PETRONELLA TENDAI MILITALA
versus
TRUSTEES FOR THE TIME BEING OF THE GRANTA SEVEN TRUST
and
PAULINE MANDIGO N.O
and
THE MASTER OF THE HIGH COURT
and
BIBIKAWA KAPOLO N.O
and
NIGEL MILITALA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 6 March, 2, 3, 4, 10, 22 April & 17 October 2024

Civil Trial

C Damiso & K Mutyasira, for the Plaintiff
T Gurira for the 1st Defendant
2nd Defendant in Person
No appearance for the 3rd Defendant
MV Mwase for the 4th Defendant
K C Chinyanganya for the 5th Defendant

TSANGA J:

Winsley Militala, died testate on the 10th of January 2021. (Hereinafter Winsley or the decedent). During his life time, he married Petronella Tendai Militala customarily in 1991 and then upgraded this to a civil marriage in 1998. (Hereinafter Petronella or the plaintiff). Together they had three children, one of whom sadly predeceased his father by 10 days on the 30th of December 2020. Winsley also sired two other children out of wedlock in 1997 and another in 2014. He left the matrimonial home in 2014 and formally filed for divorce in 2017. At the time of his death in 2021, the divorce matter was still pending and contested. Of significance

therefore is that the termination of their marriage was by death, the divorce matter having not yet been finalised.

Although he passed away still married, Winsley had executed a Will on the 28th of August 2020 in which he memorialised his ongoing divorce and had completely excluded Petronella from benefitting from his estate. This was on the basis that she had been looked after sufficiently during the course of their marriage. In those divorce proceedings he made an offer to her in his declaration of the matrimonial home, as well as three vehicles and financial support at US$500.00 a month.

This offer was severely contested by Petronella on the basis that it did not take into account all the assets acquired during marriage which she believed ought to be on the table for a just outcome. Indeed, following his untimely demise, what emerged is that in the period of his separation, he had indeed acquired in 2016 a property known as 7 Granta Rd through a Trust known as the Granta Seven Trust. He acquired that Trust on 3 October 2016. It was to benefit himself and his son born in 2014. He also acquired in South Africa on behalf of his minor son, properties valued at over R7 000 000.00 which were put in a Trust called Vanga Trust. Further acquired through a company known as Mugagara Properties in which his son and himself were directors was a house in Eastlea. This particular property has since been declared through a court order, to be part of his estate due to irregularities in having a minor as its Director. He had further amassed two apartments in Dubai. He directed in his Will (outside those properties already in Trusts) that his property was to be put into a Trust for the benefit of his mother, two of his sons, his daughter and his granddaughter. Other beneficiaries that may from time to time be identified amongst his family members as may arise were permitted.

In this trial, Petronella crystallizes her claim around two issues. She seeks to divest the immovable property commonly known as 7 Granta Road, Vainona, from the Granta Seven Trust so that it falls into the estate of the decedent. Her rationale is that its acquisition was driven by a desire to conceal the asset in light of the contemplated and impending divorce proceedings. The issues specifically referred to trial on this property were couched as follows:

1. Did the deceased Winsley Evans Militala's investment into Granta Seven Trust constitute circumvention of identification of that investment as a matrimonial asset?
2. Whether or not the properties (sic) held by the Trust should be declared as constituting the Estate of the Late Winsley Militala.

The second issue for determination is a claim for monetary maintenance under the Deceased Person's Family Maintenance Act [Chapter 6:03] against the estate of the late Winsley Militala. The Plaintiff seeks the sum of US$1770.00 per month over twenty years as a lump sum totalling US$424 000.00. Also sought in addition to monetary maintenance is the transfer of identified properties into her name as well as two vehicles. She is specifically interested in the transfer into her name of the matrimonial home in Mount Pleasant Heights, being a property described as 721 Bannockburn Rd, Mount Pleasant Heights. She also seeks a half share of the property registered in both their names being Stand 1328 Batanai Close, Houghton Park, Harare. She further seeks to be awarded 7 Granta Road Vainona or its value having regard to the true size of the expanded estate.

The action matter under HC 2377/21 involving the declaratory order sought pertaining to the Granta Seven Trust and the application for maintenance under HC 5824 /21 were consolidated into one matter under a court order dated 24 November 2021.

THE EVIDENCE LED

The plaintiff's evidence: Petronella Militala

She told the court that she is a 56-year-old widow who is unemployed due to ill health. She makes a living from letting out three rooms to students from a conversion of a property on site. She also receives assistance from her sister and her son. She worked for the Ministry of Justice in the Deeds office before securing a job with Population Services as a counselor. The job paid lucratively during hard economic times, making her, as she said, the effective breadwinner. She had further benefitted from inheriting from her parents which enhanced the marital union. They initially acquired a property in Ardbennie suburb, sold it and bought another in Houghton Park in 1995. They had also bought property in Nhowe, Norton which they registered in a company known as Petwin. They had later purchased a residential stand in Mount Pleasant Heights and built a house which they moved into in 2010. When her husband left his formal employment in 2009 that is when they formed the company known as Petwin Executor and Trust Co in 2009. They led an affluent lifestyle and their children had attended private schools because they could afford it.

Winsley had left the matrimonial home in 2014 and then instituted divorce proceedings in June 2017. He was looking after her fully. The divorce had not been finalized because they disagreed over the matrimonial estate for the reasons already outlined. She emphasized that when he died, she had been advised there was no will only for a lawyer to later produce one. It benefitted his mother who was to be looked after for the rest of her life as well as his son Nigel Tanaka, daughter Tanatsva, his minor child WM, and their grandchild.

As for the property acquired by the Granta Seven Trust bought in 2016, she believed it should form part of the estate. He had lied in the divorce papers and made her believe that the property registered in that Trust was being rented from a Mr. and Mrs. Patel by his girlfriend Bibikawa Kapolo. The reality was that they had sold the property to him in an arrangement where he took over the Trust in which it was registered. She told the court that she believes he lied in order to conceal the extent of the existing matrimonial property since he was pursuing or about to pursue a formal divorce.

Regarding the maintenance claim, she emphasized that it is necessary as she has previously had at least two major medical operations. She suffers from poor health and is therefore unable to work. Maintenance of US$1700.00 would cover her medical bills, medication, rates, domestic workers, food, car maintenance, fuel, telecommunication needs, manicures and pedicures amongst other expenses. Before Winsley died, she told the court she lived on at least US$2000.00 a month.

In addition to the claim for US$1770.00 maintenance a month, she also claims the Mount Pleasant Heights Property, the house registered under the Seven Granta Trust, a half share of the Houghton Park property and two cars. The estate, in her view, would still be left with the two properties in Dubai, the Eastlea property, and the decedent's his half share of the Houghton Park property as well as cars which include a Discovery, a Mercedes Benz and a two-ton truck.

In cross examination by all defendants' lawyers, the following emerged. She confirmed that their marriage was indeed out of community of property. She also confirmed that the property under the Granta Seven Trust was acquired before the divorce proceedings were commenced. She further clarified that during his lifetime Winsley would pay for all house expenses and she would receive US$500.00 as pocket money. She also admitted that she had

not challenged the will. Whilst an offer of US$500.00 maintenance had been proposed during the divorce proceedings, she had not accepted it because she did not agree with it.

Plaintiff's second witness: Winston Tinotenda Militala (son)

Winston Tinotenda Militala her 32 year old first born son with the now deceased was her witness. He lives in Nhowe Norton and works as an insolvency practitioner. He described his parents' marriage as having been rocky owing to his father's appetite for extra marital forays. Regarding his mother being left out of the Will, he believed his father had done so out of the assumption that the divorce would be completed and that she would have been taken care of from the divorce outcome. He told the court that he was indeed aware of the property at 7 Granta as his father stayed there from 2016 until the time of his death. The property was a contentious issue in his parents' divorce as his mother believed it belonged to his father which he had denied under oath. He also told the court of the other existing properties acquired by his father, which have been captured.

Evidence of the Executor: Pauline Mandingo

The second defendant, Pauline Mandingo is the executor. By agreement of all parties, she gave her evidence on the state of the estate in that capacity as a neutral party who will otherwise abide by the ruling of this court. She told the court that she is an estate administrator with 29 years' experience. She was appointed as an Executor in 2022. However, she was not the first executor having taken over from Mr. Mataba from Sinyoro and Partners who resigned. She told the court that although the inventory on record showed an asset base of US$572 000.00 for the decedent's estate, this amount had in fact reduced to US$544.000.00. This was owing to reductions in the value of a Land Rover vehicle as well as a reduction on claims in favour of the estate. Initially US$91 000.00 had been expected but only US$71 000.00 had been received.

Regarding the properties that Winsley had bought in Dubai, she explained that these were two apartments. One was complete and fully furnished whilst another was still under construction. The value of these properties is US$402 000. He still owed US$140 000.00 which may eventually be deducted from the value of the property. She had travelled to Dubai as the Executor. Authorities in Dubai had advised that the estate needed to be registered in Dubai as the Will could not be recognized in Dubai since it bequeathed properties to a Trust not registered there. She told the court that the fourth defendant, the minor's mother, was insisting

that since the deceased left a will forming a Trust, these properties should not form part of his estate. She could not comment on the maintenance issue. She also confirmed that the matrimonial home, as per inventory, is currently supposed to go to the Trust. The value of the decedent's shareholding in Petwin Executors was yet to be established and would be added to the estate. The current asset base is against liabilities of US$180 000.00, presumably taking into account what is owed for the Dubai properties.

THE DEFENDANTS' EVIDENCE

The first defendants are the Trustees for the time being of the Seven Granta Trust. No evidence was led on behalf of the Trustees by Mr. Sinyoro save to admit into evidence the Deed of Trust, the Deed of Transfer and the summary of evidence. However, Mr. Sinyoro was cross examined. He stated that there was nothing unlawful in the formation of the Trust by the deceased for the benefit of himself and his minor child during his life time. As for the maintenance claim, he highlighted that Petronella herself deemed the estate assets sufficient to satisfy her claim further emphasizing that there is no need to interfere with the property under the Granta Seven Trust. The Trust also allows for the admission of new beneficiaries.

The third defendant the Master of the High Court was cited in his official capacity. He did however file a report in which he referred the claim for maintenance to the court. The fourth defendant was Bibikawa Kapolo who represented her minor son born in 2014. The thrust of her evidence was that the Trust is separate from the deceased's estate and that there was nothing irregular in the purchase of the property. As for the maintenance claim against the estate, she opined that it fails to take into account that there are other beneficiaries and also fails to take into account the size of the estate. The 5th defendant Nigel Militala is one of the adult sons of the deceased. His evidence was that the claim for maintenance by the plaintiff is grossly unreasonable and exaggerated.

<u>THE LEGAL ARGUMENTS</u>

Against the backdrop of the evidence led by Petronella and her son , the essence of Ms Damiso's arguments in support of her claims boiled down to this:

> "It cannot be fair and just that a husband who stood on the shoulders of the wife to build an empire over a thirty year period can strip the matrimonial estate, disinherit her totality and leave

> the widow with an understated estate inventory to claim maintenance from. The justice of the case demands a robust approach from the honourable court".

She maintained that the true extent of the estate be revealed so that a fair, informed and equitable award of maintenance can be made in favour of Petronella both in monetary terms and transfer of properties. Relying on the issues to be considered in seeking a claim under s7 of the Deceased Persons Family Maintenance Act, she submitted that the plaintiff satisfies the criteria for the monetary award for maintenance as well as the transfer of properties that she seeks.

A key argument on behalf the Trustees of the Seven Granta by Ms Gurira, was that the decedent, having been married out of community of property, had the legal right to own property and dispose of property in his own name. Freedom of testation was equally stressed. Reliance for both these legal aspects was placed on the case of *Chigwada v Chigwada* SC 188/20 which I will engage with later in this judgment.

She also submitted that under these circumstances, the misrepresentation of the property as being rented was irrelevant against the backdrop that he was free in any event to own property in his own right, in this instance by buying property in a Trust for his benefit and that of his minor son.

The Trust itself was said to be regular. In clause 15 it made it clear that any benefit devolving upon a beneficiary shall not form or constitute a portion of any communal or joint estate of such beneficiary but shall remain separate and exclusive property of such beneficiary. As such the core argument was that the quest for a declaratory order to have the property declared part of his estate must fail. Regarding the claim for maintenance she argued that the assets from which the claim is based were neither jointly owned nor jointly purchased and therefore the plaintiff cannot claim a lump sum in the way she does. Moreover, the will having not been challenged, remained extant.

The arguments by Ms Mwase on behalf of the 4th defendant representing the deceased's youngest son, was that there was no matrimonial action pending when 7 Granta Road was acquired under the Trust. She also submitted that that in any event the plaintiff had admitted that the assets of the estate would be sufficient to meet her claim without the need for the Granta Seven Trust property being roped in. Her net submission was that the best interests of the child would be served if the property remains with the Trust.

On the maintenance claim, her core submission was that the claim is exorbitant and would deprive other beneficiaries of the estate. She also submitted that the plaintiff is able to work and can look after herself. She was also said to be receiving rentals from students, making her claim for maintenance neither needed nor necessary.

On behalf of the fifth defendant, the decedent's 26 year old son, Mr Chinyanganya submitted that it is unclear whether this is a claim for maintenance or transfer of properties. On the transfer of properties, he emphasised freedom of testation and that the decedent did not intend his estate to benefit her. The claim for maintenance was argued to be unreasonably high in view of the fact that there are other beneficiaries some still attending school and two at university. He also argued that no proof of medical expenses to the tune of $300.00 per month for example have been produced or that the plaintiff is totally unable to work due ill health. He also submitted that the decedent had offered her a sum of US500.00 a month. Allowing her to take transfer of the property as well as receive maintenance would deplete the estate, so it was argued.

LEGAL AND FACTUAL ANALYSIS

The legal position on claims by dependents in a deceased estate

In *Chigwada* v *Chigwada* SC 188/ 20 which counsels for the first and fourth defendants keenly emphasised, the Supreme Court held as follows on property rights and freedom of testation:

> "The law governing the property rights of married persons in Zimbabwe is the Married Persons Property Act *[Chapter 5:12],* which provides that since 1929 marriages in Zimbabwe are out of community of property. Parties to a marriage out of community of property are legally entitled to own and dispose of property in their individual capacities. The law of testamentary disposition in Zimbabwe recognises the doctrine of freedom of testation and does not oblige a testator to bequeath his or her property to the surviving spouse.
>
> The law of testamentary disposition, which is based on the universal principle of equality of men and women, gives a right to a person married out of community of property to dispose of his or her estate by will to whomsoever he or she chooses."

Being that as it may, testamentary freedom does not completely avail over one's dependents in that a person who was being looked after by the decedent immediately prior this death can apply for maintenance under the Deceased Persons Family Maintenance Act. Section

7 (1) iterates as follows:

7. Award of maintenance
(1) After due inquiry into an application, the appropriate court may, subject to the provisions of this Act, if it considers that a dependant who has made an application is in need of maintenance from the estate of the deceased concerned and that it is just and equitable that an award should be made, make an award against the net estate of the deceased in favour of such dependant.

Section 7 (2) then lays out the following considerations in a claim for maintenance from a deceased's estate by such a person who was being maintained and is need thereof.

(2) In the determination of an application, the court shall have regard to—
(*a*) whether or not the dependant is in need of maintenance, taking into account, where the deceased died leaving a will, the benefits, if any, to which the dependant will be entitled under the will or, where the deceased died intestate, the benefits, if any, to which the dependant will be entitled on intestacy;
(*b*) the period for which maintenance of the dependant is required;
(*c*) the ability of the dependant to maintain himself and whether or not it is desirable that he should work;
(*d*) the number of persons to be maintained by the estate;
(*e*) the general standard of living of the dependant and, during his lifetime, of the deceased;
(*f*) the reasons for the deceased failing to make provision for the maintenance of the dependant and, in this connection, whether or not the behaviour of the dependant was responsible in any way for such failure;
(*g*) where the deceased died leaving a will, the interests of the beneficiaries in respect of whom provision has been made under the will;
(*h*) where the deceased died intestate, the interests of the persons who would normally succeed on intestacy;
(*i*) the size and nature of the net estate;
(*j*) any other matter which, in the opinion of the appropriate court, is relevant to the determination of the issue.

This Act therefore imposes a post humous duty to support where warranted. It dilutes testamentary freedom as embodied in s 5 (1) of the Wills Act [Chapter 6:06] by balancing testamentary freedom with obligation towards a spouse, family or other dependents. As can be detected from the criteria set out in s 7 (2), it is the court's duty to evaluate a claim placed before it.

Where an application is by a spouse of the deceased, additional factors to the above which the court must also take into account in its determination of a claim for maintenance are outlined in s7 (3) as follows:

> 7 (3) Without prejudice to the generality of paragraph (*j*) of subsection (2), in an application by a spouse of the deceased, the appropriate court shall, in addition to the matters specifically mentioned in paragraphs (*a*) to (*i*) of that subsection, have regard to—
> (*a*) the age of the applicant and the nature and duration of the marriage; and
> (*b*) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family; and
> (*c*) the provision which the applicant might reasonably have expected to receive if, on the day on which the deceased died, the marriage, instead of being terminated by death, had been terminated by a decree of divorce.

What can be immediately gleaned is that in the same spirit of the Matrimonial Causes Act [*Chapter 5: 07*], this provision perpetuates the principle of marriage as a partnership, with different but complementary roles to which both parties have contributed to family assets. It is an important provision in the face of disinheritance in that it gives support and recognition of a surviving spouse to a decedent's estate.

Suffice it to also point out that s 8 (1) of the Act is also very clear that an award can take any form that the court deems appropriate. A lump sum or periodic payments can be made and property can be transferred. Ultimately therefore the court, if need be, can alter the testamentary wishes of the deceased in a discretionary manner as dictated by the facts of each case.

> **8 Form and substance of awards**
> (1) In making an award the appropriate court may, subject to this Act, determine that the award shall take
> such form as it thinks fit.
> (2) Without prejudice to the generality of subsection (1), an award in terms of this Act may provide for all or any of the following matters—
> (*a*) …..
> (*b*) the payment to the applicant out of the net estate of the deceased of a lump sum in such amount as the court may specify;
> (*c*)……..
> (*d*) the transfer to the applicant of such property comprised in the net estate of the deceased as may be specified by the court;
> e)…….

The plaintiff, as spouse in this instance filed a claim for support against the estate seeking a lump sum payment of maintenance and transfer of specified properties. Over and above the monetary claim of maintenance at US$1770.00 a month for the next twenty years giving a total of US$424 800.00, the plaintiff also claims the transfer of 721 Bannockburn Road Mt Pleasant, being the matrimonial home as well as a half share of stand 1328 Batanayi Close, Houghton Park of which she is a registered half owner. In addition, she also claims 7 Granta Road Vainona which is in a Trust. She justifies her need for maintenance on the basis of having been excluded in the Will with the divorce not having gone through. She also seeks two vehicles.

As for the reasons why the decedent failed to make provision for the maintenance of the dependant and whether or not the behaviour of the dependant was responsible in any way for such failure, the Will speaks volumes. Not once but twice did the Will refer to the pending divorce.

In paragraph 2 of the Will the decedent stated in part as follows:

> "I hereby wish to state the following for clarity……. The marriage with Petronila Militala has irretrievably broken down and **we are in the process of finalising our divorce**. I am the plaintiff……
>
> I state that **my former wife with whom I am undergoing a divorce** was adequately provided for during my life time and should have no role to play be it on my death or distribution of my estate." (My emphasis)

Whilst it is true that the marriage was ultimately terminated by death rather than divorce, the deceased's own Will suggests that he made no provisions for his wife because he anticipated that property distribution as between themselves would be addressed by the courts in the divorce. The plaintiff herself was not to blame. Winsley clearly had not anticipated that he would die before his divorce was finalised.

It therefore cannot be ignored that he had made his own proprietary offers under those divorce proceedings. Indeed the Deceased Persons Family Act permits the court to look at the scenario of what a party would have gotten had the marriage ended in divorce as opposed to death. At the same time, it cannot be denied that he would have been very much alive to the reality that despite his offer, it would have been for the courts to determine what was just and equitable in terms of property sharing. He certainly wanted her to have the matrimonial house and three cars and he had made an offer of US$500.00 a month as spousal maintenance showing

that he appreciated that she needed to be maintained. But what property she would get and the quantum of maintenance was always ultimately a decision for the court to make just as it is now under the provisions of the Deceased Persons Maintenance Act under which the claim has been brought.

This court is therefore absolutely of no doubt that she qualifies as a claimant as the divorce was never finalised as envisaged in the deceased's Will. The crisp issue for decision is what should be entitled to both in terms of transfer of properties and her monetary claim for maintenance.

Her claims are to be considered against the net value of the estate which Executor put at US$544 000.00 less expenses. It is also a fact that there are additional properties in Dubai said to be valued at US$402 000.00 which will augment the estate. There is no reason why the family should fail to cooperate amongst themselves and with the authorities in Dubai to ensure that these properties are rightly regarded as part of his estate. There is no need to risk forfeiture by being intransigent. The net value of the estate is therefore approximately in the region of US$766 000 if one takes into account the liabilities of the estate which the executor put at US$180 000. Granted the executor highlighted that she is still in the process of finalising the estate but what is absolutely of no doubt is that it will have sufficient assets.

Since the court is enjoined by s 7 (3) to consider the provision a spouse would likely have received had the marriage ended by divorce instead of death, I will start by dealing with the immovable properties. The plaintiff and the decedent were together for nearly thirty years. At 56 she is certainly not yet old but edging towards that. Her evidence was credible that during their thirty year marriage she contributed directly and indirectly to family needs and wealth. The age of the applicant, as well as the duration of the marriage, and, in addition, her contributions to the welfare of the family, are all considerations that the court would have taken into account in its determinations under the Matrimonial Causes Act had the marriage ended by divorce instead of death.

An award of the matrimonial home being 721 Bannockburn Rd Mt Pleasant Heights to the plaintiff would be a just outcome in this case. She should also be awarded her half share of stand 1328 Batanayi Close, Houghton Park of which she is a registered half owner. The contentious issue is whether 7 Granta Rd, Vainona, should also be transferred to her.

Whether 7 Granta Rd should be declared part of the estate

It is the legal position that marriages are out of community of property unless parties have entered into an ante nuptial contract preferring otherwise. A party in a marriage out of community of property is free to accumulate his own property. Moreover the property is in a Trust which has a distinct legal status. (See *Musemwa & Ors v Estate Late Tapomwa & Ors HH 136 /16).*

There was also a just cause and a legitimate intention in creating the Trust. The reality is that today's families come in different forms. Parenting outside an existing marriage is very real. It is equally true that where one has contracted a monogamous marriage, a lot of tensions are bound to arise from having children born outside wedlock. The plaintiff, if truth be said, was never going to be ecstatic had she been told by the decedent that he had bought property in order to secure his future for his young son he had yet again just sired outside their marriage. There was nothing fraud-like in buying property for the benefit of a minor who indeed existed. He would need support for foreseeable years to come. Making legitimate and legal arrangements to take care of a minor child can never be against public policy. Also once created for legitimate purposes the grantor ceased to have control over the Trust which now fell under the Trustees.

The best interests of the child, a principle inherently captured in s 81 (2) of the Constitution of Zimbabwe must therefore guide this court. As expressed by Cretney S M in Principles of Family Law [1], and cited with approval by the Supreme court in *Mackintosh (Nee Parkinson)* v *Mackintosh* SC 37/18 which Ms Mwase drew on:

> "But the requirement to treat the child's welfare as the 'first and paramount' consideration means 'more than that [it] is to be treated as the top item in a list of items relevant to the matter in question. [The words] connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed."

Further, the total circumstances have to be looked at. They were already on separation at the time the Trust property was acquired and had been so for more than two years. There is

[1] Cretney S M. Principles of Family Law (Third Edition, Sweet & Maxwell, London,1979)

no justification for having this property considered as part of his estate against a backdrop where the marital regime allowed him to acquire property in his own right. There is also no justification for her claim for this property to be transferred to her. The best interest of the child will indeed be served if the property remains in the Granta Seven Trust.

The quantum of maintenance

As for the monetary claim for maintenance in my view she did make a case for need. She says she is unable to maintain herself on account of medical considerations. The evidence was led and not disputed that the decedent had indeed been looking after her. It was not disputed that she had ceased working in 2011 and was being maintained by the now deceased. It was not disputed that she has had two operations. However, what was not clear was how much she spends for her medications as US$300.00 seems grossly exaggerated given that no receipts were produced for the nature of medications she outlined to the court. Some were basic pain killers and blood pressure medicines.

Winsley took charge of all household expenses during his life time and would in addition give her $500.00 according to the evidence that was submitted. Bearing this in mind some of the expenses by the plaintiff are on the high end such as the fuel bill, telephone bill, and internet subscriptions and medication bills they can be reduced as examples to bring the claim within reasonable levels. Nonetheless there is no doubt from the evidence led and the asset base that Winsley and the plaintiff led a comfortable lifestyle.

As for the call for her to re-enter the formal job market, particularly by the fifth defendant, it is a well-known fact that it is not easy to get formal employment even with qualifications. At the age of 56, though not old, she has gone past the age of early retirement which is 55 years. She has already worked in the family context and must enjoy the fruits of her labour instead of being shepherded to the formal job market by a 26 year old who has yet to work himself. It smacks of a sense of entitlement on his part. In any event, she was honest about her efforts to raise her own income and it is notable that her claim is somewhat reduced from the time of divorce.

Also the sacrifices that women in particular make in marriage to nurture and support men especially where the marriage has been of a long duration as in this case should never be

under-estimated. When one is dealing with a spouse who has little respect for matrimonial boundaries as agreed to, marriage for women, more so than for men, can amount to a life of sacrifice which many simply make on account of their children.

Turning to the considerations to be taken into account in deciding on an application for maintenance from a deceased's estate and the quantum, the number of persons to be maintained from the estate as stated in the Will are five which would make six with the plaintiff. His mother, a beneficiary is already aged 76. Materially, the decedent's wish was that the children mentioned should be maintained for educational purposes only. Two of his children will be maintained for a very short while to finish tertiary education. They are already towards the tail end of the support envisaged.

One of the sons, a minor has two other Trusts in his favour and will also obviously benefit from those for his education. In other words, the deceased's estate will not be that minor son's sole source of income. His grand-child is still a minor so she will need to be supported but bearing in mind that there is nothing in the Will that suggests that the parents are to be absolved completely from the duty to maintain their own off spring.

As regards maintenance, whilst an offer of US$500.00 had indeed been made, it was established in evidence that it was against a declaration of a false asset base. Her lump sum claim is for twenty years. There is no knowing how long she will live in reality. She could live longer or she could live for lesser years.

The real consideration is the net value of the estate and whether the figure she claims is reasonable taking into account all the factors as laid out in the Act. I have no difficulty with the category of expenses which the plaintiff outlined fully in her application which are not necessary to regurgitate save to make the observations which I have already made that some expenses can be reduced or alternatively taken care of by the plaintiff herself from her projects. I was surprised if not slightly amused in examining the record of the application that the fifth defendant genuinely believes a suburban house can run on an electricity bill of US$20.00 a month or that no money needs to be set aside monthly for vehicle maintenance or that domestic workers need living wages. These are utterances from someone who has obviously never run a home. His objections and calculations demonstrate the length those who have not worked for the money will go in demanding frugality from those who actually worked for it, just so that they, who never worked for it, can enjoy.

In total the sum of $1200.00 per month over the twenty year period envisaged, would be sufficient for her to run her home comfortably considering that she will also have her own projects. This amount per month brings the lump sum claim to US 288 000.00. It is also understandable that her claim is for a lump sum as that will establish a clean break with the affairs of the estate. She runs her own projects such as letting out accommodation to students. She is 56 years old and although no longer spritely should manage with projects where she can pace herself. I do not agree that the estate would be depleted by her claim.

Accordingly, it is hereby ordered that:

1. The plaintiff's claim for a declaratory order that 7 Granta Rd Vainona held by the Granta Seven Trust be part of the deceased's estate is dismissed.
2. The plaintiff be and is hereby awarded from the estate of the deceased Winsley Evans Militala transfer of all right title and interest in the matrimonial home, being Stand 721 Bannockburn Road, Mount Pleasant Heights Harare.
3. In addition, the plaintiff is awarded transfer of a 50 % share in Stand 1328 Batanai Close, Houghton Park, Harare.
4. The Plaintiff is also hereby awarded a lump sum of maintenance of US$288.000. 00 from the Estate of the late Winsley Militala.
5. The following vehicles are awarded to the Plaintiff
    a. Discovery Registration Number JMO GB GGP
    b. Mercedes Benz Registration Number ADY 4375.
6. Costs of suit shall be paid by the Executor from the estate of the late Winsley Militala.

Mubangwa & Associates, plaintiff's legal practitioners
Sinyoro & Partners, 1st defendant's legal practitioners
Scanlen & Holderness, 4th defendant's legal practitioners
Dhlakama B Attorneys, 5th defendant's legal Practitioners