TENDAI DZOMONDA
and
FARISAI DZOMONDA
and
TAMBIRAYI DZOMONDA
versus
KIRISON CHIPANDA
and
NOREEN CHIKAKA
and
MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 25 July 2014 and 2 October 2014

Opposed Application

M Hungwe, for the applicants
A Muchandiona, for the 1st & 2nd respondent
No appearance for 3rd & 4th respondents

TSANGA J: Sometimes even the most noble of objectives in legislative reform can result in unforeseen and unintended consequences for certain groups of people. The key question of course is what is a court to do when faced with such a reality? In this matter, which perfectly exemplifies such a scenario, this court is asked to adjudicate the competing claims of a surviving spouse to the matrimonial home against those of his step children who assert that the house was largely their mothers and therefore they have a greater claim to it than her husband. It is brought as an opposed application in which the applicants, being the children of the late Nester Chipanda, seek to set aside the 'First and Final Distribution Account' in her estate which was confirmed by the Master of the High Court, the third respondent, on 13 March 2012. Furthermore, they want the estate to be reopened. In addition, they seek the removal of Noreen Chikaka, the second respondent and executor in that estate,

and her substitution with a neutral executor. They also request that the Deed of transfer that placed the immovable property in the name of the first respondent, the deceased's husband, under deed of transfer No. 1320/2012, be set aside by the Registrar of Deeds who is the fourth respondent.

In an alternative prayer, they seek that the estate of the late Nester Chipanda be distributed in accordance with a distribution agreement that the applicants say they entered into with the first respondent, Kirison Chipanda on 27 October 2011. The application is made against the backdrop of legislation which for all intents and purposes, at least on the face of it, appears well settled on this point of who is entitled to the matrimonial home upon death of either spouse.

The facts

The facts that shape applicants' grievances and resultant quests are these. In 1994 the applicants' mother, then known Nester Mariko, applied for a stand from the City of Harare. She was granted stand No.8122 in Budidriro 5, in her own name as a divorcee in June 1995. Her four children, born between 1972 and 1983, were listed as her dependants. It is the Applicants' averment that two years after acquiring the stand and constructing a house, their mother married the first respondent, also a divorcee with his own four children. He too had his own property with his children listed as his dependants. Their mother did not have any children with the first respondent. The parties initially married under customary law in 1995 before solemnising a civil marriage in 1997. Applicants' mother died intestate on 15 January 2011.

In winding up her estate, it is Applicants' contention that they discussed extensively in the Masters office that given the circumstances under which the property was acquired, it was impracticable for the first respondent to inherit the matrimonial home moreover given that the house was the only asset of value. Their reasoning was that doing so would effectively exclude them, deceased's own children from inheriting from her estate. They contend that they entered into a *Beneficiaries Distribution Agreement* (hereinafter called the "Agreement") on 27 October 2011 with the first respondent. In terms of the 'Agreement' the property was to be sold and he would be accorded 30% of the value of the property while applicants would share the remaining 70% among the four of them, each receiving a 17.5% share. Following this 'Agreement' they say the second respondent, the executrix, refused to

give effect to it and influenced the first respondent to renege on the basis that he was entitled to the whole property. They applied for the removal of the executor on 23 November 2011.

They state that soon hereafter the court record could not be found and that they were told that the Judicial Service Commission was carrying out a 'record indexing and restructuring exercise'. They allege that it was in May 2012 that their legal practitioners managed to access the record only to discover that the estate had been wound without reference to the 'Agreement'. They also discovered that there was by then a response in the record to their quest to remove the executor advising them to go by way of court application. The gist of their claim is that the 'Agreement' that they entered into is a binding one. There being only one asset in the estate, being the matrimonial home, they argue that from their reading of the Deceased Estates Succession Act [*Cap* 6:02], the home cannot be considered as constituting free residue for inheritance by the surviving spouse only. They say they too as children are entitled to inherit if there is only one asset.

Regarding the marriage, the first respondent on the other hand says that he started living with the late Nester in 1993 when they were lodging together elsewhere. He says he customarily married her in 1995 before solemnising a civil marriage on 17 February 1997. Regarding the property in dispute, his testimony is that they built the house in question together between 1996 and 2001. As for the 'Agreement' that he is said to have entered into and which Applicants seek to declare as effectively cast in stone, his version of events is that following his wife's death he received threats of violence and eviction from the first applicant and his uncle. He says he was force marched to the applicants' lawyer's office where he was made to sign the document in question or face the risk of losing the property altogether. He says as a "weak unsophisticated and defenceless old man" he had no choice but to comply. When the family met with the second respondent the executrix, he says he made it clear it was not his intention to sell the house or donate his interest to third parties. He says he also undertook to pay the estate's expenses to avoid the sale of the house. It is his standpoint that the "Agreement' sought to circumvent the provisions of the Deceased Estates Succession Act. He argues that it was following his protestations he says that the executrix thereafter distributed the estate according to the law whereby he received a priority right to the matrimonial property. His argument is also that the applicants have misunderstood the meaning of "free residue" and are misinterpreting the provisions of the applicable Act.

The applicable law on intestacy

Where a party dies intestate and had a civil marriage, the Deceased Estates Succession Act [*Cap* 6:02] basically kicks in to act as the deceased's substitute will as it were. It recognises the rights of the surviving spouse to inherit as well as those of the children if any. In the absence of children, blood relatives who are entitled to inherit are also spelt out.

Noteworthy is that its central point of departure in distribution of the intestate estate is whether or not there is a surviving spouse. If so their share is prioritised in inheriting from the free residue of the estate. Where the estate has excess assets after the surviving spouse has received what is mandated by the law, then spouse together with the children are accorded certain stipulated legacies. The stipulated legacies are dependent on whether a party is married in or out of community of property. In the present case the parties were married out of community of property. The Act provides as follows in relation to parties married out of community of property:

> "s3 (b) Entitlement of spouse who dies intestate
>
> Subject to section *four* the surviving spouse of every person who, on or after 1st April 1977 dies either wholly or partly intestate is hereby declared to be an intestate heir of the deceased according to the following rules-
>
> a) ……..
>
> b) If the spouses were married **out of community of property** and the deceased spouse leaves any descendant who is entitled to inherit *ab intestato,* the surviving spouse of such person shall
>
> i) be entitled to receive from the free residue of the joint estate as his or her sole property the household goods and effects in such estate
> ii) succeed in respect of the remaining free residue of the deceased spouse's estate to the extent of a child's share or to so much as does not exceed the specified amount, whichever is greater.
>
> c)……."

In terms of additional mandatory entitlements due to the surviving spouse apart from the above, s 3A deals squarely with the inheritance of the matrimonial home and household effects. It is couched as follows:

> "3A The surviving spouse of every person who, on or after the 1st November, 1997, dies wholly or partly intestate shall be entitled to receive from the free reside of the estate-
>
> a) the house or other domestic premises in which the spouses or the surviving spouse, as the case may be, lived immediately before the person's death; and

b) the household goods and effects which, immediately before the person's death, were used in relation to the house or domestic premises referred to in paragraph (a);
where such house, premises, goods and effects form part of the deceased person's estate."

The estate is distributed unencumbered by debts hence the reference to "free residue" refers to that which is paid once all debts owed by the estate have been settled. That the primary thrust of the Act is to start off by being spouse centred is clear from the above provisions. A spouse inherits household goods and effects. He or she also inherits the domestic premises. If the estate still has residue after this has been done, then the spouse together with the children inherit specified statutory legacies. Inheritance by the children therefore clearly depends on the size of the estate. Where the marital home is the only asset as in the present case then the law is clear that it should go to the surviving spouse.

The context within which a particular piece of legislation is passed is useful in giving guidance to the import of that legislation. The inclusion of s 3A to the Deceased Estates Succession Act under general law came in 1997 at the same time that a swathe of changes were effected to the Administration of Estates Act [*Cap* 6:01] to make inheritance under customary law more spouse and child centred in the case of disputes. This followed extensive research by the Women and Law in Southern Africa (WLSA) in Zimbabwe as well as lobbying by activists in light of experiences with the then applicable law under customary law in particular. The law governing customary estates focused then on the single male heir and also excluded widows from inheriting under customary law. (See *Murisa* v *Murisa* 1992 (1) ZLR 167 (S)). Moreover property grabbing, especially of the marital home by relatives, was prevalent. Female children were also not on an even keel with their male siblings. (See *Mwazozo* v *Mwazozo* S 121-94; *Magaya* v *Magaya* 1999 (1) ZLR 100 (S).)

Although under general law widows were clearly better off in the sense that following amendments to the common law position in 1977 that excluded wives from inheriting, they were at least entitled to household goods as well as a stipulated legacy from a deceased spouse's estate. In effecting s 3A, the aim was to ensure that the surviving spouse, whether male or female, and whether married under general law or customary law, received the matrimonial home. The WLSA research recommended as follows with regard to the matrimonial home in monogamous marriages:

> "We recommend that the surviving spouse be designated the sole heir/ess to the deceased's rights in the matrimonial home, in the same way that he/she is the sole heir/ess to the household goods and effects. This should be the case regardless of whether the parties were married under general law o customary law. In either type of marriage, the surviving spouse should be the sole and exclusive heir to the matrimonial home".[1]

In seeking the amendment of existing laws the intention was clearly that the spouse should inherit the matrimonial home understandably to allow for a continuation of the life the spouse was accustomed to living. This was more so in light of the fact that the benevolence of the family could no longer be assumed as evidenced by reports of property grabbing. The heir under customary law in particular who was supposed to act as a father figure and protect the widow had increasingly, in modern society with its money based economy, become a dying breed. More often than not, his own interests became paramount. In any event women had by then made significant strides in society in terms of pressing for the recognition of both their economic and non-economic contributions in the marital union and in present day society. They rightly expected to benefit from the sweat of their brows instead of being cast aside as insignificant "others" upon the death of a spouse. This then is the underlying context within which s3A came to be effected in 1997 since many people at risk of being rendered homeless were also now contracting their marriages according to general law, given its popularity with those of the Christian faith in terms of its monogamous thrust.

Essentially then the law is clear. Where the house is the only asset it goes to the surviving spouse together with the household goods and effects. The exclusion of the Applicants from inheritance does not arise from a misapplication of the law by the executor but from the reality of what the present law provides. Furthermore, the exclusion arises from what is in essence available for distribution within the prevailing economic context where more often than not, the matrimonial home is the only meaningful asset of the estate.

The Applicants' purported reading of s 3A in particular to infer that where the house is the only asset it must be sold and that the spouse together with the children must inherit a share is not supported by a reading of the applicable provision nor by the history and context that led to its adoption. It must also be borne in mind that this is not a divorce where courts are enjoined to evaluate the extent of each spouse's contribution. It is an inheritance matter where the law is undoubtedly more definitive in mandating how the family home is to be

[1] Dengu-Zvogbo et al ***Inheritance in Zimbabwe : Law, Customs and Practices*** *(Harare, Sapes Trust) 1996 at p 295.*

dealt with as compared to the provisions under the Matrimonial Causes Act [*Cap* 5:13] which deal with divorce.

Furthermore, this present position in our domestic laws on rights of the surviving spouse accords with the requirements of our constitution as well as the spirit of those regional and international instruments to which we are a party. (See for example s 56 of the new Constitution regarding equality and non-discrimination between the sexes and s 25 on protection of the family. Among regional instruments, also of relevance is Art 21 (1) of the Protocol to the African Charter on Human and People's rights on the rights of women in Africa which zeroes in on the right to remain in the matrimonial home by the widow in particular. Article 2 of CEDAW an international convention is also relevant in terms of the state taking measures to pass laws that advance equality between men and women).

Analysis of the Beneficiaries' Distribution Agreement

The applicants also place heavy reliance on the "Agreement' entered into with the first respondent which they say he cannot resile from. In support of their contention, they cite s 5 of the Deceased Estates Succession Act which deals with agreements on alternative division or direction to sell property devolving in undivided shares. The relevant part of this provision is couched as follows:

> "5 (1) Where as a **result of a distribution in intestacy any property devolves upon any heirs in undivided shares-**
>
> a) the heirs may agree upon an alternative division of property, and a such agreement shall be binding on the executor;
> b) any one or more or all of them may direct in writing that he wishes or they wish, as the case may be, the property be sold and the proceeds divided amongst the heirs, and such direction shall be binding on the executor and all the heirs.
>
> 2)……."

The issue in my view is whether any property devolved on the heirs in undivided shares upon which they could then enter into an alternative distribution arrangement among themselves. In the present case there was no excess residue to talk of from which the children could inherit anything on intestacy. As stated, what determines whether the children inherit anything is the net size of the estate. With the house being the only asset, and with the law clearly stating that the matrimonial home is to be inherited by the surviving spouse, I do not think that there was a valid basis upon which the disputed 'Agreement' as understood by the applicants was entered into. Granted there are many cases in intestacy which do not require

the court's intervention, where families enter into their own arrangements and a spouse agrees to forgo a legitimate entitlement despite what the law may provide. Where there are no disputes and the agreements are freely and voluntarily entered into, then no problems arise. There are also those cases where the parties with something to inherit genuinely enter into an agreement but later change their minds regarding sticking to that agreement. Such cases then often involve the court's intervention where a dispute arises to determine whether the agreement can be set aside for valid reasons. But in the present case the first respondent challenged whether there was ever genuine consent from the onset, on the basis that he was ambushed into signing the supposed 'Agreement'. What further complicates the picture in the face of the challenge is that Applicants had no property due to them as the net estate did not generate sufficient residue.

Clearly, applicants are understandably aggrieved that the property has gone to the surviving spouse who is their step-father. This is so given that chances of inheriting from him as they are not his children are unlikely in the absence of a will. The issue of a step parent inheriting the matrimonial home to the exclusion of the deceased's children has indeed begun to generate disputes following the amendment of the law under both general and customary law. This is particularly so for instance in situations where a parent remarries following the death of a former spouse with whom he had acquired the property. In the case of *Chimhowa* v *Chimhowa* 183/12 CHIWESHE JP stated as follows in deciding to award the home to the deceased's children and to grant the subsequent spouse a usufruct over the property:

> "In my view the legislature intended to protect in the case of widows that property acquired during the subsistence of their marriage to the deceased persons. This protection benefitted not just the widows but their minor children as well. I do not perceive the legislature's intent to be to extend this protection and privilege to persons outside the marriage within which such property might have been acquired. To impute that kind of interpretation would lead to serious absurdities in the application of the law. For example A marries B. They acquire jointly what may be termed matrimonial property. They have children. A, the husband, dies and in terms of the law B, the wife and surviving spouse, is awarded the matrimonial property. Thereafter B contracts another marriage with X, the second husband. She dies and X the second husband and surviving spouse, inherits the matrimonial property that B inherited from A, at the expense of A and B's children in that marriage. Clearly the children will have been disinherited of their parents' property. They may as a result end up in the street particularly if X sells the property and converts the proceeds to his own selfish ends. In the result the noble intention of Parliament to keep the property within the family for the benefit of the surviving spouse and the children will have been subverted".

He concluded as follows

> "For these reasons I would conclude that the protection afforded surviving spouses is, in terms of inheritance, limited to those assets that were acquired during the course and subsistence of that spouse's marriage to the deceased person whose estate is under distribution. In particular, surviving spouses cannot by right claim any right to matrimonial property acquired outside their own marriage. To allow them to do so would lead to the absurdities alluded to above. It would be against public policy and conscience to deprive the children of deceased persons the common law right to inherit from their parents merely because at some stage the surviving parent had remarried. If that had been what Parliament intended to do it would have expressly so provided. I am satisfied that Parliament intended only the consequences I referred to earlier.
> In my view it is of paramount importance that the legislature revisits the relevant legislation in order that its intention be expressed in clearer terms than is presently the case."

The *Chimhowa* case however is distinguishable from the facts in the present case in a material respect. The first respondent averred that although his deceased wife was indeed granted the stand before they married, they built the house together. Although the applicants state that their mother completed the house before the marriage, the first respondent attached evidence confirming that that the stand was allocated to his deceased spouse in June 1995. He also attached evidence in the form of the written record of what he paid as *lobola* in December 1995 as signed by those who attended. The proximity in time between the acquisition of the stand and the marriage between the parties leads to the reasonable inference that indeed 1st Respondent's averment that the house was built as a joint endeavour by both of them as their matrimonial home is true.

Moreover the applicants lay specific emphasis on the 'Agreement' entered into by the parties regarding the distribution of the estate. Applicants draw support for their standpoint from the case of *Mashakada* v *Master of the High Court & Anor* 2001 (2) ZLR 311 (H) where the court held that an agreement between beneficiaries which they had adopted following their father's will having been declared invalid, stood to be honoured. Again, this case is distinguishable from the present case before me in the sense that the reason the court gave for declaring the agreement binding was the absence of a valid reason why the agreement should be cancelled. Another point of difference with the presence case is that the children in the *Mashakada* case did stand to inherit something in terms of the will that they sought to simulate in their agreement. In other words, there was property to be inherited by them whereas in the case before me this is not the case due to the size of the estate.

The decision in the *Mashakada* case suggests that if the reason for resiling is a legitimate one, then the court will take this into account. The court held in that case that there

was no good reason why the applicants sought to resile from an agreement that they had freely entered into. In the case before me the first respondent withdrew because he says he was pressured into signing the document so technically speaking there was no agreement in the legal sense of the word.

Applicants also cite the case of *Ponter* v *Ponter* 2000 (1) 336 (H) where a spouse's right to remain in the matrimonial home was successfully challenged by the step children. However, that case is distinguishable from the present case in that the death leading to the distribution of the estate in that case, occurred in 1991 when s 3A was not yet in place.

In advancing their case, Applicants also seek to rely on the report written by the Master in terms r 248 where such report is deemed necessary or is required by the court in cases involving deceased estates or persons under some legal disability. The report done is dated 31 May 2011. The grievance is that in later confirming the estate in 2012, he failed to adhere to what he had recommended in this report. He had concluded and recommended as follows in that report:

> "The 1st Respondent is the surviving spouse in terms of the general law hence entitled to inherit the matrimonial home. I however share the same view with the applicants that where parties entered into a family agreement, it becomes binding at law and one cannot seek to retract it without the court's consent and or the other part (sic). The aforesaid settlement until annulled by the court remains valid and the estate should be distributed in term s thereof. As the estate was complete with all formalities done it is my recommendation that the executrix draws an equitable distribution account and relodge for authorisation. Removal of the executrix will not assist either part as the estate will be burned with double taxation in respect of executor's fees."

The Master later reneged from this by confirming the executrix's account in terms of the Deceased Estates Succession Act.

But perhaps more significantly, the agreement that s 5 of the Deceased Estates Succession Act has in mind relates to reshuffling assets the beneficiaries would have been entitled to. As already stated there were none in this case. The situation regarding redistribution agreements among heirs is one that is captured succinctly by Wiechers and Vorster in their book *Administration of Estates*[2] albeit with reference to the South African position. As they explain:

> "Where the beneficiaries are all majors and it is clear that the purpose of the agreement is merely to **shuffle assets which would in any case have fallen to them,** no problems would normally be experience in obtaining the necessary permission from the master. Even when the persons concerned do not receive an equal share, the

[2] N. J Wiechers and I Vorster *Administration of Estates (Durban LexisNexis Butterworths, 1996 Issue 1 at 5-16.*

> master accepts that they have legal capacity and are therefore capable of protecting their own interests. The master is not concerned with the issue of whether a redistribution agreement is lawful. His duty is to examine the agreement as part of the executor's account….."

There was evidently a contradiction in the Master's actions in conceding in one breath that the matrimonial property belongs to the surviving spouse and in the same breath ordering a distribution of that very asset against protest by the party legally entitled to it. It is therefore understandable faced with the reality that no assets fell to the beneficiaries due to the size of the estate, the appropriate course of action on the part of the Master was to prioritise the rights of the surviving spouse to the matrimonial home as required by the Deceased Estates Succession Act. This is what the Master ultimately did.

Conclusion

In the final analysis, if the Deceased Estates Succession Act as amended in 1997 to effectively prioritise the rights of the surviving spouse to the matrimonial home is working to the disadvantage of children, in particular step children, it is for our legislature to effect the necessary balance. However, ideally this would have to be against the backdrop of detailed research in the same vein that the amendment itself was introduced in light of extensive research and lobbying by academics and activists alike of lived realities and what people wanted in this area of the law. Whilst a robust interpretation of the law as occurred in the *Chimohwa* case such as granting the surviving spouse a life usufruct for example, can clearly bring justice to some cases, it is not in all cases where the facts will fit the glove. Different circumstances will present different challenges. It is for this reason that striking the necessary balance between the rights of the surviving spouse and those of the children, is something that should be effected by the legislature for long term equity and stability in this area of the law. Such action was also aptly recommended in the *Chimhowa* case.

The respondents sought a dismissal of this application on a higher scale on the basis that it is plainly an abuse of court process given that the law is clear on the inheritance of the matrimonial home by the surviving spouse. However, I am of the view that though it is the case, this matter has provided an opportunity for further engagement with the existing law in situations involving a spouse and step children thereby adding to a growing chorus on possible legislative reform. Also given the recognition of beneficiary agreements in some circumstances, the quest for the courts intervention on whether this case fell within the same

ambit as those where such agreements have been embraced was not entirely frivolous as it appears at first glance.

In the circumstances, the application is dismissed with costs on an ordinary scale.

Hungwe and Partners, applicants' legal practitioners
Danziger & Partners, 1st and 2nd respondents' legal practitioners