TRACY SAKUTOMBO
versus
MASTER OF THE HIGH COURT
and
ISAAC TIGERE TICHAREVA
(In his capacity as executor of the Estate Late Elfigio Zemba)
and
YEUKAI ZHIRATSAGO
and
NOMSA ZEMBA

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 24 November, 2021 & 12 January, 2022

REVIEW

N. Tsarwe, for Applicant
J.Zuze & P. Sonono, for 3rd Respondent
M. Mbuyisa, for 4th Respondent.
No appearance for 1st and 2nd Respondents

MAXWELL J

This is an application for review of the conduct of the First Respondent. Elfigio Zemba (the deceased) died intestate on 8 October 2020. On 18 December 2020, First Respondent convened an edict meeting at his offices for the administration of the deceased's estate. Deceased's relatives disputed that deceased was married and that Applicant and Third Respondent were the surviving spouses. Fourth Respondent is deceased's child by his first wife. Applicant said that First Respondent directed that the concerned parties approach the Magistrates Court for a determination of whether or not there were surviving spouses. On 29 March 2021 a magistrate at Chinhoyi confirmed the two women to be surviving spouses. A court order to that effect is dated 21 May 2021. Second Respondent advised the Fourth Respondent of the Magistrate's decision. Fourth

Respondent challenged Applicant's marriage. The deceased's family members were invited to a meeting at First Respondent's offices scheduled for 7 May 2021. The meeting concerned the deceased's marital status. After the meeting, First Respondent issued a determination that Applicant and Third Respondent are not surviving spouses. The determination is dated on 24 May, 2021. Applicant was aggrieved and filed the present application on 5 July 2021. The grounds for review are firstly, that there was gross irregularity in the manner in which First Respondent conducted the hearing. Secondly, there was gross unreasonableness in the decision of the First Respondent and thirdly, that First Respondent lacked jurisdiction to deal with the matter.

Applicant stated that her invitation to attend a meeting to determine whether deceased was married without being told the agenda of the meeting was irregular as she did not have adequate time to prepare for it. She also stated that she was deprived of the opportunity to lead evidence from her mother, brother and paternal uncles who were present when the customary "tsvakirai kuno" was paid at her rural home in Rusape in July 2019. She further stated that at the deceased's funeral she did all that is expected of a wife in the Shona culture and that her family was treated as in laws. She alleges that she did not get an opportunity to lead evidence on this and therefore there was gross irregularity and unfairness in the manner the hearing was conducted. She further alleged that there was gross irregularity in the manner in which First Respondent gathered evidence which he relied on. For instance, he had a telephone conversation with one Emengilda Zemba. Applicant stated that she had no opportunity of confronting her with an affidavit she deposed to on 15 October 2021 in which she confirmed that Applicant was married to the deceased customarily. Applicant further stated that it was grossly irregular for First Respondent to rely on evidence which was heard by him alone to the exclusion of everyone else attending the meeting. According to Applicant, First Respondent's decision that there was no evidence that Applicant was a surviving spouse is grossly unreasonable and irrational in its disregard of available evidence that no reasonable person who had properly applied his mind to the question would have arrived at such a decision.

Applicant submitted that the First Respondent lacked jurisdiction as he had full knowledge that a Magistrate had determined the issue and was therefore reviewing the decision of the Magistrate by holding another hearing. She pointed out that for purposes of estates of persons subject to customary law, the term 'Master' includes a Magistrate to the extent that the two have

parallel jurisdiction. She averred that since a Magistrate had already determined that she is a surviving spouse First Respondent had no jurisdiction to conduct another hearing to determine the same issue as that amounted to reviewing the decision of the Magistrate. She pointed out that First Respondent has no power to review a Magistrate's decision therefore his decision is a nullity.

The application is opposed by the Fourth Respondent (Nomsa). She stated that she is the firstborn of the deceased. She disputed that there was a determination on who is a surviving spouse to her late father's estate by any competent authority other than First Respondent. She stated that at the edict meeting there were three divergent views on the question of the surviving spouse, one that there was no surviving spouse, the other that Applicant was the surviving spouse whilst the other said Third Respondent was the surviving spouse. She also stated that her late father had not stated any spouse on his Zimnat Insurance policy and when the family was summoned by Zimnat Mr *Sonono* stated that he was representing Applicant and Third Respondent and that they were the surviving spouses. She further stated that on 1 April 2021 she received a letter from the Second Respondent advising her of the confirmation of Applicant and Third Respondent as surviving spouses. On 6 April 2021 her legal practitioners wrote to Second Respondent challenging the confirmation and the issue was referred back to First Respondent. The referral led to the meeting the result of which is the decision subject of this application.

Nomsa disputes that the meeting had no agenda and states that Applicant and her erstwhile legal practitioners were aware of it. She alleges that Applicant did not assert her right to lead further evidence, that the need to lead further evidence is an afterthought as First Respondent had asked if there was anyone to be contacted to give more evidence and only Emengilda Zemba was mentioned. She disputed that evidence of cultural practices was led at the edict meeting. She also disputes that there was any union of the Applicant's family and her family during the deceased's lifetime. According to her the payment made by her family to Applicant was so that Applicant would do the customary rites simply to facilitate deceased's burial. Nomsa admitted that Applicant and the deceased were staying in Marondera and that the death certificate states that deceased was customarily married. She also confirmed that the memorial service was held at Damafalls where Applicant was staying.

In her answering affidavit Applicant averred that Fourth Respondent's legal practitioner was advised of the confirmation proceedings at Chinhoyi Magistrates court. She disputed that

Fourth Respondent's legal practitioners were not aware of confirmation proceedings. She reiterated that the Magistrate at Chinhoyi made the enquiry into deceased's marital status in his capacity as Assistant Master of the High Court. She insisted that First Respondent was aware that he was conducting a second hearing as he is the one who had directed the parties to approach the Magistrate. She also insisted that the agenda of the second meeting was only disclosed when the meeting started and she could not object as she was not aware of her legal rights. She disputes that First Respondent invited attendees to call witnesses during the meeting. She disputed that the lobola payments that were made were to facilitate burial of the deceased. She averred that the memorial service was held at her house as acknowledgement that she was a daughter-in-law.

SUBMISSIONS BY THE PARTIES

Applicant pointed out that the Magistrate at Chinhoyi was empowered to perform the functions of the Master in respect of estates of persons subject to customary law. She referred to s 68 (1) of the Administration of Estates Act [*Chapter 6:01*] as read with s 68 I of the same Act and s 2 of the Administration of Estates (Designated Magistrates) Notice, 1997, Statutory Instrument 224 of 1997. Applicant also referred to the case of *Folly Cornishe (Pvt) Ltd & Anor v Shingirayi Tapomwa N.O. & Others* SC 26/14 where it was stated on page 9 of the cyclostyled judgment

> "….In respect of estates of persons subject to customary law, any magistrate or class of magistrates may be designated by the Minister as persons entitled to perform all or any of the functions of the Master……
>
> It is apparent from the above provisions that a magistrate may be called upon to assume the functions of the Master and to preside over meetings related to deceased estates. When he does so, he acts in the capacity of the Master and not a judicial officer. Whilst the Master has the responsibility to administer deceased estates, it is clear that the Master has no judicial powers…."

Applicant argued that the magistrate at Chinhoyi acted in the capacity of the Master and not a judicial officer and therefore First Respondent had no jurisdiction to conduct a second hearing on the 7th of May 2021. Applicant also referred to the case of *Attorney-General* v *Mudisi & Others* SC 48/15 for the position that she was entitled to adequate notice of the nature and purpose of the meeting of 7 May 2021. The failure by First Respondent to give her such notice, she argued, constituted a gross procedural irregularity. She also argued that further gross procedural

irregularity was in the manner in which First Respondent purported to gather evidence from Emengilda Zemba through a phone call during the hearing and subsequently announced that she had retracted an affidavit in which she confirmed that Applicant was customarily married to the deceased. Applicant also referred to the case of *Nyandoro* v *Mukowamombe & Others* HH 209/10 in which it was accepted that the payment of "tsvakirai kuno" is evidence of a customary law marriage. She argued that it was grossly unreasonable and irrational for First Respondent to decide that she was not a surviving spouse in disregard of the evidence of "tsvakirai kuno" and "mbonano" payments that were made by deceased to her relatives. Applicant further argued that as deceased's family was aware of the customary marriage, they made further payments of lobola when deceased died. Applicant submitted that this court should declare her a surviving spouse of the deceased.

Nomsa argued that her late father's estate was registered with the First Respondent therefore the Magistrate at Chinhoyi could not have exercised the First Respondent's powers, more so in the absence of the executor and other beneficiaries of the estate. She stated that the estate of her late father was registered under DR 1809/20 and an edict meeting was held on 18 December 2020. According to her Second Respondent was appointed executor at that meeting. She referred to the case of **In re: Estate Late Amos John Chirunda** HH 119/2006 in which it is stated that the magistrate had erred in accepting the dispute of the deceased's marital status and proceeding to issue a ruling on it. It was pointed out that prior to 1997 it was competent for a magistrate to do so but the position changed after 1997 when the Administration of Estates Act was amended. Nomsa submitted that the Magistrate in Chinhoyi did not have jurisdiction to determine who is the surviving spouse and whatever confirmation or ruling that was done is unlawful and of no legal effect. She also points out that the decision was in contravention of the rules of natural justice that require all interested parties to be heard when it was known that the issue was being contested and no notice was given to all who were at the first edict meeting. She referred to the case of *Antonio* v *Antonio* 1991 (2) ZLR 42 (SC) where it was pointed out that the Magistrate should summon the reputed relatives and hear them. She pointed out that no summons or court application was served on the interested parties.

She averred that notice of the meeting held on 7 May 2021 was given on 22 April 2021 and Applicant was advised to bring her next of kin. She pointed out that Applicant attended with her erstwhile legal practitioners and none of them indicated that they were not ready to proceed.

She disputed that there were any procedural irregularities and stated that First Respondent did not rely on the evidence of Emengilda Zemba only but on the totality of the evidence presented to him. Nomsa prayed for the dismissal of the application with costs.

ANALYSIS

The first issue to consider is whether or not there is a valid confirmation of the deceased's marital status from the Magistrates court. Page 14 of the record contains notes from the edict meeting held on 18 December 2020. It is clear that the deceased's relatives were divided concerning his marital status. Some said he was single, others said he had one wife whilst others said he had two wives. The resolution is recorded as follows

"1. To appoint a neutral executor.

2. Parties were referred for confirmation of customary law marriage."

On p 15 there is a Confirmation of Customary Law Marriage Form signed by a Magistrate. The form has Applicant and Third Respondent as deceased's wives. On p 16 there is a ruling from the Magistrates Court at Chinhoyi confirming customary law marriage between deceased and the two women. There is no indication of the basis on which this process was undertaken. Applicant was content to state that the Magistrate at Chinhoyi was performing the functions of the Master as stated in s 68(1) of the Administration of Estates Act [*Chapter 6:01*]. She however does not explain how an issue in an estate that was registered in the High Court was referred to the Magistrates Court. The case of **In re: Estate Late Amos John Chirunda** (*supra*) is of assistance in resolving this issue. The parties probably proceeded under the repealed s 68 of the Act where it was competent to refer a matter to a Magistrate in such circumstances. That jurisdiction was taken away in 1997 when the Act was amended. As submitted for Fourth Respondent, the Magistrate had no jurisdiction to determine the matter and make a ruling. The confirmation therefore is a nullity.

The second issue is the position of the Master in this case. On 24 May 2021 the Master's office issued a determination which is on pages 17 to 24 of the record. The determination is said to be in terms of s 68G of the Act. Section 68G cannot be the appropriate section to determine the marital status of the deceased. That section deals with determining whether or not customary law applied to the deceased. The applicability of customary law to the deceased was not the issue in contention in this matter. A report dated 4 August 2021 was filed in this matter from the Master's

Office. In terms of the determination of 24 May 2021, there is no surviving spouse. However, in the report of 4 August 2021 the Master's Office indicated that it had no objection to the confirmation of Applicant and Third Respondent as surviving spouses as per the finding of the Magistrate. What remains is to determine what the deceased's marital status was on the basis of what is on record.

In my view the record before me points to the fact that the Applicant and Third Respondent are surviving spouses of the deceased. I say so for the following reasons. Firstly, in the minutes of the edict meeting of 18 December 2020, some relatives confirmed that the two women were the deceased's surviving spouses. This is confirmed in para 11.2 of the Fourth Respondent's opposing affidavit. Humphreys Zemba was one of the relatives who confirmed that there are two surviving spouses. In the Determination from the Master's Office dated 24 May 2021, Mrs Elina Zemba, a cousin sister of the deceased stated that she knew Third Respondent as the wife of the deceased and that deceased introduced Applicant to her as his wife. Emengilda Zemba, a biological sister of the deceased stated in an affidavit dated 15 October 2020 that the Applicant is the surviving spouse to the deceased. She also stated that the deceased was once customarily married to the Third Respondent. She stated further that deceased and Third Respondent separated and deceased was paying maintenance for his children. Separation does not necessarily mean divorce. In H R Hahlo, *The South African law of Husband and Wife*, 5th ed at pp 337 - 338, the esteemed author opined that:-

> "The mere fact that spouses live physically apart for some length of time or have separate households does not mean that they are not living together as husband and wife.
> Living together as husband and wife may cease while the spouses continue to live under one roof, and it may continue whilst they are living thousands of kilometres apart."

The author went on to state that:

> "Again, the married life does not necessarily come to an end if spouses break up their common house hold or one of them departs. The factum of physical separation does not negate continuance of the marriage consortium unless it is accompanied by the animus of at least one of the spouses to put an end to the marriage."

Even in unregistered customary law unions, the union will not be deemed dissolved by mere separation unless appropriate customary law steps are taken to dissolve the union. In *Pasipanodya* v *Muchoriwa* 1997(2) ZLR 182 (S) at 184 MUCHECHETERE JA had this to say:

> "This is because in my view the marriage was not dissolved- a marriage under an unregistered customary law can be dissolved under customary law either by giving the wife 'gupuro' or before a customary law court. The parties merely separated. On separation, there was no proper distribution of the matrimonial property."

In *Machafa* v *Mukumirwa* 2001 (2) ZLR 540 (H) after a 15 year separation the wife came back. She was awarded a share of the matrimonial house as her marriage was still recognised despite the period of separation.

On the 27th of November 2020 Gaudencia Chikura, a sister to the deceased, deposed to an affidavit confirming that deceased was customarily married to Third Respondent. The report from the Master's Office said Emengilda retracted the contents of her affidavit dated 15 October 2020 and noted that the affidavit was merely for purposes of assisting the minor children to access pensions and birth certificates through their mother. It also stated that Gaudencia also retracted the contents of her affidavit dated 27 November 2020 and said it was only for purposes of assisting children of the deceased to acquire Zimnat Pension for their upkeep and not necessarily to confirm Third Respondent as the surviving spouse. In my view the retractions which are not in affidavit form cannot override what was stated in an affidavit. The report also stated that Humprey Zemba also averred that he had mistakenly pointed out at the edict meeting held on 18 December 2020 that the deceased had two wives. He explained that he had not understood what the term surviving spouse really meant. His retraction only strengthens the suspicion of an ulterior motive.

On the issue of whether or not "gupuro" was paid to Third Respondent or to her parents, on p 18 of the record, Mrs Gaudencia Chikura is reported to have stated that the deceased told her.

> "that he was no longer married to Yeukai and that at some point he went alone to Shurugwi to meet the deceased's relatives in a bid to end his marriage with Yeukai."

She did not say the deceased advised her that he had paid "gupuro". On p 22 of the record Emengilda stated that deceased approached Third Respondent's parents at Shurugwi and gave them "gupuro". Regrettably no one witnessed the payment of the "gupuro". What is on record is the mere say so by the deceased's sisters. None of the other relatives testify of this. I find it unconvincing that the two sisters of the deceased, who previously confirmed the two spouses soon after deceased's death turn around about 6 months later and aver that their deceased brother had no surviving spouse. Elina Zemba, Lydia Muchawira and Ketty Kazengo are all recorded in the Determination from the Master's Office dated 24 May 2021 as having stated that they were advised

by Gaudencia that the deceased had no wife at the time of death. Clearly Gaudencia did not want any surviving spouse recognized in her late brother's estate.

Applicant testified before the Master that deceased had paid "tsvakirai kuno" and "mbonano". Emengilda confirmed that Applicant had advised her that deceased had paid "tsvakirai kuno" and "mbonano". Maggie Sakutombo stated in the meeting before the Master that even though the deceased was in the process of marrying, he was already recognized as a son-in-law. As stated in *Nyandoro* v *Mukowamombe and Others (supra)* where a man pays "tsvakirai kuno", he is considered as a customary law husband. In my view, that the deceased's relatives subsequently received "roora" list after deceased's death does not take away the fact that "tsvakirai kuno" had been paid.

DISPOSITION

In the final analysis, the application for review succeeds. The following order is appropriate.

1. The determination of the First Respondent dated 24 May 2021 that Applicant and Third Respondent are not surviving spouses be and is hereby set aside.
2. Applicant and Third Respondent be and are hereby declared to be the surviving spouses of the deceased.
3. Each party to bear own costs.

Tadiwa & Associates, Applicant's Legal Practitioners.
Sonono & Partners, 3rd Respondent's Legal Practitioners
Mtetwa and Nyambirai, 4th Respondent's Legal Practitioners