HENRIETTA NYANYIWA
versus
MASTER OF THE HIGH COURT
and
CLEVER MANDIZVIDZA [N.O]
and
EDDIES PFUGARI (PRIVATE) LIMITED
and
E. PFUGARI PROPERTIES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 8 November 2021 and 23 March 2022

Opposed Matter

J. R. Tsivama, for the applicant
G. Madzoka, for the 2nd respondent

TAGU J: The applicant is a beneficiary of the Estate of the Late Edward Nyanyiwa. She takes issue with the first respondent's decision to confirm the liquidation and distribution accounts filed by the second respondent in respect of the estate. Her contention being that there was never a proper valuation of the shares held by the deceased in the various companies he had interests in as envisaged by the Estate Duty Act [*Chapter 23:03*], that first respondent wrongfully and unreasonably approved an executor's fee of fifteen (15%) of the estate's gross assets as opposed to the Statutory five percent (5%). That the Executor who is more interested in enriching himself at the expense and to the prejudice of the beneficiaries would have failed to perform his duties and must be removed from office.

The brief facts are that the second respondent was appointed the executor of the estate of the late Edward Nyanyiwa on 21 March 2019. On 25 August 2020 the applicant's legal practitioners wrote two letters of complaint to the first respondent. The first respondent called upon the second respondent to comment on the complaints by the applicant. Having received such comments the first respondent dismissed the complaints by the applicant for want of substance. The present application is against such dismissal of the complaints.

Three issues lie for determination in this matter. Whether the interim distribution account for Estate Late Edward Nyanyiwa should be set aside. Whether the fees charged by the second

respondent should be set aside and whether the second respondent should be removed as an executor of the late estate Edward Nyanyiwa.

In her letters dated 5 August the applicant tabulated her issues against the liquidation accounts for Estate Late Edward Nyanyiwa. Her grievances can be summarized as follows, that the values of the late Nyanyiwa's shareholding in various companies had not been properly determined in that the value of the shares in such companies is naturally affected by the companies' liabilities and these were not taken into account in coming up with the values that the executor sought to rely on. Further that the second respondent had charged a total of fifteen percent as his fees when such percentage was not due to him. According to the applicant the second respondent's conduct constituted overcharging and that the account be set aside.

The second respondent refuted the allegations made against him and the liquidation account. In relation to allegations of improper valuation of the late Edward Nyanyiwa's shareholding, his defence was basically that the valuation had been done purely under section 6 of the Estate Duty Act and that the auditors who had valued the companies had taken into account all relevant facts and considerations. On the question of his charges his response was that the applicant had failed to demonstrate how the estate had been overcharged and that he simply taxed the estate as informed by statute. The first respondent therefore agreed with the executor that section 6(g) (iii) is applicable in the valuation of company shares and that this approach had not been formally challenged to date. In effect the first respondent reasoned that having previously accepted values ascertained using the same process, it was improper for the parties to now seek to challenge the manner in which the valuations were done.

The questions that arise now is whether there is any legal basis for the Court to interfere with the decision made by the first respondent concerning the valuation of the late Nyanyiwa's shares in the mentioned companies, whether the fees charged by the first respondent should be set aside and the executor should be removed?

The reason given by the applicant for seeking the setting aside of the valuation is serious irregularity and failure to comply with section 6(1) (g) of the Estate Duty Act [*Chapter 23:03*] in effect, therefore, two grounds for review are raised here, namely gross irregularity and illegality. She attempted to expand upon these in her founding affidavit. In paragraph 28 it is argued that there is no sworn valuation of the shares.

It is trite that gross irregularity and illegality are competent grounds for judicial review in terms of both section 27 of the High Court Act [*Chapter 07:06*], and the common low: *Bridges & Hulme (Pvt) Ltd* v *Magistrate, Bulawayo & Anor* 1996 (1) ZLR 542 *(HC), and Archipelago (Pvt) Ltd & Sar*ah's *Investments (Pvt) Ltd* v *Liquor Licensing Board* 1986 (1) ZLR 146 (HC). The real question in this case, therefore, is whether the applicant managed to demonstrate gross irregularity and illegality in relation to the first respondent's decision appearing on pages 28-30 of the application in so far as that decision pertains to the valuation of the late Edward Nyanyiwa's shareholding in the third and fourth respondent companies?

As a matter of law, it is not every error by a decision maker that would constitute gross irregularity for purposes of judicial review- *S* v *Runganga* 1995 (2) ZLR 303 (HC). In Bridges *and Hulme, supra,* the Court accepted the position that "In order to constitute 'gross irregularity' or 'clear illegality' within the meaning of the rule already quoted there must something more than this – a deliberate refusal to consider the provisions of a statute, not a mere failure to apply it correctly." Therefore, for present purposes the narrow question to be answered is whether in dismissing the applicant's challenges to valuation, the first respondent engaged in conduct that constitute a deliberate failure to consider the provisions of section 6(g) (iii) of the Estate Duty Act.

Section 6(g) (iii) of the Estate Duty Act provides for the valuation of shares owned by a deceased person for purposes of the Estate Duty Act. It provides that, the value of property to be included in the estate of any person shall –

> "(g) the in the case of shares in any company not quoted in the official list of a securities exchange registered under the Securities Act [*Chapter 24:25*] or any securities exchange outside Zimbabwe, the value of such shares in the hands of the deceased at the date of his death as determined, subject to section nine, by sworn valuation by some impartial person appointed by the Master, subject to the following provisions, that is to say –
> (i)…
> (ii)
>
> (iii) if upon winding-up of the company the deceased would have been entitled to shares in the assets of the company to a greater extent pro –rata to shareholding than other shareholders, no lesser value shall be placed on the shares held by the deceased than the amount to which he would have been so entitled if the company had been in the course of winding –up and the said amount had been determined as at the date of his death."

The second respondent reasoned that Section 8(1) (a) of the Estate Duty Act provides that the executor of an estate shall submit to the Master a return in the form prescribed by the Master disclosing the amount claimed by the person submitting the return to represent the dutiable amount

of the estate together with full particulars regarding the property of the deceased as at the date of his death. He said the Master is entitled to rely on information provided to him by an executor in terms of section 8 of the Estate Duty Act. Therefore, the acceptance by the 1st respondent of the values given to him by the second respondent was not illegal nor grossly irregular.

Turning to the alleged overcharging the second respondent argued that what is at stake are two interpretations to the legal instruments providing for the charging of fees by an executor. The issue resolves around the meaning to be ascribed to the words "brought to account."

The applicant argued that "brought to account" in the Estates Administrators (Registration and Examination) (Amendment Regulations, S.I. 50/2017, as read together with S.I. 59 /2018 should be interpreted to mean assets recovered by an executor, while the first and second respondents argued that the phrase means all capital assets of the estate mentioned in an account provided by the executor. Hence differences in interpretations of the law cannot constitute gross irregularity or illegality for purposes of judicial review.

As to the removal of the second respondent, the second respondent referred the court to the case of *van Nierkerk NO* v *Master of the High Court* 1996 (2) ZLR 105 where the court held that the removal of an executor should never be undertaken lightly. In order to justify a removal of an executor, section 117 of the Administration of Estates Act [*Chapter 6:01*] requires that the court be satisfied that the executor had failed to perform satisfactorily any duty or requirement imposed on him by or in terms of the law. The second respondent argued that the applicant failed to establish grounds for his removal.

What I noted from the second respondent's so called justification is that in his endeavor to establish the value of the estate assets, as he was obliged to do by law, he then made a decision to carry out audits and produce balance sheets, not of the estate itself, but of companies that the deceased held shares in. this was a completely unnecessary and warranted course of action as the companies themselves, being separate legal entities, do not belong to the estate. All that was required and expected of the second respondent was to establish the value of the deceased's shares in those entities. On top of such a basic error the second respondent then went on to load that unnecessary expense onto the estate and then reward himself with an additional 10% gross value of the estate's assets all at the estate's expense and that is to the prejudice of the beneficiaries.

Had the process undertaken by the second respondent resulted in any additional assets or value addition to the estate then perhaps he could have claimed a 10% fee on such value addition as the estate would not have received it but for the executor's efforts. That is not the case here and that is certainly not the second respondent's excuse for the additional charges.

In terms of the law, to ascertain the value of the shares clear guidance is availed to the executor in terms of section 6(1) (g) of the Estate Act [*Chapter 23:03*] which provides that a valuation of such shares (which are not listed on the stock exchange) should be by sworn valuation by some impartial person appointed by the first respondent. *In casu* there was no valuation of any shares at all. Rather what was done is a valuation of assets of companies by an estate agent who is a valuer of immovable properties and not shares and who was appointed by the second respondent and not even by the first respondent. How this can be argued and accepted as due compliance with section 6(1) (g) of the Estate Duty Act is puzzling, to say the least.

To make matters worse for the first and second respondents no sworn statement from Rawson Properties, the valuer of the immovable properties, was placed before the court to explain what they took into account in arriving at the given values to justify any suggestion that such valuation was as good as a valuation of shares. Moreover there is not even any evidence that they are actually qualified to carry out a valuation of shares and the respondents have also not purported to explain how a value of shares in a company not listed on the stock exchange is ordinarily determined. On what basis then would it be insisted that the valuation is in accordance with the law? The so called valuation was not in compliance with the law and so should not have been accepted or confirmed by the first respondent.

In terms of the regulations S.I. 50 of 2017 it is obvious that the executor is only entitled to charge a 10% fee on those capital assets that he would have brought to account. Because the executor would have brought the assets to account, then that would explain the fee of 10% as the estate would actually owe it to the executor the additional income accrued to the deceased's estate. The separation of the executor's fees under part A and B is a clear indication that the fees are meant to apply to different scenarios or situations and applying both to the same assets as the second respondent purported to do is clear double dipping.

What immediately comes to mind after reading the Master's report is that the first respondent has no appreciation of his own role insofar as it pertains to fees or remuneration to be

charged by an executor, and that his interpretation of the regulations, or their import, is based on his personal understanding and not supported by any law or court decision, and that he is not clear on the extent to which the regulations should guide or influence the fees chargeable in administration of an estate. Once it is accepted, as it should, that the first respondent has the power to assess the reasonableness of an executor's remuneration then his failure or refusal to make such an assessment in the face of the applicant's objection is a serious irregularity that justifies the setting aside of his confirmation of the accounts.

Further, it is trite that that which is not disputed in the affidavits is taken as admitted. I say so because the first and second respondents did not dispute the applicant's assertion that the 15% fee charged is neither fair nor reasonable. Once it is accepted that the first respondent ought to have assessed whether the fee charged is fair and reasonable, which he did not do since he simply followed what was placed before him by the second respondent then it must follow that it was not as that fact was not challenged. On that basis the confirmation of the accounts would have to be set aside with punitive costs to be borne by the estate. It is not surprising that both the first and second respondents dared not argue that the 15% charged is reasonable or fair that they did not even attempt to address that point because the fee is blatantly and grossly unfair because it leaves the second respondent as the major beneficiary of the estate ahead of the deceased's own family, among other reasons set out in the founding affidavit.

An analysis of the accounts on pages 43 to 92 of the application shows that the second respondent would benefit more than the deceased's junior wife and own children and almost as much as the senior wife's share. In monetary terms the second respondent's fee for a few months' work runs into several million United States dollars and yet all he as to do is to dispose of the estate's assets to raise his own fees, leaving the deceased's companies insolvent as the value of the estate was actually overstated. A 5% fee would still translate to a very substantial amount by any standard and would have constituted a more that reasonable fee for the second respondent. If it is accepted, which is not, that 15% is indeed supported by statute, which it clearly is not, the first respondent was obliged to assess it in accordance with section 56 of the Administration of Estates Act following the applicant's objection and come up with what he considers to be a fair and reasonable remuneration. Had he done so there is no doubt that he would have come up with a total of 5%, if not less, given the significant value of the estate, the number of beneficiaries and

the liabilities of the estate, including the estate duty and the Master's fees, to mention a few considerations.

The brazen attitude displayed by the second respondent as he went about disposing of the estate's assets with the first respondent's consent and approval in the face of the court challenges as well as partisan approach adopted by the first respondent in the face of what, with respect, is an obvious misinterpretation of the law, coupled with the obvious mistrust of the executor in this case, makes a very good case for his removal.

IT IS ORDERED THAT

1. The first respondent's decision to confirm the second respondent's interim liquidation and distribution accounts in the estate of the late Edward Nyanyiwa under DR Number 471/19 be and is hereby set aside.
2. The interim liquidation and distribution accounts filed by the second respondent in the estate of the late Edward Nyanyiwa under DR 471/19 be and are hereby set aside.
3. The second respondent be and is hereby removed from the position of executor dative for Estate Edward Nyanyiwa DR 471/19.
4. The first respondent shall within ten days of being served with this order appoint an impartial person to carry out a valuation of the shares held by the late Edward Nyanyiwa in all the companies that the estate has interests in.
5. It is hereby declared that the executor for Estate late Edward Nyanyiwa shall charge his fees at five percent (5%) of the gross value of the estate,
6. The costs of this application shall be borne by the second respondent.

Messrs Sawyer & Mkushi, applicant's legal practitioners
DNM Attorneys, second respondent's legal practitioners
Messers Scanlen & Holderness, third and fourth respondent's legal practitioners.