such a confirmation. Therefore, this application is named a declaratur to circumvent the provisions of review in rule 259 of the High Court Rules, 1971 (Rules) and section 52(9) (i) of the Act.

The crisp issue is whether applicants' complaints betray a review disguised as a *declaratur*. A review is not concerned with the merits of the decision but with the process of the decision. In a review the focus is on the process, and on the way in which the decision-maker came to the challenged decision. Instead of asking whether the decision was right or wrong, a court on review concerns itself with the procedural irregularities. In general, judicial review is concerned, not with the decision, but with the decision making process. Review is

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[1] At para (2)

[2] *Paragraphs* 3.4; 3.5 and 3.6 of the opposing affidavit: Further and foremost the applicants cannot seek to reopen the estate file through a declaratory order. This is wrong procedure. The applicants are trying to bring an application for review of the decision of the Master through the back door. They want to bring the review through a declaratur which cannot happen. The first and final distribution account of my late husband's estate was advertised and lying for inspection for twenty-one days. There was no objection raised and the account was confirmed by the Master on the 12th November 2002 – the applicants' annexure X2 and X3 refers. Section 52(9)(i) of the Administration of Estates Act [Chapter 6:01] is clear that once dissatisfied with Master's decision regarding a final account, one has to approach this court through motion proceedings within 30 days after the date of the Master's decision.

The applicants have used a wrong procedure and, even if they had come up with an application for review, they are way out of time, this application has been brought almost seventeen years after the conformation of the final distribution account. This being so by reason that the period prescribed by statute for compliance cannot be extended by any court neither could any court condone failure to abide in the absence of such provision. The court not empowered to grant condonation for failure by a party to comply with time limits provided by statute, the applicants are aware that they cannot seek a review and hence the attempt to clothe the proceedings as seeking a declaratory order. I ask this Honourable Court to see the case of Dr Madondo N.O. v Dauramanzi & Others HH 214/17.

On the points alone this matter must fail. It must be dismissed with costs. I therefore pray for the dismissal of this application with costs on the preliminary points I have raised.

not directed at correcting a decision on the merits. See: *Khan v The Provincial Magistrate* HH 39/06; *S* v *Maphosa* HH-323-13, *Chief Constable of the North Wales Police* v *Evans* [1982] 3 All ER 141 (HL) at 154d; *Bato Star Fishing (Pty) v Minister of Environment Affairs* 2004 4 SA 490 (CC).

A declaratur is provided for in section 14 of the Section 14 of the High Court Act [*Chapter 7:06*]. It provides that the High Court may, in its discretion at the instance of any interested person, inquire into and determine any existing, future and contingent or obligations notwithstanding that such person cannot claim relief consequential upon such determination. A declaratory order is an order by which a dispute over the existence of some legal right or obligation is resolved. Herbstein and Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th *ed.* Volume 2) 1428. It is used where there is a clear legal dispute or legal uncertainty regarding, e.g. administrative, executive action or constitutional rights. In a *declaratur* a court is being asked to declare that a certain state of affairs exists. It may also be used to determine whether actual or pending action is lawful or legal. It is a simple means of curing illegal activity, to put it simply, with a *declaratur* the court gives a definitive and authoritative answer to the question as to the legal position of a particular given state of affairs. See: *Rail Commuters' Action Group* v *Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) *para*. 107; *Family Benefit Society* v *Commissioner for Inland Revenue* 1995 (4) SA 120 (T) at 125; *Garment Workers' Union, Western Province* v *Industrial Registrar* 1967 (4) SA 316 (T); *Sex Worker Education and Advocacy Task Force* v *Minister of Safety and Security* 2009 (6) SA (WCC) *paras*. 43-45.

I take the view that a *declaratur* is neither designed nor appropriate procedural device to either cure or correct irregularities in proceedings of inferior courts, quasi-judicial tribunals or administrative bodies. Irregularities are corrected by means of a review. My view is that a review and *declaratur* cover different landscapes and the jurisdiction requirements are different. With a review one looks at the process or irregularities, while with a *declaratur* one is concerned with a legal position of a particular given state of affairs.

To put this point preliminary point in context, I reproduce the material parts of the founding affidavit which contains the grounds of complaint, it says:-

1. My father died at Bulawayo on the 17th of September 2001. Thereafter unbeknown to us the 1st respondent approached the additional master to register the estate of our deceased father.
2. During the registration process the 1st respondent in the company of my now deceased uncle made deliberate misrepresentations to the 2nd respondents and deliberate left information on the death notice.
3. The 1st respondent deliberately left some of the children of my deceased father who include all the applicants. The 1st respondent fully knew that we exist and her actions were tantamount to fraud and violations of the law. Please find attached the death notice attached hereto and marked annexure "X1".
4. Further to that the estate of my late father was registered surreptitiously because the 1st respondent was not a customary wife but a girlfriend. The 1st respondent was keen to benefit where she did not sow.
5. The 1st respondent awarded herself house number 76/2332 Mpopoma, Bulawayo and substantial amount of cash. Please find the distribution account attached hereto and marked annexure "X2".
6. In addition to that the 1st respondent also misrepresented that the 3rd applicant and other children of the deceased will receive movable property such as dining room suites, bed, kitchen unit etc. No such movable property was received as the applicants had no idea that the estate of our father had been registered. Please find attached alleged deceased distribution by 1st respondent attached hereto and marked annexure 'X3'.
7. All applicants as interested parties were not notified about registration of their father's estate or about distribution. The applicants are interested parties not only in terms of the law but also in terms of their cultural values.
8. The 1st Applicant only became aware that their father's estate had been registered and finalised in or about 30 November 2018 when the 1st Respondent for the first time attempted to block the 1st applicant to have access to their father's immovable property. Please find attached the ruling of the magistrate advising that the estate should be re-opened attached hereto and marked annexure 'A'.
9. The misrepresentation by the 1st respondent was clearly calculated and deliberate and meant to exclude the applicants in the registration of the Estate there was material non-disclosure which led to the appointment if executor dative and subsequent distribution of property.

10. Furthermore l am advised that if the registration of estate was illegal all subsequent actions arising therefrom should be set aside. The distribution estate should be declared null and void and all processes arising therefrom including confirmation of the 1st respondent as a customary wife as the process was done surreptitiously in a bid to defraud and mislead.[3]

Applicants calls their application a *declaratur*. In considering whether this is a *declaratur* proper or a review disguised as a *declaratur* this court looks at the substance of the application rather than what a litigant chooses to call his or her application, or its form. See: *Econet (Pvt) Ltd v Minister of Information, Posts and Telecommunications* 1997 (1) ZLR 342 at 344-345. In *Geddes* v *Tawonezvi* 2002(1) ZLR 479 (S) the Supreme Court said in deciding whether an application is for a declaration or review, a court has to look at the grounds of the application and the evidence produced in support of them. The fact that an applicant seeks a declaratory relief is not in itself proof that the application is not for review. Setting aside of a decision or proceeding is a relief normally sought in an application for review. In *casu*, the fact that in *paragraph* 1 of the order sought applicants ask this court to declare the registration of the estate null and void, is not proof that this is an application for a declaratory order.

Applicants are seeking an order setting aside the registration of the estate and the confirmation of the final distribution account. These are decisions made by the Deputy Master in terms of the Administration of Estates Act [Chapter 6:01]. The grounds anchoring the complaint is that the procedure for registering the estate was itself irregular in that it was a result of misrepresentations. It is contended that 1st respondent omitted to list the names of the applicants in the deceased's death notice. It is argued that this omission was "tantamount to fraud and violations of the law." It is argued that "if the registration of estate was illegal all subsequent actions arising therefrom should be set aside." The high watermark of the grounds of complaint and the evidence in support thereof is about the processes leading to the registration the estate and the confirmation of the distribution account. Applicants are complaining about the procedure, and the grounds and evidence do not speak to a declaration of rights. The applicants are aggrieved by the decision of the Deputy Master on the basis that it was arrived at *via* incorrect procedure.

[3] Paragraphs …… to …… of the founding affidavit.

In her opposing affidavit 1st respondent avers that applicants are aware that they cannot seek a review because they are out of the timeline allowed to make an application for review. The decisions that applicants seek to impeach were made approximately seventeen years ago. In terms rule 259 of the Rules any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceeding 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. Applicants seeks to impeach the procedure used in the registration of the estate and the confirmation of the final distribution account. A consideration of the grounds of attack, the substance of the application and the relief sought leads to an escapable conclusion that this is a review application disguised as a *declaratur*. The jurisprudence in this jurisdiction is that a litigant should not be permitted to get around the requirements for review by naming its application a *declaratur*. See: *Madondo N.O v Cecilia Vimbainashe Dauramanzi & Ors* HH 214/17; *Kwete* v *Africa Community Publishing and Development Trust* HH 216/98 and *Marashu* v *Old Mutual Life Insurance Co Ltd* 2000 (2) ZLR 197 (H); *Ex-Constable Stanley* v *The Commission General of Police and Others* HB 288/17; *Geddes* v *Tawonezvi* 2002(1) ZLR 479 (S).

Again, section 52(9) (i) of the Act provides that once one is dissatisfied with the Master's decision regarding a final distribution account, one has to approach this court through motion proceedings within 30 days after the date of the Master's decision. Applicants launched this application approximately seventeen years after the approval of the distribution account. In explaining the gap period applicants aver that they became aware that the estate had been registered and finalised in or about the 30th November 2018, when the 1st respondent for the first time attempted to block the 1st applicant from accessing house number 76-2332 Mpopoma, Bulawayo. This explanation is woefully inadequate. Such broad and sweeping generalisations serve no useful purpose. A litigant who seeks the indulgence of the court after such an extended period of inaction must be candid with the court and provide much detail as possible that is available to him. The estate was advertised in terms of the law. The final distribution account lay for inspection in terms of the law. The account was confirmed in terms of the law. There is no evidence before court that applicants did not see the advertisement. There is no evidence of the steps, if any taken by the applicants to register the estate if at all they were interested in the registration of their father's estate.

I take the view that there must be a time limit in which one may seek the re-opening of a deceased estate. It seems to me that the court should be at large to consider what is a reasonable time within which litigant may sue for the re-opening of the administration of an estate. In this case, the final distribution account was confined on the 15 October 2002. This application was filed in 2019. Approximately 17 years later. The final distribution account did lay for inspection in terms of the law. The immovable property was long transferred into the name of the 1st respondent. I take the view that the delay is too long and unreasonable in the circumstances and this court should in appropriate circumstances decline to assist a party who seeks its assistance after such a long delay. See: *Moyo v Moyo* 1999 (2) ZLR 265 (HC). There must be finality in litigation: See: *Allan Cimas Mpofu v (1) The Director of Customs and Excise (2) The Officer in charge, Harare Central (Fraud)* SC 3/02; *S v Franco & Ors* 1974 (2) RLR 39 (AD). Where the delay is found to be unreasonable, there must be a basis for this court to exercise its broad discretion to overlook it. In this case there is none.

The court has to be wary of applications that may appear as seeking declaratory orders when in fact they are review proceedings. See: *Madondo N.O v Cecilia Vimbainashe Dauramanzi & Ors (supra).* It is clear that applicants found themselves in the proverbial horns of a *dilemma.* They could not institute a review in terms of rule 259, because they were outside the time line permitted in the rule. Again, they could not approach this court in terms of section 52(9) (i) of the Act to seek reversal of the Master's decision in approving the distribution plan because they were outside the time line permitted by this provision. In the answering affidavit applicants contend that the actions of the 1st respondent do not become lawful because of the passage of time. This is not the answer to the question of adopting an incorrect procedure. The founding affidavit speaks to grounds of review. The order sought speaks to review. It is only the name that applicants chose to call their application that speaks to a *declaratur.*

There is merit in the preliminary point taken that this is a review application disguised as an application for a *declaratur.* The basis of attacking the proceedings betrays grounds for review. A litigant cannot be permitted to file an application for review well out of time, without seeking condonation, as long as it names its application a *declaratur*. See: *Geddes* v *Tawonezvi* (*supra*). Again, a litigant cannot be permitted to circumvent the provisions of section 52(9) (i) of the Act by merely naming its application a *declaratur*. 1st respondent in her opposing

affidavit urged this court to dismiss this application on the preliminary points without a consideration of the merits. I agree.

What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule. Accordingly, the applicant must bear the 1st respondent's costs.

Disposition

In the result, I order as follows:

1. The preliminary point that this is an application for review disguised as a *declaratur* is upheld.
2. This application is dismissed with costs of suit.

Sansole and Senda, applicants' legal practitioners