ESTATE LATE PHILIP MPOFU
aka PHILIP SIHUBE MPOFU
and
PEGGY MPOFU N.O.
And
PEGGY MPOFU
And
NGWENYAMA FUYANA
And
ASSISTANT MASTER
And
STANLEY MPOFU
And
SIPHIWE DZOZE (NEE MPOFU)
And
SIBONOKUHLE MPOFU
And
THABISILE MPOFU
And
DORICA FRAZER (NEE MPOFU)
And
BUHLEBENKOSI BHUMHIRA (NEE MPOFU)

Versus

DEPUTY MASTER OF HIGH COURT
And
OLIVER MASOMERA

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 30 JUNE & 13 JULY 2017

Urgent Chamber Application

Professor W. Ncube for applicants
Ms P. Ncube for the 2nd respondent
No appearance for the 1st respondent

TAKUVA J: This is an urgent chamber application wherein the applicants seek an order in the following terms:

"Terms of the final order sought

That you show cause to the honourable court why a final order should not be made in the following terms:-

1. That it be and is hereby declared that Peggy Mpofu is the lawful Executrix Dative in the Estate of the Late Philip Mpofu aka Philip Sihube Mpofu.
2. That the Letters of Administration issued by 1st respondent to 2nd respondent in the Estate Late Philip Mpofu aka Philip Sihube Mpofu dated 22nd May 2017 be and are hereby declared null and void and are set aside.
3. That 1st and 2nd respondent shall pay the costs on a legal practitioner client scale in their personal capacities jointly and severally the one paying the other to be absolved.

Interim relief sought

Pending the return date, the applicant is granted the following relief –

1. That 2nd respondent be and is hereby interdicted from in anyway exercising and performing any function or duty or responsibility of the Executive Dative of Estate Late Philip Mpofu aka Philip Sihube Mpofu.
2. That 2nd respondent be and is hereby interdicted and prohibited from visiting any of the properties of the applicants and Estate late Philip Mpofu aka Philip Sihube Mpofu and from interfering in any way with 2nd applicant's administration of the 1st applicant.
3. That 1st respondent be and is hereby interdicted from permitting 2nd respondent to perform any function or duty of the Executor Dative of Estate Late Philip Mpofu aka Philip Sihube Mpofu."

The facts are that Philip Mpofu died on 5 April 2008 and an edict meeting was convened at 1st respondent's offices including the deceased's relatives. At that meeting it was unanimously agreed that Peggy Mpofu, the surviving widow of Philip Mpofu be appointed as the Executrix Dative of the Estate. The 2nd applicant performed her duties until the 5th of June 2017 when 2nd respondent wrote a letter to the 3rd applicant advising the beneficiaries that 2nd respondent had been appointed Executor Dative of Estate Late Philip Mpofu and invited the family to a meeting at the offices of the 2nd respondent.

Aggrieved by this development, the beneficiaries engaged their legal practitioners who in turn contacted the 1st and 2nd respondents on how the second respondent had been appointed when the estate already had an Executrix Dative who had not been removed and why the purported appointment had been done unilaterally without any notice to or consultation with the

beneficiaries and the Executrix Dative. Following a series of letters between the parties, the 2nd respondent did not relent but continued to visit numerous properties belonging to the estate and interviewing tenants, occupants and employees. This further infuriated the beneficiaries resulting in a meeting with 1st respondent at his offices. Unfortunately, this meeting was fruitless leading to this application.

The basis of the application is the following:

"1. The 1st respondent unlawfully and unprocedurally appointed 2nd respondent. Executor Dative in an estate where there is in place an Executrix Dative already administering the estate and implementing the collective wishes of the beneficiaries and thereby created a situation in which there are now two people both armed with Letters of Administration to administer the same estate creating not just the risk of conflict and antagonistic actions by the two in the handling of estate property but of actual and real prejudice to both the estate and its beneficiaries.

2. The 2nd respondent has already engaged in belligerent conduct in direct conflict with the wishes of the beneficiaries including going into premises and residences without the consent and permission of the beneficiaries and residents or occupiers.
3. Irreparable harm and prejudice would be done to the estate were this application to be dealt with as an ordinary application while two people are administering the estate in conflict with each other and hence the need for this honourable court to deal with the matter on an urgent basis to avoid unnecessary conflictual actions by the two persons both holding Letters of Administration which appear valid on their face value.
4. Given the belligerent conduct of the 2nd respondent set out in the affidavits there is a real risk that if the matter is not dealt with urgently 2nd respondent would be emboldened to interfere with tenants and employees of the estate to the prejudice of the estate while an ordinary application is processed through the normal procedure".

The 1st respondent opposed the application by way of a Master's report in terms of o32 r248 of the High Court Rules 1971. However, the 1st respondent did not attend the hearing

despite being notified of the date and time. Substantively 1st respondent argued that his decision can only be challenged by way of a review application and not through an urgent chamber application for an interdict. He relied on section 26 of the Administration of Estates Act [Chapter 6:01] (the Act). It was also contended that the application is not urgent in that once applicants file their application for review, the 1st respondent will instruct the 2nd respondent to "put all tools down" and wait for its outcome. The rest of the points raised by the 1st respondent are directed at the final order sought and not the interim relief. He goes on to demonstrate that he has power to appoint, suspend or revoke Letters of Administration issued by his office.

The 2nd respondent filed his notice of opposition on 27 June 2017 in which he adopted the 1st respondent's argument that applicants have adopted the wrong procedure. On the merits, he argued that 1st respondent acted properly in revoking 2nd applicant's appointment since she is now based in the United Kingdom after abandoning the estate. Further, he also like 1st respondent relied on the provisions of sections 116 and 117 of the Act, which according to their interpretation give the 1st respondent an option to proceed to remove the 2nd respondent without making a chamber application. Finally, he submitted that the applicants should not be allowed to "arm twist" this court into reviewing a decision of the 1st respondent without following proper procedure laid down in the Act.

Dealing with the nature of this application, I find that it is quite evident from the application itself that it is not a review application disguised as an application for a declaratory order. It is in fact an application for a declaratory order as shown by the nature of the final relief sought in the draft order. I must state that I entertain serious doubt on the correctness of the respondent's conclusion that 1st respondent's decision can never be challenged other than by way of an application for review. Respondents have not referred to any provision in the Act that compels or obliges applicants to bring review proceedings to have a declarator that 2nd applicant remains the lawful Executrix. I say so for the simple reason that this application is concerned with the appointment of the 2nd respondent as executor. The declarator being sought is that the appointment of the 2nd respondent be declared *null* and *void.* In my view such an application can properly be made to this court. See *Mutyasira* v *Gonyora & Anor* 2007 (1) ZLR 318 (S) where

the appointment of an executor by the Master was challenged in the High Court by way of a court application and subsequently through an urgent chamber application seeking a provisional order with the final relief sought being a declarator that the executor's appointment was null and void. The court declared the appointment of the "Executor" by the Master *null* and *void*. On appeal this decision was confirmed. The Supreme Court per SANDURA JA with ZIYAMBI JA and MALABA JA concurring, stated that the appointment of the appellant was invalid as the 1st respondent had not been removed from office in terms of s117 (I) of the Act, and so there was no vacancy to fill. See also *Musara* v *ZINATHA* 1992 (1) ZLR 9(H).

Consequently, I find that this application is properly before me.

As I pointed out in *Turnall Mining (Pvt) Ltd t/a Beenset Investments* vs *Sipiwe Dube and Ors* HB-102-17, the requisites for the right to claim an interdict are a well beaten path. The Supreme Court in *Airfield Investments (Pvt) Ltd* v *Minister of Lands & Ors* 2004 (I) ZLR 511 (S) put them as follows;

"Briefly these requisites are that the applicant for such temporary relief must show –

(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or if not clear, is *prima facie* established, though open to some doubt;
(b) that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
(c) that the balance of convenience favours the granting of interim relief; and
(d) that the applicant has no other satisfactory remedy."

In casu, the essence of this application is to preserve the *status quo ante* until the legality or otherwise of 1st respondent's actions are determined either upon the return date of the provisional order or alternatively until the determination of any review proceedings applicant might be advised to institute now that applicants have become aware of the purported revocation which is said to have preceded the 2nd respondent's appointment. Quite clearly the applicants *in casu* have an interest in the proper administration of the estate. They have as close relatives and beneficiaries *locus standi* to bring this application. Therefore they have a *prima facie* if not clear

right to protect. As close relatives of the deceased, they qualify to compete for appointment as a preferred executor in terms of s26 of the Administration of Estates Act.

As regards the second requirement, in view of the size of the estate, the large number of beneficiaries and the fact that the 2nd respondent has already commenced work as a second executor, there is a well grounded apprehension of irreparable harm if the interim relief is not granted and applicants ultimately succeed in establishing their rights.

The balance of convenience in my view favours the granting of the interim relief in that if it is granted, respondents have absolutely nothing to lose as there is no conceivable prejudice that might be suffered by them. The 1st respondent's office is a creature of statute and he has no personal interest in this case. The 2nd respondent is a mere appointee of the 1st respondent who if he were ordered to wait for the outcome of this application would not suffer any harm.

On the other hand however, if the interim relief is declined the beneficiaries would suffer financial loss due to mismanagement of the estate assets arising from the dual administration by two competing executors. Also creditors are likely to suffer from the consequences of a hostile relationship between the beneficiaries and the 2nd respondent. Already, there has been friction over how some income generating projects under the estate are being managed.

The applicants have no other satisfactory remedy because the 1st respondent is adamant that his drastic decision to remove the 2nd applicant is lawful notwithstanding the fact that he has not resorted to s117 (1) to justify such a removal. See *van Niekerk NO* v *Master of the High Court* 1996 (2) ZLR 105 (S) where it was held that "in order to justify removal of an executor from office under s 117 (1), it had to be shown that the executor had failed to perform satisfactorily any duty or requirement imposed on him by or in terms of any law and that the executor was no longer suitable to hold office as such. There was no finding adverse to the appellant on either of these grounds. The fact that interested parties objected to the account was not in itself a ground for removal of the executor" … See also *Wang & Ors* v *Ranchod NO & Anor* 2005 (1) ZLR 415 (H).

In the circumstances I find that the applicants have established all the requisites of an interdict in that they have made adequate cause for the preservation of the *status quo ante* until the final determination of the legality or otherwise of 1st respondent's actions.

Accordingly, it is ordered that:

Pending the return date, the applicants are granted the following relief –

1. That 2nd respondent be and is hereby interdicted from in anyway exercising and performing any function or duty or responsibility of the Executor Dative of Estate Late Philip Mpofu aka Philip Sihube Mpofu.
2. That 2nd respondent be and is hereby interdicted and prohibited from visiting any of the properties of the applicants and Estate Late Philip Mpofu aka Philip Sihube Mpofu and from interfering in any way with 2nd applicant's administration of the 1st applicant.
3. That 1st respondent be and is hereby interdicted from permitting 2nd respondent to perform any function or duty of the Executor Dative of Estate Late Philip Mpofu aka Philip Sihube Mpofu.

Mathonsi Ncube Law Chambers, applicants' legal practitioners