VIRGINIA CHIDHAKWA (nee MACHOKOTO)

Versus

MANALA LOVENESS MOTSI
(cited in her personal and, also, in her capacity as the
Executrix Dative to the estate of the late Remusi Machokoto
a.k.a. Remusi Nkosi DRB 899/00)

And

DEPUTY MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 22 JUNE AND 2 JULY 2020

Opposed Application

G Nyoni, for the applicant
R Ndlovu, for the 1st respondent

KABASA J: This is an application for the removal of the Executrix Dative on the grounds that the first respondent has abdicated her duties since her appointment in 2014 to administer the estate of the late Remusi Machokoto.

The applicant therefore seeks the following relief, as articulated in the draft order:-

"1. 1st respondent be and is hereby removed as the Executrix Dative to the estate of the late Remusi Machokoto also known as Remusi Nkosi in terms of section 85 (1) of the Administration of Estates Act, Chapter 6:01.

2. 1st respondent be and is hereby ordered within 14 days of this court order being served at the offices of Upperlink Executors and Trust to render a full and detailed account of all the money she received from the sale of stand number 61402 Pelandaba, Bulawayo and all rentals in respect of house number 61402 Pelandaba Bulawayo and house number 1282 Old Luveve Bulawayo which she collected from the day she was appointed that is to say from 1 August 2014 to date of her removal.

3. Should 1st respondent fail to render an account as ordered above, applicant and 2nd respondent, shall without limitation to any civil remedies as they may

consider appropriate, be at liberty to take the issue up with the law enforcement authorities.

4. 1st respondent, in her personal capacity, to pay costs of this court application at an attorney and client scale."

Most of the facts are common cause. These are:-

1. The applicant is a daughter of the late Remusi Machokoto.

2. Remusi Machokoto was married to Mirriam Machokoto. Remusi died on 7th January 2000 and Mirriam was appointed the Executrix Dative of his estate and was duly issued with Letters of Administration.

3. On 4th July 2001 Mirriam also died before finalising the administration of her late husband's estate.

4. Martha Mataruka, a daughter to the late Remusi was then appointed Executrix Dative of the late Remusi's estate but she too died before finalising the distribution process.

5. On 1st August 2014 the 1st respondent was then appointed Executrix Dative of the late Remusi's estate and duly issued with Letters of Administration.

6. Since the issuance of the Letters of Administration the estate is yet to be finalised and the Master's fees are yet to be paid.

The applicant contends that the first respondent has failed to conduct herself as is expected of a professional Executrix and has consequently prejudiced the estate, the State and the beneficiaries.

The applicant anchored her application on the provisions of section 85 (1) of the Administration of Estates Act, Chapter 6:01.

Section 85 (1) of the Act provides that:-

(1) "Every Executor, tutor or curator shall be liable to be suspended or removed from his office by order of the High Court or any Judge thereof if the High Court or Judge is satisfied on motion that, by reason of absence from Zimbabwe, other avocations, failing health or other sufficient cause, the interests of the estate under his care would be furthered by such suspension or removal."

In order to speak to the factors covered in section 85 (1) the applicant raised a number of issues, all meant to establish sufficient cause for the removal of the first respondent.

I propose to deal with these issues under the following headings:-

1. **Delay in finalising the Administration ofthe Estate**

The applicant gave a history of the matter in her founding affidavit. Her argument is that after the 1st respondent's appointment in 2014, she took control of all the assets which formed that estate, i.e. stand number 1282 Old Luveve and stand number 61402 Pelandaba Bulawayo and all household goods and effects.

About 3 years later, in 2017 the applicant learnt of the sale of the Pelandaba house. In December of the same year she sought to clarify the circumstances of such sale. Feeling frustrated by the lack of co-operation from the 1st respondent, the applicant lodged a complaint with the 2nd respondent. The 2nd respondent invited the 1st respondent to a meeting in order to address the applicant's complaint and a meeting was convened on 14th February 2019 without the 1st respondent as she did not attend.

The applicant also attached a letter written to the 1st respondent by the 2nd respondent dated 8th July 2015 (page 20 and Annexture 5) in which the 2nd respondent drew the 1st respondent's attention to the fact that there was no progress in the winding up and finalisation of the late Remusi's estate. The lack of progress had resulted in an inordinate delay as the statutory time limits provided in the Administration of Estates Act had long been exceeded. It was also pointed out that such delay was prejudicial to the beneficiaries and to the Government of Zimbabwe as the Master's fees had also not been paid.

To date the estate has still not been finalised, to the prejudice of the beneficiaries. Such prejudice arising from the fact that the Pelandaba house was sold in United States dollars and the rentals collected for the 2 properties were also in the same currency. Due to the delay, those proceeds, if they are there, have lost value given the monetary policy of February 2019, which culminated in the promulgation of a legal instrument effectively declaring United States dollar bank accounts as RTGS.

The Master's fees are yet to be paid from the same amount whose value has plummeted.

2. **Failure to be Accountable**

The applicant submitted that there has been no report to account for the rentals collected and the call by the 2nd respondent for the payment of Master's fees has fallen on deaf ears.

A meeting called by the 2nd respondent which was to be held on 14th February 2019 to discuss the sale of the Pelandaba house went ahead without the 1st respondent as she did not attend.

On 1st April 2019 the applicant's legal practitioners wrote to the 1st respondent (page 21 Annexture H) raising the lack of progress in finalising the estate, the silence on the fate of the rentals collected from the properties and the letter the 1st respondent had written to the 2nd respondent without copying the applicant but again the legal practitioner's letter was not favoured with a response.

Based on the foregoing the applicant moved for the removal of the 1st respondent.

The 1st respondent challenged her removal as an Executrix of the Estate Late Remusi Machokoto.

In her opposing affidavit, the 1st respondent responded to the allegations leveled against her. In so doing she sought to show that there is no basis for her removal.

She accepted that the Pelandaba house was disposed of after getting the requisite Section 120 of the Administration of Estates Act Authority from the 2nd respondent.

The house was sold at a time when the 1st respondent was made to believe that there were only 2 beneficiaries to the estate, the applicant and her brother Ambrose Machokoto. The two were at loggerheads and it was decided that the Pelandaba house be sold, for which the 1st respondent subsequently obtained the 2nd respondent's authority.

The applicant was peeved at the failure to access her share of the proceeds of that sale which she could not access because the 1st respondent had been made aware of the existence of other children of the deceased.

As regards the lack of response to the applicant's complaint, the 1st respondent explained that she responded to the 2nd respondent but did not copy the applicant as the applicant had also not copied her in that complaint.She therefore did not deem it necessary to copy the applicant as the response was directed to the 2nd respondent. The sale of the Pelandaba house was also meant to address the problematic tenants whose allegiance to Ambrose made it difficult for the 1st respondent to collect rentals from the two properties.

Turning to the submission of the first and final distribution account, the 1st respondent asserted that such was lodged with the 2nd respondent on 28th January 2019 and she is awaiting 2nd respondent's permission to advertise it.

The Master's fees have therefore not been paid until the approval of the distribution account by the 2nd respondent. The non attendance at the 2nd respondent's office at the 14th February 2019 meeting was occasioned by her absence as she was out of town and she had not been notified of that meeting.

In response to a failure to respond to the letter of 1st April 2019 from the applicant's legal practitioners, 1st respondent's explanation was that it was an oversight on her part but the first and final account had already been lodged with the 2nd respondent.

She refuted the accusation of lack of accountability and asserted that she created a whatsapp group for all beneficiaries whose sole purpose was to update the beneficiaries on progress regarding the winding up of the estate. The same issue of beneficiaries also caused the delay in finalising the estate because she had to carry out investigations in order to establish their whereabouts.

The foregoing was the 1st respondent's rebuttal of the charges laid against her by the applicant and meant to justify the 1st respondent's removal as the Executrix of the late Remusi's estate.

The issue is whether a case has been made for the removal of the 1st respondent as the Executrix Dative of the late Remusi's estate.

Fortunately, the matter was not a "he said she said" scenario. This being so because the 2nd respondent submitted a report in terms of Rule 248 (1) (b) of the High Court Rules, 1977.

The contents of this report provided immense assistance as it spoke to the issues forming the basis of the applicant's grievances which informed the bringing of the present application.

The report revealed the following pertinent facts:-

1. After the appointment of the 1st respondent as Executrix Dative in 2014 there was no activity until 2018 when the applicant filed a complaint.

2. The 2nd respondent's office sought audience with the 1st respondent to no avail.

3. The first and final distribution account which the 1st respondent said was lodged on 28th January 2019 was only lodged on 10th March 2020 after the applicant had filed the present application for her removal.

4. The Master's fees have not yet been paid and they ought to have been paid upon acceptance of property values as given in the Executor's Inventory.

5. Remusi Machokoto pre-deceased his wife Mirriam Machokoto. Mirriam Machokoto was therefore the beneficiary of the Pelandaba house which was the matrimonial house in terms of section 3A of the Deceased Estates Succession Act, Chapter 6:02. The other property, which is the Luveve house, was to be shared between Mirriam and the other beneficiaries.

6. Mirriam died on 4th July 2001 and in November 2018 the 1st respondent registered Mirriam's estate but an Executor is yet to be appointed.

The sum total of the 2nd respondent's report is a damning indictment on the 1st respondent and supports the applicant's reasons for seeking the removal of the 1st respondent.

The same report engenders a sense of disquiet as to how and why the Section 120 Authority was granted by the 2nd respondent's office in November 2017 which authority authorized the disposal of the Pelandaba house.

The question therefore is whether a case has been made for the removal of the 1st respondent.

Mr Ndlovu for the 1st respondent urged the court to non suit the applicant on the grounds that only the Master of the High Court is empowered to make the present application. He argued that the applicant has no *locus standi* as her application is rooted in section 85 (1) of the Administration of Estates Act, Chapter 6:01.

To bolster this argument counsel cited CHIWESHE J (as he then was) in *Siziba v Sizibaand Another* HB 25-2004. The learned Judge had this to say:-

> "The first point is that in terms of section 117 (1) of the Administration of Estates Act (Chapter 6:01) it is only the Master who is empowered to make an application such as present, seeking the removal of the executor. The section does not empower anyone else other than the Master. The applicant therefore clearly has no *locus standi* to bring this application. He can only seek remedy through the Master's office."

MrNyoni disagreed, contending firstly that the issue was being raised for the first time in supplementary heads of argument and secondly that section 69 (3) and section 85 (2) of the Constitution of Zimbabwe creates a right of access to the courts. Counsel further argued that section 85 (1) is an embodiment of common law where a party can approach the court for removal of an Executor.

As regards the raising of the point of law late in the day, authority abounds to the effect that a question of law can be raised at any time, even for the first time on appeal (*Lobels Holdings (Pvt) Ltd v David Chiweza* SC 75-18).

In *Austerlands (Pvt) Ltd v Trade and Investment Bank Ltd and Others* 2006 (1) ZLR 327 CHIDYAUSIKU CJ held that:-

> "The general rule is that a question of law may be advanced for the first time on appeal if its consideration then involves no unfairness to the party at whom it is directed, but an appeal court will not allow the matter to be raised unless (a) the point is covered by pleadings; (b) there would be no unfairness to the other party; (c) the facts are common cause or well-nigh incontrovertible; and (d) there is no ground for

> thinking that other or further evidence would have been produced that could have affected the point."

In casu the opposing papers did not raise the issue; these papers save as the pleadings in an application. I however hold the view that the point raised does not cause unfairness to the applicant, the facts are common cause and there is no need to adduce further evidence.

That said, I hold that the question of law raised does not non suit the applicant. I say so because the applicant's application was not brought in terms of section 117 (1) of the Administration of Estates Act. That provision exclusively gives the right to approach the court to the Master where the removal of an Executor is sought for the reasons stated in that provision.

The applicant *in casu* is in essence saying

> "I have looked at section 85 (1) of the Administration of Estates Act and it gives you the court the power to remove the Executor if I am able to show that the Executor is guilty of the transgressions listed therein. So here is my story and my story should persuade you to invoke your section 85 (1) powers and remove this person."

This right stems from the common law. If the Legislature had intended to non suit any other person except the Master it would have expressly stated so.

It will be absurd to hold that where an interested person who has a clear interest and stands to be prejudiced by an Executor's conduct and seeks the intervention of the Master to no avail, he or she is still deemed unable to approach the court to seek redress because section 117 (1) which is specifically dealing with the Master excludes that person.

The applicant has not sought to step into the Master's shoes and approach the court in terms of a provision that exclusively gives that right to the Master. The Siziba case (supra) is therefore distinguishable.

I am in agreement with counsel for the applicant that section 69 (3) of the Constitution, 2013, creates a right of access to the courts. Section 85 (2) speaks of infringement of fundamental rights and the right to access to the courts is one such right, I am inclined to hold that the provisions of section 69 (3) and 85 (2) allow the applicant access to the courts for redress.

It would have been different had section 85 (1) of the Administration of Estates Act which gives this court power to remove an Executor had a proviso to the effect that:-

> "Provided that the High Court or a Judge shall exercise this power on motion initiated by the Master." It does not say so and equally does not prescribe who brings the motion to remove the executor. It is merely a provision which gives the court the power to remove an executor where a case for such removal has been made.

I therefore conclude that the applicant is an interested party as she is a beneficiary desirous of protecting her interests and so has *locus standi* to seek the removal of the 1st respondent.

I earlier on posed the question as to whether a case has been made for such removal. In *Mujuru N.O and Others v Mujuru and Another* HH 22-2006 GOWORA J (as she then was) had this to say:-

> "An Executor to a deceased estate is obligated, in terms of section 38 of the Administration of Estates Act (Chapter 6:01), the Act, as soon as possible after being granted Letters of Administration, to make an inventory showing the value of the property, movable and immovable, which form part of the estate."
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> The learned Judge goes further to say:-
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> "What therefore emerges from a perusal of the sections referred to above is that the primary duty of an executor is to finalise as quickly as possible the administration of the estate."(my emphasis)

The Master's report showed that the 1st respondent did not conduct herself as expected. The applicant had to raise a complaint with the Master because of the lack of progress and the fact that 6 years down the line the estate is yet to be finalised vindicates the applicant.

> "An executor should therefore consult the beneficiaries, heirs and legatees in any decision involving the administration of the estate. An executor in administering the estate should not dispose of more assets than are absolutely necessary to meet the obligations of the estate." (per GOWORA Jin the *Mujuru* case (supra).

In casu the 1st respondent sold a property and the necessity thereto was not established. She did not pay the Master's fees and she sold the property in 2017 before she found these other beneficiaries she argues were out of the country.

If her reason for the delay in administering the estate was because she wanted to carry out investigations in order to find other beneficiaries why then did she sell an asset from that estate before locating such beneficiaries?

It defies logic that the 1st respondent decided to sell the Pelandaba house because the applicant and her brother were at loggerheads and the brother was forcibly collecting rentals from tenants. That is hardly what is envisaged by disposing of property when such is "absolutely necessary."

In *Nyandoro v Mukowamombe and Others* HC 209-2010 GUVAVA J (as she then was) had this to say in a matter where the removal of an executor was an issue:-

> "The next issue to be determined is whether the first respondent should be removed as executor of the estate. It is trite that a beneficiary to an estate may apply at common law for the removal of an executor. It is not in dispute that being the surviving spouse of the deceased the applicant is a beneficiary of the estate. The basis upon which he can seek the removal of first respondent is if he can show that his continuance in office will not auger well for the future welfare of the estate and the beneficiaries."

In casu the 1st respondent appears to have delegated power to her husband to help in administering this estate. The basis thereof is baffling. Was this now a family affair that saw the husband creating the whatsapp group which the 1st respondent states under oath that she created?

We have an executor who does not attend a meeting called by the Master ostensibly because she was out of town. She does not respond to correspondence from legal practitioners engaged by a beneficiary desperate for information and lamely explains that it was an "oversight."

The same executor does not pay Master's fees at a time when the money received from the disposal of the Pelandaba house had value, ostensibly because she was used to paying such fees after the Master has approved the account and given the green light to advertise it.

The same executor disposes of a property which ought to have been in Mirriam's estate which estate had only been registered but an executor yet to be appointed and such an executor argues that she has performed to expectation and ought not to be removed?

It is equally baffling that the 1st respondent turned herself into a Private Investigator in order to find beneficiaries. Why would an Executor turn into an Investigator when the Administration of Estates Act articulates what the duties of an Executor are?Even if it is accepted that an Executor must safeguard the interests of all beneficiaries, it is telling that the respondent does not say what investigations she carried out and what prompted such investigations if indeed her conduct was purely honourable and meant to protect the beneficiaries.

The 1st respondent's protestations of innocence were dealt a fatal blow by the Master's report, which report, as alluded to earlier, raises a lot of questions as to the fitness of the 1st respondent to hold the office of a professional executor. I am tempted to go further and say one smells a rat in the manner the 1st respondent conducted herself. The conduct borders on fraud.

CHITAKUNYE J in *Katsande v Katsande and Others* HH 113-10 posed this question:-

> "Where an executor lamentably fails to perform his duties according to the mandate given, can there be any good reason to why he should remain in office?"

I pose the same question here and only substitute the "his" to "her" in recognition of the 1st respondent's gender.

Counsel for the 1st respondent cited ZHOU J's decision in *Dikinya v Chakasikwa N.Oand Another* HH 242-18 where the learned judge observed that:-

> "The court does not lightly remove an Executor in the absence of evidence of serious misconduct that would prejudice the estate."

If the 1st respondent's conduct cannot be regarded as serious misconduct that has prejudiced the estate then I do not know what would.

Counsel also cited *Van Niekerk v Van Niekerk and Another* [2011] 2 ALL SA 635 where WALLIS J quoted MURRAY J in *Volkwyn N.O v Clank and Another* 1946 WLD 463 where the Judge expressed the view that even where an Executor is shown to have failed to strictly observe legal requirements, something more is required before his removal is warranted.

What more could be required *in casu* when it was shown that the 1st respondent only lodged the first and final distribution account on 10th March 2020 and yet purged herself in her opposing affidavit by claiming to have lodged it in January 2019?

The lodging of the account was meant to be a smoke screen and that speaks volumes to the honesty or lack thereof of the 1st respondent.

The role of an Executor demands honesty, trustworthiness, competence and reliability. I am not sure the 1st respondent displayed any of these attributes in the manner she handled this estate.

The long and short of it is that the applicant has undoubtedly made a case for the relief she seeks.

Arguing that the 1st respondent has all but concluded the administration of this estate and so must be allowed to see it to finality is akin to condoning a wrongful act and allow the transgressor to carry on because the harm has already been done. There is no justice in that. Justice demands that one be held to account and their prejudicial conduct be mitigated as far as is reasonably possible.

Counsel for the applicant asked for costs at a punitive scale. This is one case where such an award of costs is warranted. The application ought not to have been opposed. The opposition was adding insult to injury and the court must show its displeasure by an appropriate award of costs.

In the result the application for the removal of the 1st respondent as Executrix of the estate late Remusi Machokoto succeeds and is granted in terms of the draft order.

Messrs Moyo and Nyoni, applicant's legal practitioners
R Ndlovu and Company, 1st respondent's legal practitioners