Judgment No. HB 22/2004
Case No. HC 1873/2003
X-Ref 1217/2003

CAROL ANN CORREIA

Versus

NICOLIA FOSTER AND 3 OTHERS

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 25 MARCH 2004

Adv. Colegrave for the applicant
K Phulu for the respondent

Judgment

CHEDA J: Applicant seeks an order of this court to fully authorise her to enter premises of 2nd respondent and also that 1st, 3rd and 4th respondents be directed to give applicant immediate access to all records including all financial records of the 2nd respondent from 1998 to date.

The historical background of this matter is a sad scenario of the Correia family. Applicant was married to Jose Graca Correia for 11 years and divorced in 1981. Two children Michelle and Miguel were born out of this union. The said children, together with their father have since died.

First respondent has a child with Miguel out of wedlock and they did not marry. Second respondent is a company which was built by Jose which he managed together with applicant for the 11 years of their marriage. Third respondent is a Director of 2nd respondent and executor testamentary of the estate of the late 4th respondent.

After Jose's death applicant nominated O D Mennie to be executor dative, but is also deceased. There were problems between applicant and O D Mennie. When

Michelle died she bequeathed her entire estate to applicant and by virtue of this, she is entitled to 50% share holding in 2nd respondent. Her concern is that despite her 50% share holding in 2nd respondent, 1st respondent continues to leave her out of the day to day running of 2nd respondent.

Third respondent was made director of 2nd respondent by the late Miguel however, 3rd respondent now resides in South Africa and practises law in that country. First respondent once worked as an administration/accounts clerk in 2nd respondent. The relationship between 1st respondent and applicant is very icy.

It is clear that 1st, 3rd and 4th respondents do not want applicant to be involved either in the day-to-day running of 2nd respondent or even be co-executor in Miguel's estate. First respondent in her opposition contends that applicant has no *locus standi* to institute these proceedings and that she is not a shareholder. Mr *Phulu* has raised three issues or points *in limine*:

(a) lack of *locus standi*. He argues that applicant should have stated in what capacity she is instituting these proceedings. It is in her affidavit that it appears that she avers that her interest is to safeguard her 50% share holding in the 2nd respondent also to safeguard her granddaughter Emilie (1st respondent's daughter).
(b) Failure to cite the Master of the High Court since this matter involves a deceased estate.
(c) Failure to cite the Registrar of Companies as it affects the share-holding in the company.

It is clear that her legal position is not clearly stated. It is however, not only a desirability but a legal requirement that it be so, for it is in this that applicant will put beyond doubt her *locus standi*.

Applicant is desirous to be a co-executor of Miguel's estate in order to safeguard the interest of her grand-daughter. In paragraphs 26-27 of her founding affidavit she stated:

> "26. Earlier this year I asked the third and fourth respondents if I could be co-executor in Miguel's estate, as the nominated executor Mr Mennie had died and the third respondent was resident in South Africa. Fourth respondent on the instructions of the third respondent declined this request I verily believe that it will be in the interests of equity and justice if I an co-executor. This will enable me to be involved in the affairs of my late children and grand-daughter.
> 27. Due to the experience that I had with Mennie which I have detailed in preceding paragraphs it would be only fair to oversee the administration. There is also no prejudice to any of the respondents if I am co-executor."

It is clear that she would like to be a co-executor. From her averments it is clear that this estate has not been wound up. Order 32 rule 248 of Rules of the High Court of Zimbabwe reads:

> "(1) In the case of any application in connection with-
> (a) the estate of a deceased person; or
> (b) the appointment or substitution of a provisional trustee in insolvency or of a provisional liquidator of a company or of a trustee of other trust funds;
> a copy of the application shall be served on the Master not less than ten days before the date of set down for his consideration, and for report by him if he considers it necessary or the court requires such a report."

The rules of this court require that the Master be cited. There is no discretion for failure to comply results in the fatal defect of the application. The use of the word "shall" is peremptory.

With regards to share-holding in the 2nd respondent, it is a requirement that rule 248 *supra* as read with rule 250 which reads:

> "In the case of any application in connection with the performance of any act in a deeds registry, a copy of the application shall be served on the Registrar of Deeds concerned not less than ten days before the date of set down for his consideration, and for report by him if he considers it necessary or the court requires such report."

The use of the word shall in both rules 248 and 250 is peremptory. The word shall is not capable of any other meaning where it appears in a statute. In so

interpreting one must look at the intention of the legislature. In *R* v *Archibald* 1924 OPD 20 at 22 De VILLIERS JP had this to say-

> "Theoretically, the word *sal* (Dutch version of shall) may be capable of both meaning, but when that word (*sal)* appears in a regulation, its ordinary meaning is an imperative one and it does not merely signify futurity" See also *S* v *Cowan* 1975 (1) SA 605.

It is clear therefore that the rules cited above require substantial compliance. Non-compliance therefore renders this application fatally flawed. Having so found at this preliminary stage it is unnecessary for me to examine the other aspect of applicant's failure to comply with the rules that deal with reviews. The matter ends there as non-compliance with peremptory provisions result in nullity.

Mr *Phulu* has submitted that in the event of applicant being unsuccessful she should bear the costs of this application at a higher scale. In the ordinary civil trials or proceedings costs follow the event, which is normally the costs on the ordinary scale. Courts are reluctant to grant costs on an attorney and client scale unless where some special grounds exist. This principle was well laid down in *Van Wyk* v *Millington* 1948 (1) SA 1205 (c). It was said costs at the superior scale should be only awarded where amongst other occasions, where proceedings have been brought on vexatious and frivolous basis, dishonesty or fraud of litigant etc see *Law of Costs*, A Cilliers 2nd Ed Butterworths 1984.

In *Van Wyk* v *Millington* 1948 (1) 1205 at 1215 SEALE AJ opined,

> "The court is always loath to award attorney and client costs against a party unless for very strong reasons, because every man has a right to bring his complaints or his alleged wrongs before the court to get a decision and he should not be penalised if he is misguided in bringing a hopeless case before the court."

I am comforted by these remarks and I totally align myself with them. I find no *mala fide* or same ground which can justify the court in awarding costs on the superior scale. In as much as the according of costs at a higher scale is the court's discretion, such discretion should be used judiciously and it is my view that in arriving at the decision of not awarding applicant the prayed costs I so exercised that discretion.

In the light of the above this application is dismissed with costs on an ordinary scale and there is therefore no need to proceed to deal with the merits.

Lazarus & Sarif, applicant's legal practitioners
Coghlan & Welsh, respondent's legal practitioners