BETTY ZINGUNDE
versus
MIRIRO SUSAN CHIKABIDA N.O
and
THE MASTER OF THE HIGH COURT (DR 2461/19)

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 28 February and 31 March 2022

Opposed Application

Applicant, in person
G. Ganda, for first respondent
No appearance, for second respondent

MUCHAWA J: This is a court application for a *declaratur* and ancillary relief made in terms of section 14 of the High Court Act [*Chapter 7:06*]. The following is the applicant's draft order;

"IT IS ORDERED THAT:

1. The application for a declaratory and ancillary relief in terms of section 14 of the High Court Act [*Chapter 7:06]* be and is hereby granted.
2. Applicant be and is hereby declared the surviving spouse of the late Flavian Chikabida Charumbira who died on 26 September 2019.
3. The first respondent to pay costs."

The brief background facts are that the applicant was married to the late Flavian Chikabida Charumbira in terms of an unregistered customary law marriage as *lobola* was paid to her family in 1996 and 2006.They had three children together, two of whom are still minors. The first respondent is cited in her capacity as executor of the estate of the late Flavian Chikabida Charumbira. The second respondent is cited in his official capacity as the one responsible for registration and administration of deceased estates.

It is common cause that at the time the applicant and the deceased got married in 1996, the deceased was then married to one Apollonia Chikabida in terms of the Marriage Act [*Chapter 5:11*]. Such marriage was subsequently dissolved in 2004. The applicant claims that she was still married to Flavian at the time of his death whilst the first respondent's case is that the customary law union had been dissolved. Flavian died testate and his will has been accepted by the second respondent. The applicant's gripe is that the first applicant has taken the position that she is not a surviving spouse based on the outcome of an edict meeting held before the second respondent. She feels excluded from the administration of the estate both in her capacity as alleged surviving spouse and guardian of her two minor children particularly in the disposal of some immovable assets of the property in which she says she has not given her consent. She submitted too that she has since objected to the first and final distribution account of the late Flavian's estate but she has not been favoured with a response. Her fears are that the estate will be wound up without consideration to her as surviving spouse or guardian to her children and that she risks losing the matrimonial house in the process. This is why this application has been lodged.

The application is vehemently opposed. Four points in *limine* are raised. These are as follows;

1. That the applicant has dirty hands and should be denied audience by the court as she has not settled a bill of costs under case SC 574/20 being an appeal she lodged against an order granted under HC 3434/20.
2. That there are disputes of fact in this matter which arise even in applicant's own affidavits as to whether her marriage had been dissolved or not. Minutes of a family meeting and the position taken by TSANGA J in case HC 3434/20 as to the existence of material disputes of fact regarding the applicant's marital status are said to bolster this point.
3. That the relief sought is academic in nature as the estate of the late Flavian is being administered in terms of a will which states clearly the benefit accruing to the applicant and such benefit is not affected by the applicant's marital status. That the applicant simply seeks to soothe her *ego.*
4. That the applicant is improperly before the court as she should have appealed against or sought a review of the Master's decision of 27 September 2019 which found that the applicant's marriage to the late Flavian was a nullity.

On the merits, more or less of the same issues are traversed. The first respondent prays for costs on a higher scale on account of this application being an abuse of court process similar to others the applicant has filed and withdrawn at a great cost to the estate which has been put out of pocket. This instant application is said to be purely academic and meant to soothe applicant's *ego.*

In my considered opinion, this matter can be settled by considering only some of the points in *limine.* I do so below.

Whether this application is properly before the court

Ms *Ganda* submitted that the applicant has pursued a wrong procedure as the second respondent on 27 September 2019, found at an edict meeting that the applicant's marriage to the late Flavian was a nullity on the basis that at inception of the marriage in 1996, Flavian was then married to another in terms of the Marriage Act [Chapter 5:11]. It was contended that the applicant did not challenge that decision through an appeal or application for review to have the decision set aside as it is extant. She is alleged to have simply ignored that decision and brought the application for a *declaratur* as a fresh application. This is alleged to be un-procedural.

The applicant submitted that though the initial *lobola* was paid in 1996, the bulk, which included *rusambo* was paid in 2006 at a time when the late Flavian's civil marriage had been dissolved and the marriage cannot be said to be a nullity.

The resolution of the second applicant which appears on page 29 to 30 of the record, is as follows;

> "Parties were advised that from the submissions made both are in agreement that the deceased customarily married Betty Zingunde and paid *lobola* in 1996 when he was still married to Ms Apollonia Chikabida under civil law. This therefore means the marriage of the deceased to Betty Zingunde was a nullity."

The applicant claims that she was not favoured with the second respondent's reasons for the above position. I am at a loss as to what further reasons the applicant required as the above resolution gives the reasons for the conclusion reached. The second respondent's decision has informed the administration of the estate as the executor has proceeded on the basis that at the time of his death, the late Flavian was single. It has always been open to the applicant to bring an appeal or review against this decision. The learned authors, *Herbstein and Van Winsen, Civil Practice of the High Court of South Africa, 5th ed* at page 1271 state as follows;

> "The reason for bringing proceedings under review or appeal is usually the same, *viz* to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of trial, it is proper to bring the case on review."

The applicant appears to be saying that the decision of the second respondent was erroneous as the bulk of the *lobola* was paid in 2006 after the civil marriage had been dissolved. The contention is that there was an error in the law. The *declaratur* sought does not have the effect of setting aside the decision of the second respondent. It indeed ignores that decision which remains extant. The route taken by the applicant is indeed un-procedural and the matter is therefore improperly before me.

This point succeeds too.

Whether the relief sought is academic in nature

It is common cause that the late Flavian executed a will on 25 January 2018 and that the estate is being administered in terms of the will. The will provides that the applicant's current home remains her family home for herself and the children, Omega, Tendai and Shepherd with the house eventually passing to Shepherd. I agree with *Ms Ganda* that the applicant's entitlement is not affected by her marital status at the time of the husband's death.

The applicant craves for recognition as surviving spouse. That does not amount to a substantial change in the estate administration. She wants to be recognized and given a place in the process of administration of the estate. She can air her opinion in her capacity as guardian of her minor children. The solution is not to seek to be declared surviving spouse. This case falls neatly within the class of *Makuni* v *Makuni* SC 51/2002 wherein the court held that the appeal could very well be an academic exercise and that the court's time should not be taken up by deciding on theoretical questions. I uphold the point in *limine*.

Whether there are material disputes of fact

Ms Ganda submitted that the applicant avers that she was customarily married to the respondent and the marriage was never dissolved. In support of this she has attached affidavits from her mother and brother. She however attached an affidavit from one Andrew Chikabida in which he avers that he accompanied his brother and presented a divorce token to the applicant's family. Another affidavit is from Monica Nyabadza, the deceased's sister who claims not to have been involved in the dissolution of the marriage but who was approached by the applicant who

was seeking that she plead with the late Flavian to take her back and that the deceased had left the matrimonial home and was staying on his own. These papers filed by the applicant are said to present a dispute of fact on their own. Additionally, reference was made to the sentiments of TSANGA J at the hearing of the application filed under HC 3434/20 when she declined to make a ruling on whether the applicant was a surviving spouse on the basis that this issue could not be decided on the papers.

The first respondent in support of proving that the customary marriage had been dissolved, filed minutes of a family meeting at which the applicant was present and the late Flavian announced that he was no longer married to the applicant. The first respondent has also attached an affidavit from Herbert Chikabida who called this meeting.

The applicant was agreed that there was indeed need to go to trial so that people like Andrew Chikabida and Monica Nyabadza can give evidence on the material facts in dispute.

I am however of a different view and for that I rely on the case of *Jirira* v *Zimcor Trustees Limited & Anor* 2010 (1) ZLR 375 (H) wherein MAKARAU J (as she then was) stated;

> "The applicant deposed to facts in her affidavit that were neither common cause nor capable of proving by way of affidavits. Her allegations needed *viva voce* evidence to explain and she proceeded by way of application notwithstanding but at her own peril. Secondly, the nature of the case that the applicant sought to portray is one that clearly cannot be proved on paper and by way of affidavits. It requires the parties to give oral evidence and to be examined on their evidence to find out where the truth lies. It is a case in my view that will ultimately turn on the credibility of the witnesses and affidavits have no colour save the colour of the paper on which they are typed. There is no proven way of ranking affidavits in terms of veracity. One simply cannot find one affidavit more credible than the other."

In *casu*, it is not just the affidavits at stake that are relied on to prove whether or not the customary law union was dissolved. There are minutes of a family meeting in which the deceased clearly stated that he was single. These have not been disputed by the applicant nor explained. There is also the fact that the applicant and the deceased were no longer staying together at the time of his death. Affidavits provided by the applicant herself affirm the dissolution of the marriage. If all these other factors did not exist, I might have found that there is a material dispute of fact. I might then have been called to rank affidavits in terms of veracity. In this case, the other factors outside the affidavits, tilt the scale in favour of first respondent's version of events.

In *Supa Plant Investments (Pvt) Ltd* v *Edgar Chidavaenzi* HH 92/09, MAKARAU J (as she then was) said that a material dispute of fact arises when such material facts put by the applicant

are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence. I have not found myself in that position. There is further evidence on record which has given me a ready answer as to whether the customary law union was dissolved.

I find no merit in this point in *limine a*nd dismiss it.

Having upheld two of the three points in *limine* considered, I could very well proceed to resolve in favour of the respondents and strike the matter off. However, the nature of the merits of the matter require that I conclusively deal with the matter and I am proceeding to do so hereunder. This is particularly as I have found that there is no material dispute of fact.

Whether the deceased was survived by a spouse

The applicant's case on the merits is that her marriage should not have been declared a nullity as the bulk of the *lobola* was paid in 2006 after the dissolution of the civil marriage in 2004.

On the other hand, the second respondent points to the civil marriage being a monogamous marriage. At the time of applicant's customary law union in 1996 when part of the bride price was paid (see page 16 of record for *lobola* notes), it is argued that was the date of the marriage. This assertion is backed up by case law. See *Sibanda* v *Sibanda* HB 86/13 where it was held as follows;

> "Unregistered customary law unions are those marriages where all the traditional and cultural rites of marriage are followed. They include the meeting of families from both sides (that is to say, the man's and the woman's sides). The payment of lobola whether in full or upon agreed terms usually completes the validity of a customary union. See the case of *Chapendama* v *Chapendama* 1998 (2) ZLR 18."

The notes on page 16 of the record show that the families met on 17 June 1996 and payment of part of the *lobola* was done. There was also agreement on the rest of the *lobola* to be paid. The customary law union became valid on that date therefore. It does not matter that the rest of the *lobola* was paid in 2006. The 1996 date becomes significant as in 1996 the purported marriage was a nullity. The late Flavian could not have entered into any other marriage. The nullity of the marriage could not have been saved by the subsequent dissolution of the civil marriage. It is trite that if an act is void then it is a legal nullity which is incurably bad and any further proceeding founded on it is also equally incurably bad. See *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 at 1172.

One cannot ignore the overwhelming evidence on record, that even though the marriage is taken to have been valid for a moment, Andrew's affidavit states it was dissolved in the customary

law way of paying *gupuro* to her family. Monica Nyabadza's affidavit also shows that the applicant went to beg her to ask the late Flavian to take her back and that he was in fact staying away from the applicant at the time of his death. To top this up, are minutes of a family meeting on page 60 to 62 of record in which the late Flavian was asked to clarify his marital status and it is recorded that he said he was single and applicant was only assisting him by for instance bringing food as his health had deteriorated as they shared children together. The applicant has not disputed that the meeting took place as well as the minutes thereof.

The totality of the above facts point to only one conclusion which is that the late Flavian was single at the time of his death. The order sought cannot be granted, in the circumstances.

Costs

The applicant prayed for costs on a higher scale on the basis that this application shows high degree of irregularities, bad behaviour by the applicant and vexatious proceedings particularly as the order sought is said to have no bearing on how the estate is being administered. It said to be purely academic. The applicant is also said to be under the mistaken belief that if she is declared a surviving spouse she will control how the estate is administered.

It was also demonstrated that the applicant has filed at least two applications and withdrawn them at the very last minute after putting the estate out of pocket. Two cases were referred to being a notice of withdrawal of a chamber application for stay of execution under case HC 7630/20. The other is a withdrawal of a chamber application for condonation for the late noting of an appeal under case SC 574/20. In both cases, no costs were tendered. Despite an order for payment of costs in the Supreme Court matter, these remain unpaid.

Costs on a higher scale should be awarded only in exceptional circumstances where a party's conduct is mischievous and objectionable and the cause of all the costs. See *Davidson* v *Standard Finance Ltd* 1985 (1) ZLR 173 (HC).

In *casu* it is true that the applicant has embarked on a purely academic exercise, taken an improper route of ignoring the Master's decision and gone forum shopping without seeking the setting aside of that extant decision. Her application was ill conceived and doomed to failure and taken in the context of the previous matters filed and withdrawn at the last minute, one can be forgiven in concluding that the applicant seeks to harass the first applicant and has neglected to

seek proper legal advice. This has resulted in the estate being unnecessarily put out of pocket. In order to mark the court's disapproval of applicant's conduct, costs on a higher scale are justified. Consequently I make the following order;

1. The application be and is hereby dismissed with costs on a higher scale.

Honey & Blackenberg, first respondent's legal practitioners