

PRECIOUS TARUVINGA
versus
MURADZIKWA LILIAN
(in her personal capacity and as the executrix of the Estate
of the Late Marthar Taruvinga)
and
THE MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 14 June 2021, 14 July 2021 and 5 May 2022

Civil Trial

S R Silver, for the plaintiff
S Chako, for the defendant

WAMAMBO J: This is an application for absolution from the instance at the closure of Plaintiff's case. The Plaintiff is the daughter of the late Marthar Taruvinga, Marthar Taruvinga is Plaintiff's late father. His first name may however erroneously suggest a female. For expediency I will refer to Marthar Taruvinga as the deceased hereafter.

The first defendant is the deceased's surviving spouse. She however is not the Plaintiff's biological mother but a stepmother. Plaintiff issued summons seeking an order declaring the distribution and registration of the deceased's estate null and void and also an order for the remittal of the matter back to defendant for the fresh registration of the estate and costs of suit.

Issues referred for trial embrace the question of the procedure of challenging the Master's decision by way of a declarator and whether or not first defendant made misrepresentations to the second defendant upon registration of deceased's estate. Further, that if first defendant made misrepresentations to the second defendant should the registration and distribution of deceased's estate be declared null and void.

Plaintiff's counsel is from the Legal Aid Directorate. I must mention from the start that Plaintiff's counsel was making her first appearance before the High Court. This much was announced in open court and was apparent in the manner she presented the evidence before me. Without partitioning any blame, I am of the considered view that the practise of holding a new practitioner's hand on his or her first few appearances in Court is commendable. That Plaintiff's

legal practitioner could appear in a matter before the High Court without assistance from a more experienced practitioner from the Legal Aid Directorate was clearly not advisable.

Plaintiff was the only witness in her case. Her position was simple. She lost her father and first defendant without her knowledge registered her father's estate. First defendant benefited solely from deceased's estate to the prejudice of Plaintiff. Relevant documentation in relation to deceased's estate have since gone missing.

Plaintiff's evidence was short. There was some cross examination which was rather gruelling.

In the application for absolution from the instance first defendant referred to case law among them *Gaibe and Another v Castanheira and Another* SC 58/20, *MC Plumbing Pvt Ltd v Hualong Construction Pvt Ltd* HH 88/15 and *Tapfuma Chirisa v Makufa Mugadzaweta and Ors* HH 323/14.

In the application first defendant raised the following issues:
Plaintiff did not adduce any documentary evidence to support her allegations. Plaintiff does not have evidence to rebut the assertion that her siblings and some of her late father's relatives are benefiting from the estate.

A lot more is said but it is basically to the effect that Plaintiff's should have obtained the relevant documents from the Office of the Master. Further that Plaintiff did not rebut the position that first defendant was properly appointed as executrix of deceased's estate and went through the proper legal processes to register the estate.

There is some attack on the credibility of Plaintiff's evidence. Suffice it to say the attack was rather spurious and does not go to the root of the dispute. In any case for purposes of this application it does not appear to me to be directly relevant.

On the other side Plaintiff opposed the application. I should again note that the Plaintiff's notice of opposition was filed late in the day. For purposes of addressing the application I needed to have input from both sides.

Plaintiff's counsel also cited a number of authorities including *Standard Chartered Finance Zimbabwe v Georgias and Anor* 1998(2) ZIR 547 and *Katerere v Standard Chartered Bank Zimbabwe Limited* HB 51/08.

Plaintiff's counsel referred to the relevant portions of her client's testimony. More pertinently she pointed out that Plaintiff testified that she was advised by the relevant authorities that documents relating to the registration of her father's estate went missing.

Plaintiff's counsel was quizzed on whether or not she was not going to produce any of the Plaintiff's discovered documents. Her answer was that she was not. For some reason Plaintiff fell into the error of referring to the very same documents which she did not produce as evidence. I will not consider that portion of Plaintiff's submissions.

In *Gascoyne v Paul and Hunter 1917* TPD 170 DEVILLIERS JP at p 173 espoused the test for an application for absolution from the instance thus:-

“At the close of the case for the plaintiff, therefore the question which arises for consideration of the court is:

:Is there evidence upon which a reasonable man might find for the plaintiff.....The question therefore is, at the close of the case for the plaintiff was there a *prima facie* case against the defendant.....

In other words, was there such evidence before the court upon which a reasonable man might, not should give judgment, against “(the defendant)”

In *Supreme Service Station (Pvt) Ltd (1969) v Fox and Goodridge (Pvt) Ltd 1971(1) RLR 1 (A)* BEADLE CJ at 5B-D expressed himself thus: -

“Once it is accepted that a judgment which a court “might” give may differ from that which it “ought” to give it is clear that the judgment which it might give and which differs from the judgment which it ought to give must be an incorrect judgment. As a matter of logic therefore, in considering what a reasonable court might do allowance must be made for its making and giving an incorrect judgment.....

The test therefore boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the Plaintiff?

What is a reasonable mistake in any case must always be a question of fact and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make, a definition which helps not at all”

I note from the onset that Plaintiff in her summons alleges that first defendant misrepresented to second defendant that she was the sole beneficiary to deceased's estate. To buttress this assertion in Plaintiff's declaration she alleges in para 7 thereof that first defendant has already transferred three immovable properties formerly belonging to deceased into her name.

First defendant's plea reflects that at the stage when she filed it, she was not legally represented. First defendant's plea reflects that first defendant alleges that Plaintiff was married when the estate was registered. The relevance of Plaintiff's marital status at that stage was lost on me.

First defendant goes further to allege in her plea that she advised Plaintiff of the registration of deceased's estate but she (Plaintiff) did not attend the edict meeting. On the face of it there was no obligation on first defendant to invite Plaintiff to the edict meeting. Further, Plaintiff who appears to have been interested in the deceased's estate, would not necessarily and knowingly reject an invitation to an edict meeting.

First defendant alleges in her plea that she included Plaintiff in the death notice as deceased's child. This assertion should be viewed in the light of Plaintiff's assertion that documents relating to the registration of deceased's estate went missing.

I note that first defendant's plea concentrates more on the effect of the registration of deceased's estate and not the form, taking into consideration Plaintiff's summons and declaration.

Nowhere in first defendant's plea does she mention that Plaintiff or any other person apart from first defendant herself benefited directly from deceased's estate. First defendant in her plea in para 5 alleges that she advised Plaintiff to use one of the Shops at Mushayavanhu. That is however not the issue. Use of a shop and ownership are far from the same. The question is why would Plaintiff be content with using one of deceased's shops only? Why would first defendant be a peripheral beneficiary to her father's estate if indeed the deceased's estate was properly registered.

In para 7 of first defendant's plea she mentions that Plaintiff should have brought her claim within a reasonable time "now all the properties are mine, see certificate of authority attached" I note that first defendant in para 7 concentrates on the fact that all the properties are now hers and not on how, she managed to gain ownership of all the properties to the exclusion of Plaintiff.

There is no other document attached apart from the certificate of authority referred to by first defendant in her plea. She also refers to a death notice which does not form part of her schedule of Documents.

On the face of it the absence of these important documents among them the death notice supports the assertion by Plaintiff that, the relevant documents went missing.

The fact that first defendant benefited solely from deceased's estate reflects on the face of it that she may have declared herself the sole beneficiary. When I say first defendant benefited solely, I also consider first defendant's position. She declares that all the immovable properties are now hers. When first defendant refers to any other person benefiting from the estate it is

through her benevolence. No one else even according to first defendant was declared a beneficiary to deceased's estate except herself.

A consideration of the above leads me to the conclusion that a reasonable man might give judgment to Plaintiff. This is mainly because when one reflects on the relief sought by Plaintiff a number of issues come to the fore.

There is a paucity of information and documentation giving *prima facie* credence of deceased's file being missing. Deceased's file being missing raises the presumption *prima facie* that it may contain information to Plaintiff's advantage.

The fact that first defendant is the sole beneficiary to deceased's estate especially in the face of missing relevant official documentation lends *prime facie* credence to the allegation that she misrepresented to the second defendant as the sole beneficiary. There is a *prima facie* case established by Plaintiff.

I am satisfied therefore that the application for absolution from the instance is without merit. To that end I order as follows:

1. The application for absolution from the instance is dismissed.
2. First defendant to pay plaintiff's costs.

Legal Aid Directorate, Plaintiff's legal practitioners
Mushangwe and Company, first defendant's legal practitioners