SHEILA GWASIRA
versus
LAZARUS MURENDO
and
TOKOZANI MAZVIMBAKUPA
and
ZAMBE NYIKA
(In his capacity as executor of the
Estate Late Shepherd Gwasira)
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 24 September and 7 October 2021

Opposed Application

Mr *T W Nyamakura*, for the applicant
Mr *C Warara,* for the 2nd respondent
Mr *C J Mahara*, for the 3rd respondent

MUCHAWA J: Following the confirmation by the first respondent, acting in his capacity as provincial magistrate, of the second respondent as a co-surviving spouse with the applicant, in terms of customary law to the estate of the late Shepherd Gwasira, the applicant lodged this application for review.

The grounds of review are stated as follows:

1. There was gross irregularity in the manner in which the first respondent conducted and concluded the confirmation proceedings or process in that first respondent lacked territorial jurisdiction to "confirm the purported customary marriage between Tokozani Mazvimbakupa (second respondent) and the late Shepherd Gwasira given that the marriage

in issue was not solemnized in Manicaland nor did the cause of action arise in Manicaland where the first respondent is stationed. Second respondent clearly did forum shopping.

2. There was procedural impropriety in the manner in which the first respondent conducted and concluded the proceedings in that the first respondent did not call all the interested parties to the dispute namely, I, the beneficiaries of the Estate, the brothers and sisters of the deceased as well as the executor of the Estate. By so doing the first respondent violated my right to be heard and that of other interested parties.
3. There was illegality in the manner in which the first respondent conducted and concluded the proceedings in that, first respondent confirmed my marriage in my absence and not at my instance and without evidence in support thereof. I am not known to the third witness who purportedly witnessed my marriage whilst the second witness is merely a nephew to my late husband and not a brother as purported.
4. The first respondent grossly erred and misdirected himself in dealing with a registered estate in circumstances where he did not satisfy himself on the status of the estate and when he was informed of the registered estate and the nature of the dispute that was before the executor of the estate.
5. The first respondent erred and seriously misdirected himself in confirming second respondent's customary law marriage in circumstances where there was no evidence in support of the purported customary law marriage.

It is prayed that the confirmation of the customary law marriage between Tokozani Mazvimbakupa and the late Shepherd Gwasira issued out on 27 April 2021, be set aside for impropriety with second respondent paying costs of suit on an attorney-client scale.

In opposition, the second respondent raised two points *in limine*. One was that the application is fatally defective in that it does not state the exact relief as required in terms of r 257 of the High Court Rules, 1971. This point was however abandoned at the hearing of the matter after I condoned the late filing of heads of argument, by the second respondent. The second point persisted with is that the application has been prematurely filed as what should be impugned is the Master's acceptance of the confirmation of customary marriage as that would then lead to his decision on who are the surviving spouses and their ranking. It was argued on the strength of the case of *Stella Hapaguti* v *Cecil Madondo N.O & Anor* HH 94-15 that this court has no jurisdiction

to determine such an issue which falls within the province of the Master. Mr *Warara* submitted that the record shows that the Master had accepted the second respondent as a wife and had dealt with the estate as such. He further countered that this court would be jumping the gun if it were to pronounce itself on the first respondent's certificate before it is presented to the fourth respondent and he makes a decision on it.

According to Mr *Warara*, in terms of s 68 of the Administration of Estates Act, as amended the first respondent's confirmation of customary marriage, gives the Master the requisite starting point to decide if he should endorse the decision. It was averred that the consequence of such endorsement is that one cannot challenge the processes leading to the Master's ranking of a wife. It was argued that the application for review must necessarily challenge the decision of the Master and not that of the Magistrate. It was further argued that this court has no jurisdiction to stand in the shoes of the Master and substitute its discretion for that of the Master. The only reviewable decision in this case was alleged to be that of the Master. This application was alleged to be a nullity therefore on the strength of the case of *Macheka* v *Charasa* HH 149-17.

Mr *Nyamakura* submitted that the second respondent is misreading the law as the decision that ignited proceedings is that of the first respondent who was acting as a court and whose decision would be binding until set aside, even if he acts as an administrative authority.

The case of *Macheka* v *Chasara* was alleged to be important as it held that the power of a magistrate to hold an inquiry in terms of Administration of Estates Act, no longer exists in our law, therefore what was done is no longer lawful as all that power is now reposed in the Master. Mr *Nyamakura's* position is well supported by legal authorities on this subject particularly the *Macheka* v *Chasara* case cited by second respondent. Citing the case of *re Estate Chirunda* 2006 (2) ZLR 264 (H), the legal position is succinctly set out below and I can do no better that quote extensively therefrom:

> At p 265 G-266 F thereof MAKARAU J (as she then was) stated that:-
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> "One issue exercised our minds in this appeal. It is the jurisdiction of the magistrates' court to hold an inquiry of the nature it did. That it was invited to hold the inquiry by the letter from the executor that I have largely reproduced above is not disputed. The invitation to the provincial magistrate is in that part of the letter that I have highlighted. What exercised our minds is whether the magistrates' court should have accepted the invitation of the executor to hold an inquiry in the matter.

> It is trite that prior to 1997, the law provided for a manner of settling disputes or controversies arising from the administration of estates of Africans dying intestate in a speedy and less expensive way than ordinary litigation. This was through the provisions of the old s 68(2) of the Administration of Estates Act [*Chapter 6:01*]."

After citing the section the learned judge proceeded to state that:-

> "The law relating to the administration of estates was radically amended by Act No. 6 of 1997. The amendment to the law saw the deletion and substitution of the entire s 68 dealing with the administration of the estates of intestate Africans. A new Part IIIA has now substituted the old s 68 of the Act and it now deals with estates of persons subject to customary law where such estates are not disposed of by will.
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> Apart from the noticeable change in the language employed in the amendment which now progressively refers to "persons subject to customary law" rather than to "Africans", reference of disputes arising from such estates to a provincial magistrate or senior magistrate was repealed and was not re-enacted. This may have been by design or was an oversight on the part of the draftsperson. A new manner of dealing with questions or controversies arising from the estates of persons subject to customary law has been introduced. A reading of the Act appears to give the Master extensive powers to determine whether an estate is to be distributed in terms of customary law or not and the plan in terms of which the estate is to be distributed. It also provides that any party aggrieved by the decision of the Master in regard to his powers under this new law may appeal to the High Court."

The learned judge proceeded to conclude that:

> "The executor was wrong in referring the matter to the magistrate and the magistrate was also wrong in holding the inquiry and even issuing a ruling when he had no such jurisdiction."

The facts of the matter of *re Estate Chirunda* were also about a dispute as to whether a second woman was a surviving spouse of the deceased they fit squarely herein as does the legal position.

The first respondent had no jurisdiction to purport to confirm the existence of a customary law marriage between the second respondent and the late Shepherd Gwasira. There was no legal basis for him to hold an inquiry as powers previously exercised by magistrates were repealed by Act No. 6 of 1997. There is no merit in the preliminary point. In fact, the second respondent has dug her own grave by raising the preliminary point.

Mr *Warara* attempted to argue that the confirmation was sought for pension payments and not for the estate per se and section 68 of the Administration of Estates Act would not apply. Clearly, Mr *Warara* was arguing in circles and departing from the case made in the pleadings

before me. He cannot have his cake and eat it too. The pleadings show that the dispute was about the status of the second respondent in relation to the estate of the late Shepherd Gwasira as her claim of being a surviving spouse was being challenged. That is why she approached the first respondent. It is inconsequential that the form used for that material confirmation that the second respondent and applicant were customary law wives of the late Shepherd Gwasira appeared in the manner of a form addressed to the Director of the Pensions Office.

Having found that the first respondent had no jurisdiction to act as he did, there is nothing to be gained by detaining myself on the rest of the grounds of review.

Mr *Mahara*, counsel for the third respondent, indicated that the third respondent would be bound by the court's decision.

I accordingly order as follows:

1. The application for review be and is hereby granted.
2. The confirmation of the marriage between Tokozani Mazvimbakupa and the late Shepherd Gwasira issued by Esquire L Murendo on 27 April 2021 be and is hereby set aside.
3. The second respondent is to pay costs.

Messrs Bere Brothers, applicant's legal practitioners
Warara & Associates, second respondent's legal practitioners
Muvingi and Mugadza, third respondent's legal practitioners