CHRISTALLENI PROESTOS
and
ESTATE LATE DINOS EROTOKRITOU
CONSTANTINOS PROESTOS (Represented herein by
CHRISTALLENI PROESTOS in her capacity as the Executrix Dative)
and
ESTATE LATE ELENI DINOU PROESTOS (Represented herein by
CHRISTALLENI PROESTOS in her capacity as the Executrix Testamentary)
versus
ATHOS PROESTOS
and
PRATIBHA PATEL
and
THE MASTER OF THE HIGH COURT N.O.
and
THE REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 22 May and 9 June 2023

Opposed Matter

SM Hashiti, for the applicants
V Vhera, for the first respondent
No appearance for second, third and fourth respondents

MUCHAWA J: This is a court application for dismissal of action for want of prosecution made in terms of r 31 (3) of the High Court Rules, 2021. The action sought to be dismissed is one brought by the first respondent under case number 2528/22.

The applicant and first respondent are siblings, in fact twins, born to the late Dinos Erotokritou Constantinos Proestos and the late Eleni Dinou Proestos. The applicant is the *executrix dative* in her late father's estate under DR 4429/21 and executrix testamentary in her late mother's estate under DR 4428/21.

The second respondent is cited in her capacity as the one who bought and now holds title to the immovable property in the estate of the second applicant namely 94 Churchill Avenue, Gunhill Harare. She has not opposed this application and has stated that she will abide by the ruling of the court.

The third respondent is cited in his official capacity as the official responsible for the administration of deceased estates whilst the fourth respondent is cited in his official capacity as the official responsible for registration of title of immovable property.

The order sought by the applicants is as follows:

> "IT IS ORDERED THAT:
> 1. The summons filed by the first respondent on 13 April 2022 under case No. 2528/22 be and are hereby dismissed for want of prosecution.
> 2. The first respondent shall pay costs of this application and costs in HC 2528/22 on a legal practitioner and client scale."

A brief background of this matter is that the first respondent issued summons out of this court on 13 April 2022 under case number HC 2528/22 for the setting aside of a last will and testament accepted by the third respondent, the Master of the High Court in respect to the estate of his late mother, herein, the third applicant. The applicants herein are the defendants in that matter. In the summons, the first respondent was claiming the following:

a. A declaration to the effect that the last will and testament dated 19 June 2020 which was tendered to the third respondent in respect of the third applicant's estate is null and void.
b. A declaration to the effect that the last will and testament signed by the late Eleni Dinou Proestos dated 24 July 2000 is the valid last will and testament in respect of the third applicant's estate.
c. An order for the revocation of letters of administration granted to the first applicant by the third respondent in respect of the second and third applicants' estates.
d. An order setting aside and cancelling the sale by the first applicant of an immovable property known as certain piece of land situate in the District of Salisbury called Stand 12895 Salisbury Township, also known as number 94 Churchill Avenue, Gunhill, Harare, Zimbabwe to the to the second respondent.
e. Costs of suit on a legal practitioner and client scale.

The applicants entered their appearance to defend on 22 April 2022. The second respondent entered her appearance to defend on 27 April 2022. The applicants then filed their plea to the summons on 9 May 2022 whilst the second respondent filed hers on 12 May 2022. In terms of r 40 (1) of the High Court Rules, 2021, the first respondent ought to have filed his replication to the applicants' plea within 12 days of receipt of the plea as shown below:

> "40. (1) Within twelve days after service upon him or her of a plea and subject to subrule (2), the plaintiff shall where necessary, file a reply thereto to be called the plaintiff's replication which shall comply with rule 37."

What the first respondent did was to file his replication on 21 June 2022, yet he had the applicants' plea served upon him on 10 May 2022.

The Law

The starting point is to look at r 31(3) which is the basis for this application. It provides as follows:

> "(3) Where the defendant has filed a plea and the plaintiff has not, after one month of the filing of such plea, taken any further step to prosecute the action, the defendant may, on notice to the applicant, make a court application for the dismissal of the action for want of prosecution and such application shall be supported by affidavit made by the defendant or a person who can swear positively to the facts or averments set out therein, setting out the grounds for seeking that relief and on hearing an application the court may either grant the application or dismiss it and make such order as to costs as it considers necessary in the circumstances."

In the case of *Dube* v *Premier Medical Investments (Pvt) Ltd* SC 32/22, Honourable MATHONSI J put out the law in relation to an old rule like the one under consideration (though dealing with applications), as follows:

> "Rule 236 (3) of the High Court Rules (now r 59 (15) of the High Court Rules, 2021 does not set out the factors to be considered by a judge or the court on an application for dismissal for want of prosecution. CHIDYAUSIKU CJ however set out those factors in the case of G*uardforce Investments (Pvt) Ltd, supra*[1], at pp 5-6 as:
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> > 'The discretion to dismiss a matter for want of prosecution is a judicial discretion, to be exercised taking the following factors into consideration-
> > (a) the length of the delay and the explanation thereof;
> > (b) the prospects of success on the merits;
> > (c) the balance of convenience and the possible prejudice to the applicant caused by the other party's failure to prosecute its case on time.'"

All the above factors must be considered in conjunction with each other in the process of the court's exercise of discretion. See *Dube* v *Premier Medical Investments (Pvt) Ltd & Anor* SC 32/22.

I turn now to consider each of these factors in relation to this matter.

Length of delay and explanation for it

It is the applicants' case that the first respondent fell foul of r 30 (3) in that he had one month from the date of receipt of the plea to further prosecute his matter, otherwise the applicants had the option to apply for dismissal of the matter for want of prosecution. As they

[1] SC 24/16

served their plea on the first respondent on 10 May 2022, the one-month period is said to have lapsed on 10 June 2022. The purported filing of the replication to the plea which, in terms of r 40 (1) of the High Court Rules, 2021, should happen within 12 days is alleged to be contrary to the rules. The prescribed period is said to have lapsed on 27 May 2022. By operation of r 40 (9), the first respondent is alleged to have been automatically barred. As a result of r 39 (4) the operative bar is said not to allow a barred party to file any subsequent pleadings nor appear personally or through a legal practitioner in any subsequent proceedings in the matter without first seeking upliftment of the bar. The replication filed by the first respondent on 21 June 2023, is said to be of no consequence.

The first respondent accepts that there was a delay of up to a month and that he is therefore barred. It is explained that the replication could not be filed within the prescribed 12 days because the applicants' plea had raised new and unexpected allegations which necessitated the gathering of further evidence to sustain the first respondent's claim. The gathering of such evidence is said to have taken more than 12 days. The first respondent is based in Cyprus. His legal practitioners say that they did not want first respondent to make bare denials but to respond to every allegation raised. Some of the evidence which was required is set out as follows:

a) That the late Eleni Proestos had money and she simply did not want to wind up her husband's estate and not that she did not have money to do so.
b) That the first respondent would always send money to the third applicant from proceeds of the sale of her property and her shares in the Bank of Cyprus and such money would be used for the upkeep of the first and third applicants and could also have been used for the winding up of the estate.
c) That the first respondent took care of his late mother and the first applicant including payment of their medical bills therefore he did not neglect them.
d) The witnesses alleged to have witnessed the execution of the fraudulent will were not yet working for the late Eleni Dinou Proestos, so they could not have possibly witnessed the signing of the second will thus pointing to the fact that it was fraudulently made.
e) There was need to retrieve old WhatsApp chats between first applicant and her nephew Daniel Proestos which show that the first applicant coerced the late Eleni Proestos to sign the new will.

f) There was need to interview one Maidei Mwale who was the late Eleni's housemaid to assess the relevance of her evidence. Locating her was difficult as she had since ceased working for the Proestos family.

The gathering of such evidence is said to have taken time due to the considerable time lapse from the death of the father, Dinos Erotokritou Constantinos Proestos in 1992 and the mother Eleni Dinou Proestos in 2021. It is averred that after the gathering of the evidence, it was then possible to substantively respond to the plea, though it was out of time.

First respondent's counsel confirm that they advised their client to gather relevant evidence first because it is a cardinal rule that a replication should not be a bare denial. It is contended that the first respondent should not be punished because of following their legal practitioner's advice.

In explaining the delay in filing the application for condonation and upliftment of bar, first respondent's counsel explained that the urgent matter HC 4701/22 took up their focus as they tried to preserve the status quo at the property. It is elaborated that whilst the first respondent was in the process of gathering the further evidence and attending to the drafting of an application for condonation and upliftment of bar, the first respondent noticed that the second respondent had commenced making massive and destructive changes to the immovable property at the core of this matter. They then filed an urgent chamber application on 15 July 2022 under case number HC 4701/22. The matter was heard on 21 July 2022 and an order was made in favour of the first respondent maintaining the status quo at the property and barring the second respondent from continuing with any construction works, destruction of walls, cutting down of trees, digging, trenching, excavating or in any way making physical changes.

The application for condonation for the late filing of the replication was only filed on the 11 August 2022 under HC 5336/22. This application for dismissal of action for want of prosecution was filed on 17 August 2022.

Mr *Hashiti* submitted that there is no reasonable explanation proffered for the delay as a party is not allowed to plead in instalments and a party should have all the facts at the time of approaching a court. He said that it was a bold lie for the first respondent to say he needed further evidence, yet such evidence is not stated.

A perusal of the first respondent's opposing affidavit to this matter shows, in para 13 that the first respondent incorporates his founding affidavit to the application for condonation of late filing of the replication, in which the evidence is laid out as I have set it out above. A further perusal of the summons in HC shows that indeed the applicant's plea did raise a totally

new complexion to the matter which the applicant had placed before the court, particularly in relation to the status of the late Dinos Erotokritou Constantinos Proestos' Estate, alleged neglect of the late Eleni Dinou Proestos by the first respondent and abuse of her funds and her alleged indigency. In the face of such strong allegations, it made sense for first respondent's counsel to re-establish whether he had a sound case.

Mr *Hashiti* went further to aver that a replication does not require evidence and should just state whether a party is denying or admitting the averments in the plea.

Rule 40 (2) however provides that:

> "(2) No replication or subsequent pleading which would be a mere joinder of issue or bare denial of allegations in the previous pleading shall be necessary and issue shall be deemed to be joined and pleadings closed in terms of rule 44."

This is what the Rules provide for in relation to a replication in r 40 (1):

> "Within twelve days after service upon him or her of a plea and subject to subrule (2), the plaintiff shall where necessary, file a reply thereto to be called the plaintiff's replication which shall comply with rule 37."

Rule 37 says that:

> "37. (1) The defendant's answer to the plaintiff's declaration shall be called his or her plea, and it shall set forth concisely the nature of his or her defence, and deal with the allegations in the declaration as provided for in rule 36(11)-(18)."

What this means is that the replication must set forth concisely the nature of the plaintiff's response to the plea and deal with all the allegations raised. If it was a simple denial, then there was no need for the filing of a replication. Given the new issues raised in the plea, it was necessary for the first defendant to verify his facts and extensively deal with the arising issues.

The first respondent's counsel, as a form of courtesy, could have written to the applicants' legal practitioners and advised them of the delay and sought indulgence and promptly filed the application for condonation. They do explain the further delay. If they were not desirous of prosecuting the matter, they would not have filed the urgent application which was aimed at preserving the status *quo* nor filed the application for condonation which was in fact filed before this current application.

In the circumstances, I find that the first respondent has given a reasonable explanation for the delay which delay is not inordinate in the circumstances.

Prospects of success on the merits

Mr *Hashiti* submitted that the first respondent has no prospects of success on the merits of the main matter as he pleads that the last will and testament, he is challenging was signed by the late Eleni Dinou Proestos under duress brought by the first applicant. He opined that duress is such an onerous requirement which will not be lightly upheld as per *Muza* v *Agricultural Bank of Zimbabwe Limited* SC 70/03. On the merits of this matter, he said that there is no way that the first respondent will succeed as he has not set out the extent of duress and how it happened. It was pointed out too that the first respondent has never set foot in Zimbabwe since 2007 therefore he will be unable to establish fraud, duress and corruption which is alleged in the summons.

Furthermore, the applicants' case is that in the appointment of an executor the Master prefers the surviving spouse and thereafter, the immediate next of kin. It is submitted that the only next of kin in this case was the first applicant who is the daughter to the late Eleni. It was argued that there is no basis for praying that her appointment be set aside.

On the strength of the case of *Salma Ebrahim* v *Attiya Ebrahim & Ors* HH 448/18 the court was urged to consider that a complaint against an executor should be directed to the Master and that the court will not entertain complaints unless the Master's office is first approached.

The prayers of the first respondent in the main matter are alleged to be all reviewable and that the first respondent should have sought a review of the Master's decision. As title has passed on the property, it was contended that a declarator does not reverse title.

Ms *Vhera* countered that the first respondent does not have to live in Zimbabwe in order to successfully prove duress as he has a witness who can attest to what transpired to show that there was duress in how the will was signed. This issue, she stated needs to be fully interrogated at the trial. Though it was admitted that the first respondent is not resident in Zimbabwe, it was averred that his children are resident here and they interacted with the late Eleni and will be called as further witnesses.

Ms *Vhera* submitted that the will dated 19 June 2020 in respect of the third applicant's will is null and void as it contravened s 6 of the Wills Act [*Chapter 6:06*] in that she personally wrote the will conferring a benefit on herself and exerted duress upon the late Eleni and by fraudulent means caused her to sign the will and thereafter unlawfully destroyed and concealed the proper will of Eleni.

Furthermore, the late Eleni is alleged not to have had any capacity to make a will as envisaged by s 4 of the Wills Act [*Chapter 6:06*] as she was suffering from dementia. Consequently, it is argued that because of all these breaches, the will accepted by the Master should be declared null and void and the one of 24 July 2000, be declared the valid will and testament.

A natural flow from the above would be a revocation of the first applicant's letters of administration and the sale of property based on such faulty letters of administration would have to be set aside as well as the title deeds. Reliance was placed on the case of *Mavhurume* v *Maikoti & Ors* HH 199/11.

> "Thirdly, and in any event, the position of law does not state that section 117 applies to the exclusion of any other law. On this point counsel referred to the words of MAKARAU JP (as she then was) in *Katirawu* v *Katirawu* 2007 (2) ZLR 64 at 69D-G learned judge opined aptly that:-
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> > 'While s 117 (1) empowers the Master to approach the court for the removal of an executor for the listed grounds, in my view, such a power granted to the Master was not intended to take away the right of all those having an interest in the estate from approaching the court at common law to have the executor removed if they can establish to the satisfaction of the court that the continuance in office of the executor does not augur well for the future welfare of the estate and beneficiaries. The power granted to the Master by s 117 is, in my view, complementary to the inherent power of the court at common law. In any event, if it was the intention of the legislature to revoke the common law power of the court in this regard, it would have done so in express language, for the jurisdiction of the court is not ousted other than in clear language.
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> > **Applying the above law to the facts before me, it is my finding that the applicant as beneficiary in the estate has the capacity to approach this court at common law to move for the removal of the first respondent as an executor. Her application was brought at common law as she alleged fraud. She is not alleging any of the grounds listed in *s* 117 for the removal of the first respondent as executor of the estate.'" (My Emphasis)**

Mr *Hashiti* cannot be correct in saying that this court should decline jurisdiction to deal with the matter before the Master handles it. The first respondent's case is one in which he alleges fraud, duress and corruption. It is therefore brought at common law as the first respondent is alleging that he is a beneficiary to his mother's estate. Whether or not he should have approached the court by way of review or action will best be dealt with when the matter is heard.

The case of *Mavhurume* v *Maikoti &Ors* 119/11 deals with the prayer to have the sale of property set aside as follows:

> "The next issue pertains to whether applicant had authority and capacity to sell the property at the time of the sale. In as far as I have concluded that his appointment was not lawful it follows that he could not have had the authority and capacity to sell."

In *casu,* once a decision is made on whether the first applicant's appointment as executor is tainted by a finding of illegality, that will influence the sale as she might be found to have had no authority and capacity to sell the property. That issue cries out for determination. See also *Katirawu* v *Katirawu* 2007 (2) ZLR 64 and *Katsande* v *Katsande* HH 113/10. In *Katirawu* (*supra*) it was held that as the appointment of an executor had been procured by fraud nothing legal could flow from it thus tainting the sale agreement on grounds of illegality.

Indeed, the case of *Muza* v *Agricultural Bank of Zimbabwe* (*supra*) points to the onerous burden on someone who alleges duress as follows:

> "Contracts that are void *ab initio* by reason of duress are very rare as the duress required to render an agreement void *ab initio* has to be extremely severe. It has to be so severe as to negative any element of voluntariness such as where a stronger person physically overcomes a weaker person and puts a pen in his hand and physically forces his hand to write his signature on a written contract.[2]"

What that case shows is that the establishment of duress is a question of evidence. Unless one hears the evidence, it is difficult to conclude that there are no prospects of success. It is for that very reason that I conclude that the parties must have their day in court and fully ventilate this issue. The first respondent does not need to be the one who is a witness to the duress if he can call a witness who can attest to and establish that duress was present then there are reasonable prospects of success. I hazard to think that this may be the very reason why more time was required to locate and interview the witnesses.

The Wills Act also bolsters the first respondent's case. In s 4 a person who is mentally incapable of appreciating the nature and effect of his act has no capacity to make a will. The first respondent alleges that the late Eleni was suffering from dementia. It is a question of evidence to prove this.

In s 6(2)(c) a person who personally writes out the will on behalf of the testator or at his direction is precluded from benefitting from the will if it confers a benefit upon him. This too would be subject to the evidence led.

Because of the facts of this matter, it appears to me that the first respondent has fair prospects of success on the merits of this matter.

The balance of convenience and the possible prejudice to the applicants caused by the first respondent's failure to prosecute its case on time.

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[2] The Law of Contract in South Africa, 3rd Edition. *R.H. Christie* p. 337; *Grocious* 3.48. *Van Leenwan* C.F. 1.4.41; *Voet* 4.2.2. *Smith v Smith* 1948 (4) SA 61 (N) 67-8

The only prejudice pointed to by the applicants is that they have incurred legal costs in defending an action which the first respondent is not keen to prosecute. They have also incurred further costs in lodging this current application.

Ms *Vhera* submitted that given the likely prospects of success highlighted, it would be prejudicial to the first respondent to be denied his day in court on technicalities on the strength of *Guardforce Investments (Pvt) Ltd* v *Ndlovu & Ors* (*supra*). If the application was granted, it is contended that the first applicant would be benefitting from her own wrongs whilst the first respondent would lose out on his inheritance.

It was pointed out that the second respondent has taken the noble position that she will be bound by the court's decision and has not adverted to any prejudice on her part.

The conduct of the first respondent, throughout the matter depicts someone who is keen to prosecute his matter to the end. Despite the bar operating against him, the first respondent did file his replication and PTC papers in the main matter and has filed an application for condonation which is due to be heard on the 21st of June 2023. The application for condonation was filed more than a week before this application for dismissal. The applicants took the calculated option to apply for dismissal of this matter well knowing that an application for condonation had been filed and was pending. They invited the legal costs attendant to such a route.

I note too that this is a matter between siblings who are the only surviving children of their parents. They are in fact twins. The issues raised in the main matter need to be thrashed to ensure that relations are managed by allowing the parties their day in court so that their different versions can be tested and possibly the true or more credible version is upheld. It is the only way for them to clear the air and move forward.

The balance of convenience therefore favours the dismissal of this application and allowing the main matter to be heard.

There is no justification for costs on the higher scale either way.

Consequently, I order as follows:

The court application for dismissal of the matter HC 2528/22 be and is hereby dismissed with costs.

Chivore Dzingirai Group of Lawyers, applicants' legal practitioners
Tamuka Moyo Attorneys, first respondent's legal practitioners