MARK TARUHLA
and
LUCKY TARUHLA
and
TENDAI TARUHLA
and
RATIDZO TARUHLA
and
KUDZANAI TARUHLA
and
HILDA TARUHLA
versus
FAKAZI SONNY TARUHLA
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 27 September, 24, 28, 29, 30 and 31 October, 13 and 14 November 2019

Opposed Matter

B Mupwanyiwa, for the applicants
C.W Kanoti, for the 1st respondent

CHIRAWU-MUGOMBA J: The death of one Sonny Taruhla (the deceased) on the 5th of September 1996 triggered an inheritance feud amongst his children that has remained unresolved. I have previously commented that estates need to be finalised within the stipulated six months period to avoid erosion in the value of assets. This call seems to be falling on deaf ears judging by the number of succession disputes that are coming before the courts. I hasten to add that litigants have a constitutional right to approach the courts but the fact that this estate has not been finalised 23 years down the line is a cause for concern. As the record reflects, the estate record at the Kadoma Court allegedly went missing thus further complicating the state of affairs.

In *casu*, the six applicants were born to the same father and mother. The first respondent was born to a different mother but same father with the applicants. That makes them half-siblings which in itself often spells disaster in inheritance matters.

The applicants' case as amplified by the first applicant in his founding affidavit is as follows. At the time of the deceased's death, he was survived by a total of thirteen children who include the applicants and the first respondent. The first respondent who is the eldest son generally occupied a position of responsibility in the family in relation to the assets and properties left by the deceased. There was no formal registration of the estate due to logistical challenges of not being able to have the family together at one place. It was only in October 2018 that the family resolved to have the estate registered. This was done at the offices of the second respondent in Harare under D.R Number 2965/18. At the edict meeting, one Jairos B Matandire acting as a representative of the first respondent announced that the estate had already been registered at the then Kadoma Community Court and had been administered to finality. A copy of a certificate of heir in the name of the first respondent was duly produced. Presumably the applicant and those with a similar view as his expressed ignorance of the registration of the estate. The second respondent undertook to conduct investigations and thus the edict meeting was postponed. The second respondent addressed a letter to the Additional Assistant Master of the Kadoma Magistrate Court requesting for the record of the estate registration for perusal. The resident Magistrate at Kadoma responded to the effect that his office had searched the provincial archives but could not locate the record. In addition, the reference number used is different from the ones used in Kadoma.

After the response from the Magistrate Court Kadoma, the first respondent requested for time to conduct an independent search at the provincial and national archives. He was granted the indulgence by the second respondent. Whilst this process was going on, the first respondent filed an urgent application that sought to bar the second respondent from dealing with the estate as registered under DR 2965/18 pending clarification on the origins, location and authenticity of the certificate of heir WE4/158/96 Kadoma Community Court. The provisional order was granted by consent. The first respondent proceeded to search for the file through the Chinhoyi Magistrate Court but to no avail. The applicants firmly believed that the estate of the deceased was never formally registered and administered to finality as alleged by the first respondent. They questioned the authenticity of the certificate of heir. The applicants were concerned that the certificate of heir had given exclusive powers to the first applicant. This had prejudiced not only applicants but also other beneficiaries who were not able to be part of the application. It would therefore be in the best interests of justice and balance of convenience that the estate be administered *de novo* assuming that it was indeed

once registered which was highly unlikely under the circumstances. The administration of the estate under DR 2965/18 would not prejudice anyone as the process would be transparent.

The applicants thus sought a *declaratu*r in the following terms:-

1. That the certificate of heirship referenced WE4/158/96 purportedly issued to the 1st respondent in respect of the estate late Sonny Taruhla be and is hereby declared invalid and accordingly set aside.
2. That the 2nd respondent be and is hereby directed to proceed with the administration of the estate of the late Sonny Taruhla registered under DR 2965/18.
3. That the 1st respondent shall bear costs of suit on a higher scale of Attorney/client if he opposes this application.

The first respondent strenuously opposed the application. He submitted as follows. The applicants were in a manner of speaking attempting to rectify their non-opposition to the final order obtained in HC 1270/19 in which it was ordered that he remains the sole heir to the estate of the deceased as appointed and certified by the Community Court of Kadoma on the 19th of December 1996 under reference number WE4/158/96. In support, he attached a copy of the extant court order that reads as follows:-

1. The applicant remains the sole heir to the estate late Sonny Taruhla and certified so by the Community Court of Kadoma on 19 December 1996 under reference number WE4/158/96.
2. 1st respondent be and is hereby ordered and directed not to re-open the administration of the deceased estate late Sonny Taruhla reference number WE4/158/96 without an order of a court of competent jurisdiction to that effect.
3. There be no order as to costs.

There appears to be nothing new in the present application that has significantly altered or added to the circumstances pertaining as at the time that case number HC 1270/19 was filed. The Magistrate who registered the estate at Kadoma in 1996 deposed to an affidavit confirming the authenticity of the certificate of heirship. The first respondent attached an affidavit from one Caroline Chigumira who was the Magistrate in question. The applicants have not refuted the confirmation of the certificate of heirship. The applicants have gone about searching for the record in an improper manner and hence they could not locate the copy of the certificate of heir in official documents. These were raised as *points in limine.*

On the merits, the first respondent submitted as follows. The administration of the deceased estate was known by all the children and he took good care of them. In support of this contention he attached the affidavit of one Selina Forget Magwali a sister to the deceased. The applicants developed an interest in one of the inherited mines wrongly believing that the first respondent had used proceeds from there and yet he had obtained a loan from the RBZ to fund the activities. The applicants had side-lined the first applicant when they registered the estate 'afresh' and it was only at the instance of the second respondent that they were forced to involve him. The applicants are motivated by malice and ill will. One Emily Chikumba who was a wife to the deceased is the driving force behind the machinations of the applicants.

In response the applicants filed a lengthy answering affidavit and in the process a 'supporting' affidavit from Emily Chikumba was filed without seeking leave of the court. The first applicant explained the reasons why confirmation of the provisional order in HC 1270/19 was not opposed. The crux of the matter was the authenticity of the certificate of heir and there was no reason to oppose confirmation. He disavowed knowledge of Selina Forget Magwali. The other applicants adopted the first applicants answering affidavit. The fourth applicant Ratidzo Taruhla expanded her response by alleging that they knew Selina as a nurse and used to call her aunt. She was not related to the deceased in any way.

At the hearing, Mr *Kanoti* raised three preliminary points. (1) That he had been served with a copy of the consolidated index 'a few minutes' before the hearing, (2) that the report of the Master was missing and (3) that the matter was *res judicata.* In response Mr *Mupwanyiwa* stated that the matter was not *res judicata* because the cause of action in *casu* is different from that in case number HC 1270/19. The 1st and 2nd preliminary issues have no merit. With regards to the aspect of *res judicata,* it is clear that the order in HC 1270/19 specifically states that the estate of the deceased can only be re-opened through a court order. The applicants were well within their rights to seek a court order and therefore that preliminary point was dismissed.

On the merits, Mr *Mupwanyiwa* for the applicants made the following submissions. These were also based on a lengthy exchange with the court. If the court were to set aside the administration of the estate as registered in Kadoma, the old law of inheritance would still apply. Under that law, the first respondent is the eldest son and would still be entitled to inherit in his personal capacity under the male primogeniture rule. However, the applicants are beneficiaries in the deceased estate and they would be entitled to apply for support in

terms of the Deceased Persons Family Maintenance Act [*Chapter 6:03*]. If the estate is re-opened, the applicants will still have a chance to apply for maintenance. The applicants are surviving from the assets left behind by the deceased. In addition an heir under the old law of inheritance owed a duty of support to the beneficiaries. There was never an estate administration at Kadoma Magistrate Court due to the fact that the certificate of heir issued to the first respondent was not authentic. There is a pending estate registration at the Master of the High Court and if the application is granted, the applicants will have a chance to submit their concerns.

Mr *Kanoti* for the first respondent submitted that the first respondent is well prepared to co-exist peacefully with the applicants. Further that the applicants had failed to prove that the estate had not been registered. The estate was registered at the Kadoma Community Court and was finalised. Some papers however seemed to have been lost at the court. The re-opening of the estate as indicated in HC 1270/19 would cause prejudice to the first respondent. He has invested heavily in one of the mines to the extent of getting a loan.

In my view, the starting point in this matter is that there is an extant court order in HC 1270/19. The interpretation of the order is as follows:-

a. The first respondent is recognised as the heir to the estate of the late Sonny Taruhla.
b. The registration details for that estate are WE4/158/96 meaning that an estate record for the deceased was opened at the then Kadoma Community Court (which court since become part of the Kadoma Magistrate Court).
c. The estate, meaning WE4/158/96 can only be re-opened with the order of a court of competent jurisdiction.

The legal issues that arise in *casu* are as follows:-

1. Should the estate of the late Sonny Taruhla be re-opened?
2. If so, should the estate be re-opened under DR 2965/18?
3. If the estate is re-opened, what if anything will the applicants be legally entitled to from the deceased estate, i.e. will the applicants be treated as beneficiaries and if so, what would they be entitled to?

I propose to start with issue 3 above because it will also provide answers to issues (1) and (2).

The date of death of the deceased is critical because it means that his estate was to be administered in terms of what is commonly known as the old law of inheritance. At the time

of death, i.e. the 5th of September 1996, the predominant form of inheritance under customary law was the male primogeniture rule, i.e. male eldest son inheritance. A brief history will suffice. In *Chihowa* v *Mangwende,* SC -84-87, it was held that due to the then Legal Age of Majority Act, a female had acquired the same rights as a male child to inherit from her late father's estate if she was the eldest child. In *Vareta* v *Vareta,* SC -126-90, the Supreme Court departed fundamentally from the reasoning in *Chihowa* but without expressly stating that the latter decision had been overruled. The court held that one attribute of customary law that remained is generally that the eldest son is the natural heir of his deceased father's estate even if a daughter is the elder. In *Mwazozo* v *Mwazozo,* SC-121-94, the court looked at the patrilineal nature of the shona people and held that allowing daughters to inherit would result in sons-in-law benefitting and the daughters would use the wealth for the benefit of their husband's families. In *Magaya* v *Magaya,* 1999(1) 100 (SC), the decision in *Chihowa* was overruled. It was held that the appointment of male heirs to the estates of deceased Africans remained unaffected by the Legal Age of Majority Act. The contest then was between the eldest son and daughter. What is critical is not a lesson in history of the development of the law but the fact that the first respondent was rightly appointed heir to his late father's estate as confirmed in the extant court order.

The then s 68 of the Administration of Estates Act [*Chapter 6:01]* read as follows:-

> ***Estates of Africans Married by African Custom***
>
> **"68 When estate of African to be dealt with according to usage of his tribe**
>
> (1) If any African who has contracted a marriage according to African law or custom or who, being unmarried, is the offspring of parents married according to African law or custom, dies intestate his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged.
>
> (2) If any controversies or questions arise among his relatives or reputed relatives regarding the distribution of the property left by him, such controversies or questions shall be determined in the speediest and least expensive manner consistent with real and substantial justice according to African usages and customs by the provincial magistrate or a senior magistrate of the province in which the deceased ordinarily resided at the time of his death, who shall call and summon the parties concerned before him and take and record evidence of such African usages and customs, which evidence he may supplement from his own knowledge.
>
> (3) Every decision of a magistrate under this section shall be subject to an appeal to the High Court at the instance of any person alleging an interest in the distribution of such property."

I did not read the applicants' affidavits to question the appointment of the first respondent in the sense that according to the customs and usage of the customs and usages

of the Taruhlas, he would not have qualified to be appointed the heir. This could perhaps have boosted their case for the setting aside of the certificate of heir. Instead, this issue was canvassed in the applicants' heads of argument but was never covered in the founding and supporting affidavits. This issue constitutes a point of law. The law is clear that such point can be raised at any time.

In *Muchakata* v *Netherburn Mine* 1996(1) ZLR 153 (S) KORSAH JA said at 157A:

> "Provided it is not one which is required by a definitive law to be specially pleaded, a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed: *Morobane v Bateman* 1918 AD 460; *Paddock Motors (Pty) Ltd* v *Igesund* 1976 (3) SA 16 (A) at 23D-G."

In *Muskwe* v *Nyajina & Others*-SC-17-12, the court said:

> "Undoubtedly, a point of law can be raised at any time even though not pleaded. However, this is subject to certain considerations, one of which is that the court has to consider whether raising a point of law at this juncture would cause prejudice to the party against whom it is raised.
> In our view there is great prejudice to the appellant who, if the matter is decided against him, stands to lose the appeal without argument."

In my view, great prejudice will be occasioned to the first respondent who will not be given a chance to explain his understanding of the customs and usages and also to perhaps even call on expert witnesses. The court can also *mero motu* consult reported cases, texts and other sources and receive opinions orally or in writing in the ascertainment of customary law-see section 9 of the Customary Law and Local Courts Act [*Chapter 7:05*]

The old law of inheritance had provisions on what were the entitlements of the heir but also expectations. It was a role with rights and responsibilities. *Masango* v *Masango*, SC-66-86 succinctly set out what these were. An heir inherited property in their **personal capacity** (my emphasis). Their duty was to look after the dependants of the deceased. He could not for instance evict the dependants without providing them with alternative accommodation. A widow in *Mbwandawo* v *Mude*, SC-237-95 for instance was awarded maintenance to be paid by the heir. The applicants in my view have failed to show how they will benefit if the estate is re-opened. At the hearing Mr *Mupwanyiwa* tried to argue a case for the applicants to apply for maintenance in terms of the Deceased Persons Family Maintenance Act [*Chapter 6:03*]. Although this is also a question of law that can be raised at any time, this is akin to clutching at straws as the applicants never based their case on the

application for maintenance. This would have required them to overcome the first hurdle, that of proving that they are dependants of the deceased in the manner expected by the act. Instead they based their application on the fact that the certificate of heir was fraudulent and the estate needed to be re-opened. Just as with the question of customs and usages, the issue of maintenance would cause prejudice to the first respondent as he would not have been given a chance to deal fully with whether or not the applicants are dependants.

The first respondent inherited the property of the deceased in his personal capacity and a re-opening of the estate will not change the legal position. The applicants even admitted that the first respondent worked with them at one of the inherited mines. In their view they became entitled to some benefits in the deceased estate. Whatever the first respondent did was due to his own benevolence and not that the applicants are entitled to any benefit from the deceased estate. This fallacious position no doubt based on incorrect legal advice seems to have spurred the applicants on. They genuinely believe that they are beneficiaries to the deceased estate a position not supported by the law.

The second issue relates to whether or not the estate has to be re-opened under DR 2965/18? Apart from the applicants not showing that they are beneficiaries in the deceased estate, they fail on another hurdle, i.e the extant order in HC 1270/19. Clause 1 of that order confirms that the first respondent remains the sole heir to the deceased estate. The second clause gives the applicants some leeway in seeking the re-opening of the deceased estate under reference number WE4/158/96. The applicants cannot in my view seek to re-open the estate under a different DR number for what will constitute fresh winding up. An estate can only be registered once. Even if an executor is removed, the estate registration remains. A new executor is appointed to the same estate. Even if the court was inclined to set aside the certificate of heir, the estate would still remain registered as required by the law. The position of the applicants that it was them who had to determine when to register the estate is not supported by law. It is trite that every estate must be registered at law. Once an estate is registered it is allocated a number. It is that number with a corresponding file which contains vital information. It is that number that is used as a reference for estate notices in the gazette and the newspapers. All those who lodge claims against the estate and the few who come forward stating that they owe an estate money or goods use the estate registration number. A perusal of the Administration of Estates Act shows that it relates to the registration of an 'estate' not estates in relation to one death. HC 1270/19 clause 2 recognizes that the only

estate that can be re-opened is WE4/158/96. In my view, the applicants were ill-advised not to oppose confirmation of the provisional order in HC 1270/19. The confirmation has far reaching consequences to the estate of the deceased and the rights of the first respondent.

The first issue relates to whether or not the estate of the late Sonny Taruhla should be re-opened as recognised in clause 2 of HC 1270/19? This can be decided by looking at the requirements of a *declaratur* as per section 14 of the High Court Act [*Chapter 7:01*]. In *Johnson* v *AFC*, 1994(1) ZLR 95 @ 98, CHIDYAUSIKU J (as he then was) summarised the three basic requirements for an application to succeed as follows:-

1. The person instituting the proceedings must be an interested party.
2. The court must inquire and determine an existing, future or contingent right or obligation.
3. The case must be a proper one for the court to exercise the discretion conferred on it.

Whilst the applicants may be interested parties in the sense that they are children of the deceased, it is my considered view as expressed in dealing with legal issue one that the applicants do not have any rights current or future given the fact that the appointment of the first respondent as heir cannot be impugned. In addition, as I have already stated his appointment was in terms of the old law of inheritance as applicable to estates of persons who died before the 1st of November 1997. The law applicable as at the death of the applicants' and first respondent's father was based on the male primogeniture rule. As conceded by Mr *Mupwanyiwa*, the first respondent by virtue of being the heir inherited property in his personal capacity. That position will not change. The order in HC 1270/19 remains extant and this is not a case which the court can exercise discretion in favour of the applicants. As a result, the applicants have failed to make a case for a *declaratur.*

The registrar is directed to bring this judgment to the attention of the Master of the High Court, the second respondent in this matter.

DISPOSITION

It is ordered as follows:-

1. The application be and is hereby dismissed.
2. The applicants shall pay the costs of suit jointly and severally each paying the other to be absolved.

Mufadza and Associates, Applicant's Legal Practitioners
Kanoti and Partners, first respondent's Legal Practitioners