

JOYCE PARADZA N.O.
versus
MARITA SITHOLE
and
MASTER OF THE HIGH COURT
and
NORTON TOWN COUNCIL

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 21 February and 31 March 2017, 24 October 2017

Opposed matter

A.A Debwe, for the applicant
G.M. Nyangwa, for the respondent

MWAYERA J: On 31 March 2017, I granted an order sought by the applicants and gave oral reasons for my disposition. By a letter dated 26 April 2017 the respondents requested for written reasons for judgment. These are the reasons:

As is usual with deceased estates there are accusations and counter accusations over who should inherit what and or who has what rights. The arguments which occur over deceased estates are not only numerous but cause for concern because of their multiplicity and diversity. Many a time relatives and or beneficiaries end up at each other's throat over the deceased's estate. I'm persuaded to think that the deceased turn in their graves wondering why they acquired the properties in the first place.

The late Joseph Sithole acquired a vacant residential stand known as 2974 Katanga, Norton from the Ministry of Local Government and Rural and Urban Development. The late Joseph Sithole then entered arrangement with his sister's husband one Norbert Paradza. The late Nobert Paradza, husband to the applicant constructed a house at the said stand through financing from CABS Bank. Both Joseph Sithole and Nobert Paradza respectively, husband to the first respondent and applicant died. The first respondent was appointed executor in her husband the late Joseph Sithole's estate. The applicant and the first respondent are sisters in law and central to the contentious deceased estates. Given the history of the stand in issue

which was purchased by the late Joseph Sithole and developed by the late Nobert Paradza, the applicant approached the court seeking the reopening of the estate late Joseph Sithole and setting aside of cession of the late Joseph's rights. The contentious aspect being centred on rights of the applicant and the first respondents over stand 2974 Katanga.

The first respondent opposed the application which in the main sought the reopening of the late Sithole's estate. The respondent raised points *in limine*. Firstly the respondent argued that the matter was riddled with material disputes and as such ought to be dismissed on that basis. It is settled that a material dispute of fact arise in circumstances where from the evidence placed before the court, the court is left with no ready answer to the dispute between the parties.

See *Supa Plant Investments Pvt Ltd v Edgar Chidavaenzi* HH 92/09 wherein it was stated by MAKARAU J as she then was

“A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

See also *Tamarillo (Pty) Ltd v BN Aitkem Pty Ltd* 1982 (1) (1) SA 398 on definition of existence of material dispute of facts. *In casu*, given the background information outlined in the founding and opposing affidavit it is apparent there are no material disputes of facts warranting dismissal of the application. The applicant is seeking centrally the reopening of the late Joseph Sithole's estate so as to allow the administrative functionary, the second respondent, the Master of High Court, to wholistically deal with the obviously related estates were property moved from one to the other albeit at the time the principal parties were still alive. From the papers filed the issue at stake is clear as the facts essential for determination are not in dispute. The second respondent in his report annexed to the record p 75 correctly recommended granting of the relief which is essentially to reopen the late Joseph's estate. Such a relief will enable a wholistic ventilation for the benefit of all interested parties' with a view to effectively and justly administer the deceased estates in question. The applicant adopted the correct procedure of proceedings by way of application as clearly there are no material disputes of fact given the issues before the court.

The respondent further raised another point *in limine* that the application should be dismissed because it is laced with serious material non-disclosure. The respondent argued that the applicant did not disclose that the matter had been deliberated on by the Magistrate's Court. It is evident this point *in limine* was not properly taken because in the matter which was heard in the Magistrate Court the applicant was not part to the proceedings. The first respondent in

those proceedings successful sought to evict tenants that had been placed in the property in question by the applicant's late husband. What the applicant is seeking in this case is the reopening of the late Joseph Sithole's estate to enable the second respondent to involve all interested parties given the undisputed construction on the stand in question by the applicant's late husband. The applicant also disclosed that the Additional Assistant Master handled the late Joseph Sithole's estate and that the applicant did not object as she and her late husband were not aware. The applicant then sought to have the estate reopened. There appears to be clear full disclosure such that the request for dismissal of the application for material none disclosure cannot be sustained. The applicant did not withhold any material information warranting sanctioning by the court. It is settled where there is deliberate none disclosure of material facts then the applicant should not be granted the relief sought. See *Graspeak Investments (Pvt) Limited v Delta Corporation Private and Anor* 2001 (2) ZLR 551. In this case it was evident from the applicant that the applicant was not party to but a witness to proceeding at the magistrate court case number 278/13. Further it was apparent from the applicant that the edict meeting held at the magistrate court with the court sitting as an Additional Assistant Master was done to the exclusion of the applicant and her husband and other relatives of the respondent's late husband were also not available due to lack of notification by the respondent. A judgment of this court HH 464-12 annexure to the applicant's paper p 26 clearly assessed evidence and dismissed the counter-claim by the respondent. The respondent had claimed an account on the cost of construction of a house on the property in dispute and the amount of rentals collected by the applicant's late husband since the date of construction. This was on the back drop of common cause aspects that the applicant's late husband fully financed the building of the house on the stand and that he used his own plan and was in charge of construction. There was no account given to the first respondent's late husband as regards construction even after completion as regards rentals. For the second respondent to then register and wind up her late husband's estate inclusive of dealing with a house built by the applicant's late husband is ingenuine. It is this anomaly which the applicant seeks to redress by having the relief sought in the main, being reopening of the Estate of the late Joseph Sithole. This will not only enable all interested parties to be taken on board but also allow ventilation to the inclusion of all interested parties in the interest of administration of justice.

I must mention that the respondent appears to be the one bend on not disclosing material facts as the papers seem silent on proceedings deliberated on in this court under HH 464/12 especially on the rights of the then plaintiff therein, now the deceased Estate as represented by

the applicant. It is rather awkward that, the respondent, despite the clear right by the applicant to the stand in question raise the points *in limine* of existence of material disputes of fact and none disclosure.

The respondent further sought to have the application dismissed on the basis that the first respondent was cited in her personal capacity and thus the Estate of the late Joseph Sithole was not joined. The respondent argued that such non joinder of the Estate of late Joseph Sithole was fatal to the application. The law is clear that failure to join a party who has a direct or substantial interest in the result of any litigation whose interests might be prejudicially affected must be afforded an opportunity to be joined. In this case the Estate of the late Joseph on the face of it has an interest in the matter but at the time of lodging the application the estate had already been wound up and the property in question ceded to the first respondent. The non joinder of the estate late Joseph Sithole is not prejudicial to the estate in the circumstances, given the nature of relief sought if granted would occasion the reopening and hence involvement of the estate. The respondent has already taken over title and interest in the property in question and the non-inclusion of her late husband estate is not fatal to the proceedings.

Rule 87 (1) of the High Court Rules is instructive it states:

“No cause or matter shall be defeated by reason of misjoinder or non-joinder of any party and the court may in any cause or matter determine the issue of questions in dispute so far as they affect the rights and interests of the other persons who are party to the cause or matter.”

In this case the non-joinder is not prejudicial to the estate Joseph Sithole and there is no irregularity in suing the first respondent in her personal capacity since the rights and title now vest in the first respondent and not the deceased estate.

The other point taken by the respondent is that the claim ought to be dismissed because it has prescribed. The claim by the applicant can be defined as a debt as envisaged in s 15 (2) of the Prescription Act [*Chapter 8:11*] “debt without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract delict or otherwise.”

MCNALLY J (as he then was) defined “debt” in the case of *Pickering v SYF Holdings (Pvt Ltd* 1981 ZLR 344 when stated “debt” as including any cause of action arising from statute/contract delict or otherwise and any sum of money which may be sued for or claimed by reasons of an obligation arising from statute, contract, delict or otherwise.”

Given this wide meaning the cause of action in this matter falls under the definition of debt as defined in the Prescription Act. See *Evins v Shield Instone Company Ltd* 1979 (3) SA 1136 W wherein Kings stated that “ the word “debt” in the Prescription Act must be given a wide and general meaning denoting not only a debt sounding in money which is due, but also for example a debt for the vindication of property.

In the present case the claim falls under the umbrella of vindication of property. This became due in 2008 when the applicant’s late husband became aware of cession of the stand to the first respondent. However, it is apparent on record that the late Paradza instituted legal action which culminated in the judgment in HC 464/12 a judgment issued out on 9 January 2013. Such process interrupted the operation of prescription. It is common cause that the parties at that stage agreed to absolution from the instance to reopen the estate of the late Joseph Sithole and that the respondent’s counter claim on rights to the property was dismissed. It is also common cause that the applicant’s late husband Paradza fell sick and latter passed on. The applicant then lodged the present application in 2014. Given the judicial process which occurred and ended in 2013 the prescription period of 3 years did not run continuously but was legally interrupted. The application is therefore not prescribed and is properly before the court. It is worth noting that the first respondent registered her late husband Joseph Sithole’s estate and wound up to the exclusion of interested parties inclusive of the applicant and her late husband. Such omission on the part of the first respondent constitutes a basis for reopening of the estate to allow all interested parties audience. The second respondent, suggested that in circumstances where there is clear misrepresentation or no full disclosure then it is in the interest of justice that the estate ought to be reopened. Failure to notify the party who had paid for the development of a stand in question in itself is an anomaly which should not go unchecked. In this case the applicant has established they have a clear right though subject to doubt. Further the applicant will suffer irreparable harm if their interests are not taken on board by the second respondent in the administration of the late Joseph Sithole’s estate. The remedy sought of reopening the estate is the only remedy available for proper ventilation on the parties’ interests. The balance of convenience favours granting of the relief sought as declining to grant the relief would perpetuate the unlawful conduct by the respondent.

Failure to notify interested parties and proceeding to register, administer and wind up an estate by the second respondent is a misdemeanour warranting the reopening of the estate so as to attain the ends of justice.

Accordingly the application is granted.

It is ordered that

1. The estate of late Joseph Sithole registered with the Assistant Master Magistrate Court Norton (Ref DE 11/2008) be and is hereby reopened
2. The cession of rights, title to interest in stand K2974, Katanga Norton to the first respondent be and is cancelled.
3. The third respondent is hereby directed to make the appropriate endorsements and entries in its registry.
4. The interested parties are to lodge their claims with the Master of High Court within 2 months of this order.
5. Each party is to bear its costs.

Debwe & Partners, applicant's legal practitioners
Mawere & Sibanda, respondents' legal practitioners