LILIAN MATIZA N.O (In her capacity as Executrix
Dative to Estate Late Joel Biggie Matiza)
and
BATSIRAI JOEL MATIZA
and
BATANAI JOSEPH MATIZA
and
JOSHUA BONGANI MATIZA (Duly represented by Lilian Matiza
In her capacity as biological mother and Legal Guardian)
versus
TENDAI MUCHANDO
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 16 & 23 February 2022 and 11 May 2022

Opposed Application

M D Hungwe, for the applicants
First respondent in person
No appearance, for 2nd respondent

WAMAMBO J: This is an application by the applicants to compel a DNA test on first respondent. The order sought by the applicants reads as follows:-

> "1. The court application to compel first respondent to undergo DNA tests be and is hereby granted.
> 2. The first respondent is hereby ordered to submit himself to a DNA test by an institution agreed by both parties within five (5) days of granting of this order failing which the Registrar is hereby authorised and directed to appoint one.
> 3. First respondent to pay costs of suit on the scale of attorney and client if he opposes this application."

Joel Biggie Matiza (hereinafter called the deceased) passed on on 22 January 2021 and was survived by one wife (the first applicant) and three children (the second to fourth applicants). The first applicant was appointed the executrix dative to the deceased's estate DR 27/21 on 8 April 2021. The marriage certificate reflects that deceased and first applicant were married on 10 January 2000.

First respondent claims that he is a biological son to deceased born of deceased and Rosemary Muchando. He opposes the application. The second respondent is cited in his official

capacity as the government official who overseas deceased estates in Zimbabwe. The basis upon which this application is mounted is as follows: -

On 14 April 2021, first applicant received a letter from first respondent requesting to be included in the distribution plan of the estate of the deceased. Attached to first respondent's claim are paternity tests conducted in 1998. In response thereto first applicant wrote to second respondent proposing that first respondent should undergo DNA tests which would confirm whether or not he is indeed a beneficiary to deceased's estate. First respondent constantly refused to undergo DNA tests before deceased's demise. The deceased had always challenged first respondent's claim that he (first respondent) was his son. She proposes that this Court should resolve the issue of first respondent's paternity to enable the estate to be wound up. First applicant questions the authenticity of the paternity tests submitted by first respondent. She avers that in 1998 DNA tests were not readily available in Zimbabwe. First applicant further proposes that first respondent should be subjected to DNA test with the participation of second to fourth applicants who are offspring of deceased by operation of law and as evidenced by their birth certificates.

In his opposing affidavit first respondent avers as follows: -

In the letters he wrote to second respondent (Annexures C1 and C2, appearing at pages 20 to 25) he is demanding the status of a beneficiary in deceased's estate. He is a biological son to deceased as evidenced by DNA tests appearing on record as Annexures F1 and F2 at pages 39 to 42. First applicant for some reason omitted to attach Annexure F2 which was a second opinion requested by the deceased and ordered by court order Annexure "G"

Annexure F1 the DNA test was conducted by the National Blood Transfusion Service Zimbabwe. Annexure F2 is the result of DNA tests done as a second opinion by the Laboratory for Tissue Immunology Cape town, South Africa.

The deceased under HC 8707/17 also sought a third opinion, but however, withdrew his application. First respondent is unsure whether DNA tests conducted against another person as opposed to the deceased would be conclusive. Here I note that first respondent is responding to the first applicant's suggestion that DNA tests should be done with the participation of second to fourth applicants (deceased's children from his marriage to first applicant). In the heads of arguments and in oral submissions applicants submitted that only the scientific process of DNA testing will conclusively resolve the matter.

The applicants further submitted that the application ought to be granted on public policy grounds. They averred that it would be against public policy and the interests of justice for first respondent to unjustly benefit from the deceased's estate through 'falsehoods'.

In para 4.4 of the heads of argument applicants submit that the DNA test results proving paternity could easily have been manufactured. They further aver as follows: -

> "These are documents known only to first respondent, their origins and authenticity is unknown to the applicants. The first applicant cannot rely on documents coming from first respondent who has an agenda and is an interested party. Coupled with the fact that the deceased Joel Biggie Matiza disputed first respondent's paternity, it is submitted that there are cogent reasons for this court to compel first respondent to go for DNA testing."

First respondent who appeared in person also submitted heads of argument. The heads of argument are brief. His main argument however revolves around the submissions as referred to earlier in this judgment. He bases his opposition to the application on Annexures F1 and F2 and the fact that deceased withdrew the application under HC 8707/17. First respondent made oral submissions to the effect that the DNA tests reflected under F1 and F2 are sufficient. They are authentic and were done inclusive of samples from deceased and his mother.

Mr Hungwe for the applicants was not able to cite a Zimbabwean case wherein the Court compelled a DNA test to be conducted in circumstances similar to this case. He however, cited a South African case *LB* v *YD 2009(5) SA 483 (NGP)* as persuasive authority. The cited case however is distinguishable from this case.

The brief facts in *LB* v *YD* (*supra*) were as follows:-

The applicant therein applied to the High Court for an order compelling respondent to submit herself and her minor child for DNA testing to establish the paternity of her minor child. Respondent opposed the application on the basis that the court order would constitute an invasion of her rights to privacy and dignity and that it would not be in the interests of the child. MURPHY J found that the law was uncertain on the subject and there was no binding precedent he was obliged to follow. He however preferred the view that the Court as upper guardian and in the interests of effectiveness could order that the child be submitted to blood tests.

It becomes clear from the above that at the centre of the application was a minor child. The Court thus invoked the principle that as the upper guardian of all minors and in the interest of effectiveness a blood, test could and was ordered.

In the instant case we are dealing with first respondent who is a major. Although applicants aver that a DNA test would be beneficial to first respondent as he will be able to know whether he is a beneficiary or not it may not necessarily be so;

It would appear that the primary basis for the application is for first applicant to wind up the estate.

But the question is in the circumstance should he be compelled to undergo a DNA test? Is it in the interests of justice that first respondent be so compelled?

Applicants in their heads of argument in para 2.4 refer to a quotation from the case of *LB* v *YD* (*supra*). In the same quotation is mention of the competing interests of the rights to privacy and bodily integrity.

The Constitution of Zimbabwe Amendment (No 20) Act, 2013 provides, for rights to human dignity (s 51) and right to personal security (s 52)

Section 51 of the Constitution provides as follows;

> "51. Right to human dignity
> Every person has inherent dignity in their private and public life and the right to have that dignity respected and protected."

Section 52 of the Constitution provides as follows;

> "52 Right to personal security
>
> Every person has the right to bodily and psychological integrity which includes the right
> a) To freedom from all forms of violence from public to private sources
> b) Subject to any other provision of this Constitution, to make decisions concerning reproduction
> c) Not to be subjected to medical or scientific experiments or to the extraction or use of their bodily tissue without their informed consent." (the emphasis is mine)

A DNA test necessarily involves the extraction of bodily tissue. First respondent does not consent to this invasion. I find that he is protected by s 52(c) of the Constitution of Zimbabwe and can thus not be forced to undergo a DNA test.

There are a number of other variables militating against the granting of an order as sought in this case. They are as follows;

I have to point out at the outset that the applicants have not been candid to the court. In many respects they have skirted the truth or deliberately failed to elicit a number of issues raised by first respondent.

They deliberately underplay and question the authenticity of the DNA results done on first respondent in 1997 and 1998. I am aware that in this application I am not asked to decide on the authenticity or otherwise of Annexures F1 and F2. What I find astounding is for applicants to pretend as if the Annexures F1 and F2 were deliberately created by first respondent.

There appears to be a deliberate play to feign ignorance or question the origins of the DNA tests. All this is but a façade.

According to first applicant as far back as 14 April 2021. She was made aware of the paternity results D3 See p 28 of the record. The same results are attached to the record by the first respondent as F1. See p 39 of the record.

The other DNA test results emanating from South Africa were brought to the applicant's attention in para 5 of first respondent's opposing affidavit filed on 21 July, 2021. At the time of filing first applicant's answering affidavit in December 2021 applicants had all the time to trace and investigate the authenticity of Annexures F1 and F2.

From the first respondent's opposing affidavit mention was also made of HC 8707/17. The mention of this relevant matter should have ensured that applicant would peruse the said file to properly consider the issues holistically.

I have had occasion to peruse the file under HC 8707/17. The said file reflects the following;

The deceased applied for an order for DNA testing of first respondent. This was pursuant to two DNA tests – F1 and F2.

F1 was compiled as a result of successful application by deceased for first respondent to be compelled to undergo a DNA test. An order was duly granted by the magistrate under M 281/88.

It thus becomes clear that the DNA tests conducted and encapsulated in F1 were done at the instance of deceased. They were addressed to the Provincial Magistrate's Office because the DNA tests were done pursuant to a Court order.

An application for a second opinion was made by deceased resulting in Annexure F2. The very Annexures F1 and F2 were being used by deceased under HC 8707/17. For applicants to feign ignorance of same is clearly misplaced and misleading.

F1 reflects as follows; - First respondent was born on 28 November 1987. On 15 December 1997 (when first respondent had just turned 10 years old) blood samples were obtained from Rosemary Muchando, Biggie Joel Matiza and first respondent.

The report further reflects that the major parties mentioned above produced identification cards while a birth certificate was produced for first respondent.

The result under F1 reflects as follows;

Probability of paternity is 99,82%. Under comment it is reflected as follows;

> "Red cell grouping and HLA typing do not exclude Mr Biggie Joel Matiza from paternity of the child Tendai Muchando. A 99,82% probability of paternity means paternity is practically proven"

Annexure F1 was authored by a specific person Doctor M.E Chitiyo, a medical director under cover of the National Blood Transfusion Service Zimbabwe letterhead.

F2 (see pp 41 to 42) deals with the same paternity wrangle. If any evidence was needed that the tests done were DNA tests this document lays that issue to rest. It specifically refers to the "results of the DNA testing" and refers to "the results of the DNA tests".

F2 puts the probability of paternity at 99,85%.

The conclusion of F2 is couched as follows;

> "According to these results paternity of Joel Matiza for Tendai (child) is practically proven"
> Under HC 8707/17 the deceased withdraw the application on 9 February 2018. The reasons for so doing are not placed on record.
> The above details were traversed for reasons of clarity on the background of the matter. First respondent as a self-actor although he had referred to and filed documents to support his stance may not have been as eloquent in presenting the same."

The above history however reflects that first respondent has been subjected to DNA testing when he was a minor. The order by the magistrate to carry out DNA tests on the minor (first respondent) would accord with the persuasive authority of *LB* v *YD* (*supra)* cited by the applicants.

To now order first respondent to be compelled to undergo DNA testing against tests already held when he was a minor is not tenable.

He is now a major and has rights to human dignity and personal security as already adverted to.

I find that first respondent stands on firm ground when he resisted the application.

In passing I might comment that three separate application were launched by deceased, two of them before the Magistrates' Court and one HC 8707/17 before the High Court. All of the said applications sought scientific tests to determine paternity of first respondent.

HC 8707/17 was withdrawn by deceased. From 1997 when the first paternity results were first conducted up to July 2021, about 25 years later the wrangle is still about first respondent's paternity.

There is clearly need for finality to the issue. There are to my mind other ways in which applicants, or respondent can bring a conclusion to the dispute if so advised.

In the circumstances however, I find the application unmeritorious.

I therefore order as follows;

The application be and is hereby dismissed with costs.

Kadzere, Hungwe and Mandevere, applicant's legal practitioners
First respondent, in person