

**THE PARTNERS FOR THE TIME BEING
OF MASEKO LAW CHAMBERS**

Versus

**RICHARD MOYO MAJWABU N.O
IN HIS CAPACITY AS EXECUTOR OF ESTATE LATE
NICHOLAS MAGQOKANA NDEBELE**

And

**ESTATE LATE NICHOLAS MAQGOKANA NDEBELE
DRB 1038/19**

And

THE SHERIFF OF THE HIGH COURT

And

THE MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 16 FEBRUARY AND 7 SEPTEMBER 2023

Opposed Application

U. Nare, for the applicant
Advocate P. Dube, for the 1st respondent

TAKUVA J: This is an application for specific performance in terms of Order 32 of the Old High Court Rules 1971. Applicants are claiming conveyancing mandates over certain properties belonging to 2nd respondent. In the alternative applicants claim 80% fees premised off a conveyancing tariff SI 24/2013.

BACKGROUND FACTS

Nicholas Magqokana Ndebele died on 12 June 2019. Applicant alleges that it was given a mandate by Dr Nicholas Ndebele on 6 February 2019 to conveyance properties in his estate. Applicant acquired title deeds and other documents relating to 2nd respondent's property

through the deceased's brother namely Godfrey Ndebele. It is applicant's averment that certain conveyance work had been done on behalf of both Nicholas Magqokana Ndebele when he was alive and for his deceased estate namely 2nd respondent. The said alleged work is attached as annexures to applicant's application. However there is no power of attorney attached by applicants from Dr Nicholas M. Ndebele when he was alive, authorizing the said conveyance documents and work.

Applicants also attached draft deeds of transfers. These encompass the majority of the conveyance work applicants allege to have performed under the mandate of Nicholas Ndebele. What is noteworthy is that each draft deed of transfer is devoid of a power of attorney from Nicholas M. Ndebele. Further applicants have attached alleged powers of attorney to effect transfer in their answering affidavit. These annexures do not have the deceased's signature. They are all in the name of Nicholas Magqokana Ndebele and not the Estate Late Nicholas M. Ndebele and therefore the said drafts are not usable.

The 1st respondent is the executor of the deceased estate. Applicants have refused to hand over documents relating to the deceased's estate to 1st respondent. Also applicant's law firm namely Maseko Law Chambers is in possession of various documentation relating to the submission of Stand 429 (certificate of consolidated title Reg. No. 1748/2016), and the executor of the Estate Late Nicholas M. Ndebele the 1st respondent has requested the above documents from applicants.

POINTS IN LIMINE

Firstly, 1st respondent claimed that there is no definite party before this court in that applicants have failed to properly identify and outline the partners of Maseko Law Chambers. By describing themselves as "The Partners For The Time Being of Maseko Law Chambers" they give an impression that this is a "fluid constitution of partners and the litigants before this court may change from time to time." Therefore 1st respondent prayed for the dismissal of the application for lack of a definite party before the court.

Responding to this argument the applicant's legal practitioner urged the court to dismiss it as being frivolous in that firstly the information being sought is readily available at the Law Society of Zimbabwe. Secondly, the parties exchanged numerous correspondences wherein the partners of the applicants are explicitly stated on applicant's letter head. Thirdly it is trite

that Law firms can sue and be sued in their own name – See *Gula Ndebele & Partners Legal Practitioners v A G Venture (Pvt) Ltd* HH 39-2012.

See also 02A 7 (b) of the High Court Rules 1971.

In my view, the 1st point *in limine* has no merit as the identity of the applicants can be easily ascertainable with sufficient precision.

The second point taken is that the applicant's answering affidavit does not adhere to the primary purpose of an answering affidavit in that it should not contain new material as affirmed in the *Turner & Sons v Master of The High Court and Theresa Grimmel and Dobrock (Pvt) Ltd* HC 9904/11 (2015) ZWHHC 498 (2 June 2015) wherein MAKONI J (as she then was) said;

“Answering affidavits should not contain new material or bring fresh allegations against the respondents. They should also be brief, not voluminous. If they are unnecessarily prolix or do not comply with the requirements of r 227 regarding the layout and contents of affidavits, an adverse order of costs may be made.”

See also *Jarvis Mudzengerere v Estate Late Jackson Jekera & Ors* HH 244-10, HC 137591

In the present matter, it cannot be denied that applicants have introduced new material documentary evidence in their answering affidavit that should have been attached to the applicant's founding affidavit. Said annexures should be struck out. The attached Annexures to the Answering Affidavit are hereby struck out.

The 3rd point *in limine* relates to the claim of fees for conveyancing work done. The point made is that SI 24/2013 was replaced and therefore no longer applicable at the material time applicants claimed to have performed the conveyance work. The point has not been seriously challenged. I find that the claim is bad at law. Further, the claim suffers from another weakness, namely that the deeds of transfer attached as Annexures B1 – B14 cannot be used in order to finalise transfer from the deceased estate to the alleged buyers. This is so because they are without a power of attorney from the deceased. Therefore the said deeds were drafted without authority. Accordingly, I find that the point *in limine* has merit.

Finally, the 1st respondent submitted that applicants do not have a mandate to represent Estate Late Nicholas Magqokana Ndebele factually and at law. Applicants have not produced

any written mandate to represent Nicholas M. Ndebele when he was alive. It is the 1st respondent as the executor of the said deceased estate who has authority to administer it.

It was further argued that if the applicants had a mandate to provide legal services to the deceased, the said mandate died with the deceased – See *Jarvis Mudzengerere v Estate Late Jackson Jekerera & Ors supra*.

The argument is that any mandate that applicants seek to rely on for the above estate has elapsed by operation of law.

While I agree that applicants do not have a mandate to deal with estate property, it must be accepted that there are two distinct periods in this matter. There is the pre-deceased's death era and the post deceased's death era. It is apparent from par 9 – 15 of The Founding Affidavit, Annexures A1, A2 (p. 10) from Coghlan & Welsh showing the “schedule of work in progress for transfers from Nicholas M. Ndebele,” the Deeds of Transfer and numerous correspondence between applicants' Law firm and 1st respondent's Law firm that applicants were mandated by Nicholas M. Ndebele during his lifetime to do conveyancing work in respect of the listed property. As a matter of law and fact, this mandate “died” on the day the grantor passed on.

What is clear from the above is that applicants are now incapacitated to transfer ownership. The only party with legal authority to do so is the Executor (1st respondent). The applicants cannot complete these procedures without the 1st respondent's consent and input.

Accordingly, there is need for this court to adopt a pragmatic and realistic approach to the stalemate in order to do justice to all interested parties. In this regard, I share 1st respondent's view that in the event this court finds that the applicants had a valid mandate to do the transfers, the court should make it “a condition that the applicants and/or the purchasers should first produce proof of payment before the 1st respondent can be required to sign any transfer documents.”

This is a necessary compromise that will deliver real justice to all the parties.

In the result it is ordered that:

1. The 1st respondent be and is hereby directed to sign all documents and make all payments towards obtaining the 4th respondent's consent, Rates clearance, Capital Gains Tax Clearance and all other documentation necessary for the

transfer of the properties listed in the Estate Late Dr Nicholas Magqokana Ndebele on condition applicants or the purchasers of those properties first furnish to the 1st respondent proof of payment of the purchase price in respect of each of the properties in question before the 1st respondent can be required to sign any transfer documents.

2. The following are the properties to be dealt with in terms of paragraph 1:-
 - (i) Lot 6 Sundivision R of Stands 178, 179 and 180 of Matshemhlope situate in the District of Bulawayo.
 - (ii) Lot 1 of Subdivision R of Stands 178 of 178, 179 and 180 of Matsheumhlope situate in the District of Bulawayo.
 - (iii) Stand 432 of Stand 429 of Matsheumhlope situate in the District of Bulawayo.
 - (iv) Lot 2 of Subdivision R of Stands 178 of 178, 179 and 180 of Matsheumhlope situate in the District of Bulawayo.
 - (v) Lot 10 of Subdivision R of Stands 178 of 178, 179 and 180 of Matsheumhlope situate in the District of Bulawayo.
 - (vi) Lot 2 of Subdivision R of Stands 178 of 178, 179 and 180 of Matsheumhlope in the District of Bulawayo.
 - (vii) Lot 3 of Subdivision R of Stands 178 of 178, 179 and 180 of Matsheumhlope in the District of Bulawayo.
 - (viii) Stand 431 of Stand 429 of Matsheumhlope situate in the District of Bulawayo.
 - (ix) Lot 8 of Subdivision R of Stands 178 of 178, 179 and 180 of Matsheumhlope situate in the District of Bulawayo.
 - (x) Lot 2 of Subdivision K of Stands 178 of 178, 179 and 180 of Matsheumhlope situate in the District of Bulawayo.

- (xi) Stand 435 of Stand 429 of Matsheumhlope situate in the District of Bulawayo.
 - (xiii) Lot 9 of Subdivision R of Stands 178 of 178, 179 and 180 of Matsheumhlope situate in the District of Bulawayo.
 - (xiii) Stand 434 of Stand 429 of Matsheumhlope situate in the District of Bulawayo.
 - (xiv) Stand 433 of Stand 429 of Matsheumhlope situate in the District of Bulawayo.
3. The applicant's legal practitioners of record shall be tasked to draft and lodge all documents in pursuance to the said transfers.
 4. There shall be no order as to costs.

Maseko Law Chambers, applicant's legal practitioners
James Moyo-Majwabu and Nyoni, 1st and 2nd respondents' legal practitioners