

JEFFERSON TSURO MHANDA
versus
MARTHA MUFARO MHANDA
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 18 March 2019 & 11 April 2019

Court Application

B.T Kazembe, for the applicant
G. Mharapara, for 1st & 2nd respondents

MANZUNZU J: This is a court application in which the applicant seeks the removal of first respondent from the position of executrix dative. The order sought reads:

“IT IS ORDERED THAT:

1. The appointment by the Master of the High Court of 1st Respondent Mufaro Machimbira (nee Mhanda) as Executrix Dative of the 15th of April 2016 be and is hereby set aside.
2. The Master of the High Court shall, within seven (7) days of the date of this order, appoint an independent neutral person to be Executor in the Estate of the late Wilfred Mhanda DR Number 813/16.
3. The 1st Respondent shall pay costs of suit on a scale calculated as between attorney and client.”

The simple facts are that Wilfred Mhanda (the deceased) died intestate on 28 May 2014. The applicant is a brother to the first respondent and the deceased was their brother. The deceased’s estate was registered with the Master, the second respondent, who in the course of administering the estate appointed the first respondent as the executrix dative on 15 April 2016.

The basis upon which the applicant has challenged the second respondent’s decision to appoint first respondent was stated in the following words:

“the second respondent was wrong and erred grossly and indeed acted irrationally in appointing the first respondent as the executor in the instant matter when it was clear that there was so much

conflict and bad blood in the family such that only a neutral person ought to have been appointed as the executor.”

In other words the applicant is saying the first respondent did not qualify in the first place for appointment.

The applicant says he makes this application under common law and in fact under s 26 (3) of the Administration of Estates Act (*Chapter 6:01*). Section 26 (iii) empowers a judge of the High Court upon application to review the decision of the Master and in the process may confirm or set aside such decision. The onus is on the applicant to show the justification for the removal of first respondent as executrix dative.

While the Master can approach the court for the removal of an executor under s 117 of the Administration of Estates Act, (*Chapter 6:01*), any interested person can equally approach the courts for the same purpose under common law. See *Katirawu v Katirawu & Ors* HH 58/07.

All sorts of allegations have been leveled against the first respondent in an attempt to show that she must be relieved of the duties of an executrix dative. These allegations were raised with the Master, with the first respondent refuting the same, with the result that the Master did not see the justification to resort to s 117 of the Administration of Estates Act. The applicant insists that first respondent be removed from that position. Some of the grounds advanced are that she owes the estate, she has dissipated the estate assets, she did not enjoy any good relations with the deceased during his lifetime, in fact it was a relationship full of hostility. The parties’ pleadings show nothing more than a deep seated family conflict in which members of the same family have taken positions, thrown missiles at each other and with each group claiming superiority over the other. This is revealed through these two parties if their stories are anything to go by. They seem to have built oceans between themselves. Their differences seem to widen by the day. Whatever their differences, the law relating to removal of executors is fairly settled. Let me start with the grounds laid down in s 117 of the Administration of Estates Act which reads:

“117 Master may apply for removal of executor, tutor or curator from office.

(1) The Master may apply to a judge in chambers for the removal of an executor, tutor or curator from his office on the ground-

- (a) that he was not qualified for appointment to such office or that his appointment was for any other reason illegal; or
- (b) that he has failed to perform satisfactorily any duty or requirement imposed upon him by or in terms of any law; or
- (c) that he is mentally or physically incapable of performing satisfactorily his duties; or

- (d) that in his opinion such person is no longer suitable to hold such office; and the judge may, upon such application, remove the executor, tutor or curator concerned from his office or make such other order as he sees fit.”

At Common Law, in the case of *Bonsma NO v Meaker NO and Others* 1973 (2) RLR 16 at 21, GOLDIN J adopted the summary of the law on the subject matters on what SOLOMON ACJ had to say in *Sackville West v Norse & Another* 1925 AD 516 at page 527 in the following words:

‘There is very little authority in our law with respect to the grounds which justify a court in removing trustees from office, and what is still more strange is that there appears to have been an equal dearth of authority on this subject in the law of England. The matter was however carefully considered in the case of *Lettersted v Broers* (9A.C.371), which came before the Privy Council on appeal from the Supreme Court, and which has laid down broad principles by which, on this subject, Courts administering the Roman-Dutch law should be guided. In his judgment, Lord Blackburn says; ‘There is very little to be found to guide us in saying what are the cases requiring such a remedy, so little that their lordships are compelled to have recourse to general principles. He then quotes a passage from Story’s *Equitable Jurisprudence* (par. 1298) as follows; ‘But in cases of positive misconduct Courts of equity have no difficulty in interposing to remove trustees who have abused their trust: it is not indeed every mistake or neglect of duty or inaccuracy or conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity’”

The applicant’s application while asking the review of the Master’s decision is two pronged:

In the first leg the applicant is saying, because of certain existing adverse factors on the part of the first respondent, she is not a fit and proper person for the Master to appoint her executor dative. The second leg is that while she took the position which she ought not have taken, she must be removed because of her conduct which is incongruent with the position of an executor. The two are intertwined in that the applicant is like saying, “she was not fit in the first place and she has shown by conduct that indeed she has not been fit in the first place.”

Removal of an executor is not taken lightly and reasons for removal must be given to the satisfaction of the court. See *Master of High Court v Sithandizile Dhlamini Moyo & Ors* HH 11/09.

In laying out the background before the appointment of the first respondent, the applicant intended to show the existence of potential bias on the part of the first respondent. But potential bias on the part of the executor is no ground to set aside the appointment: see *Katsande v Master & Anor*, HH 50/07.

The applicant says it is incredulous to expect the respondent to perform duties in the interests of the beneficiaries. It must be noted that it is the word of the applicant against the respondent. There is no supporting evidence from any other beneficiary. There is nothing specifically shown and proved than that the respondent has done which is prejudicial to the beneficiaries of the estate. The onus is on the applicant to show that the executor dative has failed to perform satisfactorily the duties upon him in terms of the law. As already stated there is nothing shown that the respondent acted in any way to prejudice the estate of the late Wilfred Mhanda.

To that end, I find no merit in this application.

Accordingly,

It is ordered that:

1. The application be and is hereby dismissed with costs.

Tendai Biti law, applicant's legal practitioners

Mtombeni, Mukwasha, Muzawazi & Associates, 1st respondent's legal practitioners