HB 230/17
HC 2299/15

GLENDA PABALLO MOYO

And

BEATRICE JOYCE MOYO

Versus

SININI MOYO

And

CLW ANDERSON N.O
Executive Dative in the
Estate of the Late Seiso Moyo

And

ASSISTANT MASTER N.O.

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 1 FEBRUARY & 27 JULY 2017

Opposed Application

J. Mhlanga for the applicant
R. Ndlovu for the 1st respondent
No appearance for the 2nd and 3rd respondents

TAKUVA J: This is an application for review in which the applicants seek the setting aside of the final liquidation and distribution account of the late Seiso Moyo prepared by the 2nd respondent and confirmed by the 3rd respondent.

The grounds for review are that:

"1. The 2nd respondent erred and applied the wrong formular in distributing the estate.
2. The final liquidation and distribution account left out some assets of the late Seiso Moyo's estate.
3. The 2nd respondent misdirected (sic) in winding up the Estate of the Late Seiso Moyo without consulting all the beneficiaries and without their consent.

4. The 2nd respondent did not fully apply his mind into the objections and concerns raised by the beneficiaries in winding up the Estate of the Late Seiso Moyo.
5. There is a serious malicious misrepresentation of facts by the 1st and 2nd respondent rendering the final distribution and liquidation account biased and one sided.
6. 2nd respondent in the final distribution account did not consider the educational needs and requirements of the 2nd applicant".

The relief sought is in the following terms:

"1. An order in terms of the draft setting aside the final liquidation and distribution account of the late Seiso Moyo's estate DRB 34/13 prepared by the 2nd respondent and confirmed by the 3rd respondent.
2. The 3rd respondent to convene a special meeting with due notice to the applicants and all interested parties for the resolution of the dispute in terms of section 68 F of the Administration of Estates Act (Chapter 6:01).
3. Costs of suit on an attorney and client scale against the 1st respondent".

The 1st and 2nd respondents opposed the application on the following grounds:

(a) the application is incompetent by reason of the applicants' failure to comply with section 52 (9)(1) of the Administration of Estates Act (Chapter 6:01) (the Act).
(b) the substantive relief sought in the draft order is incompetent in that the deceased's estate is not subject to customary law.
(c) the allegations made by the applicants in their founding affidavits are spurious and an attempt to reverse the lawful administration of the estate by the executor.

The background of the matter is that the late Seiso Moyo was married to the late Constance Moyo and the marriage was blessed with two daughters who are the applicants *in casu*. During the subsistence of their marriage they acquired immovable and movable properties amongst other things house number 6 Mangwe Lane, Newton West, Bulawayo. Upon the death of applicants' mother, her estate was wound up and both applicants were awarded a 50% share of the house with their father the late Seiso Moyo retaining the other 50% share.

In 2002 the late Seiso Moyo married the 1st respondent and they acquired immovable and movable property during the subsistence of their marriage. Amongst the immovable property is

stand number 7702 Nketa 7, Bulawayo. This property was not included in the estate. Also stand number 290 Justicia Road, Beitbridge was excluded from the estate. Further, a Land Rover Discovery vehicle issued to the late Seiso Moyo for his personal use as a Government Minister was left out of the estate as 1st respondent had purchased it for US$2 679,20. First respondent sold the vehicle for US$82 000,00. The purchase price was not included in the estate.

The 2nd respondent also awarded the whole 50% of the late Seiso Moyo's share in house number 6 Mangwe Lane, Newton West to the 1st respondent despite the fact that at the time Seiso Moyo met his death, she was not staying in that house. Despite applicants' objections the 2nd respondent prepared and submitted a final liquidation and distribution account of the late Seiso Moyo. The 3rd respondent approved it and applicants were aggrieved resulting in this application.

The application is in terms of O33 r 256 of the High Court Rules 1971. In opposing the application, the 1st and 2nd respondents took two points *in limine*. The first is that this application should have been made in terms of section 52 (9) (1) of the Act and not in terms of O33 r256 of this court's rules. Section 52 (9) (1) states:

> "The Master shall consider such account, together with any objections that may have been duly lodged, and shall give directions thereon as he may deem fit.
>
> Provided that –
>
> (i) Any person aggrieved by any such direction of the Master may within thirty days after the date of the Master's direction and after giving notice to the executor and to any person affected by the direction, apply by motion to the High Court for an order to set aside the direction and the High Court may make such order as it may think fit:
> (ii) …"

The argument is that since the 3rd respondent's decision to confirm the First and Final Distribution and Liquidation Account was made on the 3rd of July 2015 and this application was filed on the 25th of August 2015, more than 30 days after the 3rd respondent's decision, this application is therefore incompetent. It was further contented that since the period of 30 days is

set out in an Act of Parliament, there is no provision for this court to condone non-compliance with the stipulated time limit.

In my view, the respondents' argument has no merit for the simple reason that the Act uses the word may. This shows that this provision is not peremptory but directory – see *Amalgamated Packaging Industries* v *Hutt* 1975 (4) SA where it was held that words like 'may' indicate a discretion and should be interpreted as being directing unless the purpose of the provision indicates otherwise.

See also *Pio* v *Smith* 1986 (3) SA 145 (ZH); *MDC & Another* v *Mudede and Others* 2000 (2) ZLR 152 (SC); *Sterling Products International Ltd* v *Zulu* 1988 (2) ZLR 293 (S) and *Kutama* v *Town Clerk Kwekwe* 1993 (2) ZLR 137 (S).

The underlying principle in these cases is that were the language used is peremptory then it must be complied with either exactly or substantially.

I take the view that if the legislature's intention was to compel those aggrieved by the Master's decision to file an application for review within 30 days whatever the circumstances it would have used the word "shall" instead of "may". Also, if it had been the intention of the legislature that the only basis of a right to challenge the Maser's decision is to be found in the proviso to section 52 (9) (1) of the Act, it again would have used the word shall and not may. See for example *Mayiswa* v *Master and Anor* 2011 (2) ZLR 44 (H).

For these reasons I would dismiss the 1st point *in limine*.

The applicants have conceded that the 2nd point *in limine* relating to section 68F of the Act has merit. Applicants applied for the amendment of paragraph 2 of the draft order. The effect of the amendment is to delete any reference to section 68F. The amendment was granted.

On the merits, the 2nd and 3rd respondents contend that their position as regards the Discovery motor vehicle and stand number 7702 Nketa 7 Bulawayo cannot be faulted for the following reasons:

1. The motor vehicle was owned by the Government at the time of the late Seiso Moyo's death and 1st respondent applied to purchase it in her capacity as the widow and thus the contract of sale was between her and the Government of Zimbabwe. Therefore, the vehicle could not be part of the estate assets.
2. The stand was acquired by the 1st respondent using her "housing list form" and it is registered in her name therefore it would not form part of the estate.

The respondents' argument in respect of the motor vehicle is devoid of merit in my view for the simple reason that even if it were to be accepted that Seiso Moyo had a personal right in the vehicle, upon his death, that personal right should have been exercised by the Estate of the Late Seiso Moyo, and in particular the executor of that estate. This is so because the Act provides for all property, goods and effects, movable and immovable of whatever kind belonging to the Estate and includes even those that a deceased would have had an interest at the time he met his death.

Further, this vehicle was paid for by Sifelane Modeme Moyo a brother to Seiso Moyo. In his affidavit, he states in paragraph 12 that:

> "12. I personally went to Harare and paid US$2 679,20 for the vehicle. The vehicle with the consent of all the parties was registered in Sinini's name for convenience as it was easier to do so as she was the surviving spouse and the vehicle was to be the benefit of the Estate." (my emphasis)

The 1st respondent has not denied these factual averments at all. She relies on the fact that since the motor vehicles is now registered in her name, it cannot belong to the estate. She does not explain the legal basis for such personal enrichment to the exclusion of the children. Quite clearly, 2nd and 3rd respondents' acceptance of such an anomalous development amounts to gross irregularity and bias.

As regards the stand in Nketa 7, it is clear that in terms of the law it is matrimonial property. Section 4 of the Act does not exclude such property from the matrimonial property regime. The stand was acquired during the subsistence of the marriage and therefore becomes

matrimonial property despite its registration in 1st respondent's name. It is absurd to conclude that Seiso Moyo did not own this property jointly with 1st respondent, more so where there is documentary evidence that Seiso Moyo applied for the stand. The same applies to the Beitbridge stand where the 2nd respondent appears to have negligently excluded it from the estate without establishing the exact position vis-à-vis its ownership.

The 2nd and 3rd respondents have contended that the 1st respondent as the surviving spouse is entitled to the award of the whole share of the late Seiso Moyo is not merited. Section 3A of the Deceased Estates Succession Act (Chapter 6:02) states:

> "3A Inheritance of matrimonial home and household effects
>
> The surviving spouse of every person who, on or after the 1st of November 1997, dies wholly or partially intestate shall be entitled to receive from the free residue of the estate –
> (a) The house and other domestic premises in which the spouse or surviving spouses as the case maybe, lived immediately before the person's death; and
> (b) The household goods and effects which immediately before the person's death were used in relation to the house or domestic premises referred to in paragraph (a) where such houses, premises, goods and effects form part of the deceased person's estate."

In casu, the applicants contended in their affidavits that at the time their father met his death, he was living in Harare and the 1st respondent in Botswana where she is employed. Sifelani Moyo corroborates this allegation in his supporting affidavit. What is noteworthy again is that 1st respondent has not challenged or denied this fact. Surely, if the facts are as espoused by the applicants, then the awarding of the whole 50% of Seiso Moyo's share in house number 6 Mangwe Lane, Newton West, Bulawayo is grossly irregular in that it violates section 3A *supra*.

In ascertaining 1st respondent's entitlement, the 2nd and 3rd respondents should have resorted to section 3(b) of the Deceased Succession Act, which provides that if the spouses are married out of community of property, (like *in casu*) and the deceased's spouse leaves any descendent who is entitled to succeed *ab intestatio,* the surviving spouse of such person shall succeed in respect of the remaining free residue of the deceased's spouse' estate to the extent of

a child's share or to so much as does not exceed the specified amount or whichever is greater. Put simply, the applicants are entitled to benefit or inherit part of their father's half share in the house.

It follows therefore that the 2nd respondent's decision to award the whole 50% of Seiso Moyo's share in the house amounts to a gross irregularity.

As regards costs, I am not persuaded that 1st respondent should be ordered to pay costs on an attorney and client scale.

In the circumstances, it is ordered that:

1. The final liquidation and distribution account in the Estate of the Late Seiso Moyo DRB 34/13 prepared by the 2nd respondent and confirmed by the 3rd respondent on the 3rd of July 2015 be and is hereby set aside.
2. The 3rd respondent be and is hereby ordered to convene a special meeting with due notice to the applicants and all interested parties for a resolution of the disputes affecting the Estate.
3. The costs of this application shall be borne by the 1st respondent.

Masiye-Moyo & Associates incorporating Hwalima, Moyo & Associates, applicants' legal practitioners
R. Ndlovu & Company, 1st and 2nd respondents' legal practitioners