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Judgment No. S.C. 5\03
Civil Appeal No. 197\02

(1) KARL PASALK (2) ELIZABETH PASALK v (1) ADELLAH KUZORA (2) CECIL MADONDO (3) THE MASTER OF THE HIGH COURT

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, MALABA JA & GWAUNZA JA
HARARE FEBRUARY 3 & MARCH 10, 2003

L. Mazonde, for the appellants

D. Foroma, for the first respondent

ZIYAMBI JA: This is another instance in which a legal practitioner has done a disservice to his clients.

The background facts are as follows. The appellants are major children of the late Detliev Pasalk who died in 1995. Prior to the distribution of the estate, three vehicles forming part of the deceased estate were given to the appellants as part of their inheritance, it being the understanding of the executor, that the appellants were the only heirs to the deceased estate.

Then in 1998 the first respondent, who had lived with the deceased from 1982 until his death in an unregistered customary union, obtained an order from

the High Court declaring her a partner in a universal partnership between herself and the late Detliev Pasalk and ruling that she was entitled to one half of the joint estate acquired by them from 1982 until the date of his death. The second respondent then sought directions from the Master of the High Court who directed the distribution as per his letter which reads in part as follows:-

> "The essence of Chinhengo J's judgment is that we put together the values of both movable and immovable properties, divide the total by two, this will give us Adella Kuzora's 50% which should not come into this estate.
>
> Put simply:
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> | | |
> |---|---|
> | Value of immovable property | $474 500 |
> | Add value of movables | $645 440 |
> | Total | $1 119 940 |
> | | |
> | 50% to Adella Kuzora | $1 119 940 : 2 |
> | | $559 970 |
>
> I take note of the fact that the 3 vehicles namely the Mercedes Benz, Usuzu Trooper and Nissan Pick Up Truck were requested and made available to the two Pasalk children namely Karl and Elizabeth. In the same vein Adella has always had possession and occupation of the house. The said house is valued at $474 500. I therefore rule that it is only fair that Adella be allowed to take the immovable property as part of her 50% share plus other movable assets of her choice from the list as provided by Tony West.
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> Having said that I now turn to the distribution in the estate of Late Detliev Pasalk. Karl and Elizabeth have already accessed and used the motor vehicles. In other words they have already accessed part of their inheritance. Therefore the vehicles which were made available to Karl and Elizabeth are awarded to them as part of their inheritance subject of course to the satisfaction of the maintenance claim by Adella Kuzora and her children.
>
> As regards the Mubayira, Hatcliff and Mufakose properties I note that Chinhengo J made a finding in his judgment that there was no basis upon which the said properties could be brought into the estate. I find no reason why I should entertain the same issue that has already been decided by the High Court.
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> Finally and in brief the following is directed:-
>
> (a) That the values placed on the movables and immovable properties by Tony West Real Estate be accepted for purposes of winding up this estate.

(b) That the immovable property Lot 232A Highlands be awarded to Adella Kuzora as part of her 50% share holding in the Universal Partnership.

(c) That the 3 motor vehicles namely Isuzu Trooper, Nissan Truck and Mercedes Benz be taken as part of the estate of Detliev Pasalk but for purposes of distribution of this estate, the said vehicles are regarded as having been awarded to Karl and Elizabeth.

Any other assets that do not form part of Adella's 50% in the Universal Partnership should be brought to account with values as at the date of death."

The appellants, aggrieved by the award of the house to the first respondent as her half share of the property, filed a court application to the High Court seeking that the Master's decision be set aside and that the appellants be registered as "joint undivided owners with the first respondent of the immovable property".

The founding affidavit was deposed to by a legal practitioner who stated that he is a senior partner in the firm of legal practitioners which represents the appellants and that he was authorised to attest the affidavit "and make application to this Honourable Court for a review of the decision of the Master on a point of law in terms of section 113 of the Administration of Estates Act [Chapter 6:01]. This section provides:-

"Whenever any difference of opinion upon a question of law arises between the executor and the Master in the distribution of an estate and a minor is interested in the decision of that question, the Master and the executor may state a case in writing for determination by a judge of the High Court in chambers, and the determination of the judge shall be binding upon the Master and the executor, without prejudice to the rights of other persons interested in the distribution:

Provided that the judge may refer the matter to the High Court for argument."

It will be noted that it is the Master and the executor who are given standing to approach a judge of the High Court in chambers where they disagree upon a question of law. Further, the section applies where a minor is interested in the decision of that question of law. The legal practitioner clearly did not apply his mind to the issues involved. Even a cursory reading of the section quoted above would have revealed to him that the appellants did not fall within the ambit of that section. In short, his clients had no *locus standi* to approach the court in terms of the section. If, then, he was minded to seek a review in terms of the High Court Rules, it was incumbent on him to comply with the requirements of the rules relating to reviews.

Rule 257 of the High Court Rules, 1971('the Rules') provides as follows:-

> "257. **Contents of notice of motion**
>
> The court application shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for."

No grounds of review were stated in the court application or in the founding affidavit. The deponent (the legal practitioner), described the first respondent as an intestate heir to the deceased estate having been declared a "universal heir" and requested the court to apply the "law of intestacy by finding that the respondent is entitled to a 50% award of the assets in the deceased estate". The first respondent was in fact declared a partner (not an heir) in the universal partnership. Her customary union with the late Pasalk not having been registered, she could not inherit from his estate on intestacy.

In supplementary heads of argument filed with the consent of the Court the appellants advanced a totally different argument, namely that the issue was the dissolution of the partnership and the Master had acted unlawfully in distributing the estate before the partnership was dissolved. Paragraphs 4 and 5 of the appellants' supplementary heads of argument submitted to the High Court read as follows:-

> "4. It is respectfully submitted that the basis of the application is that the Third Respondent acted contrary to law when he allocated a house to the First Respondent. By reason of that misdirection at law, it is respectfully submitted that the decision of the Third Respondent is not only tainted with illegality in that the Master was guilty of an error in law, but was also irrational in the sense that it is so outrageous in its defiance of logic or of accepted standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. See *Secretary for Transport & Anor v Makwavarara* 1999 (1) ZLR 18 (SC) at 20 B-C; *Tapfumaneyi v Cotton Co of Zimbabwe & Ors* S-140-97.
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> 5. What was involved *in casu* was dissolution of a partnership by death. The authorities are clear:-
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> > 'On dissolution the partners (and, in the case of death, the executor of the deceased partner's estate) have a right to wind up the partnership affairs. … No partner has the right to retain possession of any of the partnership assets, nor to dispossess co-partners or partnership property.'

It is not surprising, then, that in the court *a quo* the respondent successfully took the point, *in limine*, that the application was fatally defective for want of compliance with Rule 257 of the Rules, in that no grounds of review had been averred by the appellants in their founding affidavit. Indeed, it is clear that the deponent to the founding affidavit had no appreciation whatsoever of the fact that he was dealing with the dissolution of a partnership. The learned Judge found that the averments in the founding affidavit were "totally divorced" from those in the supplementary heads of argument. A belated request, by counsel who appeared for

the appellants at the hearing, for condonation of his instructing legal practitioner's failure to comply with the rules, found no favour with the learned Judge who gave, at page 57 of the record, her reason for declining the request:-

> "The basis of asking the applicant to clearly state the basis upon which he seeks a review of any proceedings is to enable the respondents to be in a position to answer adequately to the issues raised and the court to determine the basis of the challenge. Clearly this was not done in this case.
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> In my view the court cannot in these circumstances condone the non-compliance of the rules".

This was an exercise by the trial court of its discretion conferred on it by Rule 4C of the Rules which provides as follows:

> "4.C The court or a judge may, in relation to any particular case before it or him, as the case may be –
>
> (a) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;"

The learned judge having given consideration to the matter was of the view that this was not a case where she could condone the departure from the rules.

It is trite that this Court will not interfere with the exercise by a trial court of its discretion unless it is satisfied that the manner in which the discretion was exercised was so unreasonable as to vitiate the decision reached.

The appellants submitted in their heads of argument before this Court, that this was an injudicious exercise of the learned Judge's discretion entitling this court to interfere with the decision arrived at. I do not agree. It is not for the

respondent, or the court, to study the affidavits carefully in order to determine what case the respondent is to answer. The grounds of review must be clearly and shortly stated, and, in my view, this must be in the court application itself or, at the commencement of the founding affidavit. Rule 257, before it was amended, required those grounds to be contained in the notice of motion which is indicative of the intention of the draftsman that the grounds of review must be readily apparent at the commencement of the application. (See Rule 257 of the High Court Rules, 1970).

This Court has time and time again cautioned legal practitioners to exercise more care in the presentation of review applications. See *Ministry of Labour & Ors v PEN Transport (Pvt) Ltd* 1989(1)ZLR 293 (SC) at p 296; *Stanley Mtetwa v Rejoice Moyo and O.K. Bazaars* HC-H 222/89; *Hall v Director of Civil Aviation* HC-H 38/89; *Art Printers Ltd v The Regional Hearing Officer and Joaquim Moyana* HC-H 168/87.

Legal practitioners are warned that they risk not only being non-suited but also being ordered to pay costs *de bonis propriis* in cases where they have failed, as in this case, in their duty to advise their clients correctly or in the correct presentation of applications to the Courts to the detriment of their clients.

Mr *Mazonde*, who appeared for the appellants, confessed his difficulty in supporting the appeal. This is understandable in view of its obvious lack of merit.

Accordingly the appeal is dismissed with costs.

MALABA JA: I agree.

GWAUNZA JA: I agree.

Coghlan Welsh & Guest, appellants' legal practitioners

Saywer & Mkushi, first respondent's legal practitioners