JOYCE ZWANE

Versus

SIMELELE MASUKU
(In her capacity as Executrix Testamentary of Estate late Obert Dube DRB 170/22)

And

CEPHAS MAVONDO
(In his capacity as Executor Testamentary of Estate late Obert Dube DRB 170/22)

And

ASSISTANT MASTER OF HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 25 July 2023 & 24 August 2023

Court application

Ms. M. V. Nyika, for the applicant
M. Ncube, for the 1st respondent
P. Mukono, for the 2nd respondent

DUBE-BANDA J:

[1] This is an application for a declaratory order. The order sought is couched in the following terms:

i. That the last Will and Testament of the late Obert Dube registered and accepted under DRB 170/22 be and is hereby declared invalid and set aside.
ii. The appointments of 1st and 2nd respondents as the Executrix and Executor Testamentary of the Estate of the late Obert Dube DRB 170/22 be and is hereby reversed.
iii. The certificate of authority issued to the 1st respondent in the Estate of the Late Obert Dube DRB 170/22 be and is hereby revoked.
iv. The 3rd respondent be and is hereby ordered to convene an edict meeting within 30 days of the granting of this order for the purpose of appointing an Executor of the Estate of the Late Obert Dube DRB 170/22 in terms of the Administration of Estates Act [Chapter 6:01].
v. Costs of suit on a legal practitioner and client scale.

[2] The application is opposed by the first and the second respondents. The third respondent neither filed opposing papers nor participated in these proceedings, and I take that it has made a decision to abide by the decision of the court. For convenience and where the context permits, the applicant shall be referred to as "Zwane", the first respondent as "Masuku" and the second respondent as "Mavondo." And Obert Dube as either the "testator" or the "deceased."

The background facts

[3] This application will be better understood against the background that follows. In 1975 the applicant married the deceased in terms of an unregistered customary law union. On 26 June 1981 the parties registered their marriage in terms of the African Marriages Act [Chapter 238]. The parties have six children who are now adults. On 11 May 2018 the deceased married Masuku in terms of the Marriage Act [Chapter 5:11]. There is one minor child of this marriage. Obert Dube died on 4 January 2022. At the time of his death, both marriages were subsisting.

[4] On 19 November 2021 the deceased executed a Will, and on 14 February 2022 the Master of the High Court accepted the Will as his last testament. The first and the second respondents are testamentary executors of the estate of the deceased. The Will bequeaths an immovable property known as number 1405 Mapisa, Kezi to the first respondent, and the residue of the estate to what is called a "Trust Estate" to be administered by the first and the second respondents. The beneficiaries of the Trust are the first respondent and all the children of the deceased. The applicant is not a beneficiary to the estate of the testator.

[5] The applicant avers that she and the testator acquired certain properties in equal shares. The properties are listed as these: immovable properties: Maphisa Omadu Lodge stand number 184; Limpopo Lodge stand number 2905; two homesteads one in Gohole, Maphisa and the other in Shashe; Shashe cattle ranch; farm in Tuli Mangwe; undeveloped commercial stand number 195, Maphisa; and stand number 405 Maphisa, Kezi. Movable properties: 149 head of cattle; 22 calves; 77 goats; 20 sheep; Ford Ranger Reg. number ADL 8918; Truck Reg. number ABM 4099; Toyota Hilux Reg. number ABM 5268; Tractor; Compressor; Engines at the farm at Shashe and Gohole; household goods at the homestead: No. 113 Matopos Road, Famona, Bulawayo and Shashe homestead.

[6] The applicant avers further that the testator bequeathed jointly owned properties; that she was unfairly disinherited as the surviving spouse; that at the time the testator executed the Will he was in a diminished health and mental state; and that he was too old as to be able to execute a valid Will. It is against this background that the applicant has launched this application seeking the relief mentioned above.

The applicant's case

[7] The applicant avers that the Will is invalid. She avers further that she jointly acquired the properties in question with the testator, and that she is also the surviving spouse and hence she has a lawful claim against the estate. She avers further that the first respondent cannot expect her to produce proof of ownership to the properties, because she acquired the properties together with the testator for their benefit and the benefit of their children. And it was decided to register the properties in the name of the testator. It is averred that at the time the testator executed the Will his health had diminished and he was advanced in age to be capable to execute a valid Will. He bequeathed jointly owned properties as if he was the sole owner.

[8] In the heads of argument it was submitted that the Will is invalid on the basis that it disinherited the applicant a surviving spouse of the testator. It was argued further that the applicant contributed in the acquisition of the properties bequeathed to the first respondent. And that the applicant has established that she is the surviving spouse of the testator and a co-owner of the properties bequeathed in the Will. It was submitted that while it is not in dispute that in terms of s 5(1) of the Wills Act [Chapter 6:06] a testator has freedom of testation, however that freedom is limited by s 5 (3) (a) of the Act in as far as the disinheritance of a surviving spouse is concerned. It was submitted further that the Will is not in sync with s 5(3) therefore, and it must be declared invalid.

[9] Ms. *Nyika* counsel for the applicant in her oral submissions argued that the applicant is a joint owner of the property bequeathed by the testator. Although she is not a registered owner, she has shown that she contributed to the acquisition of the properties in issue. It was argued that the testator had no right to bequeath 100% of the properties when he owned 50% thereof.

It was submitted further that the testator could not bequeath what he did not own in his lifetime, and to the extent that he purported to bequeath what he did not own, the Will is a nullity.

[10] In her reply to the submissions made by counsels of the first and second respondents, Ms *Nyika* argued that in a case of joint ownership of property s 2(1) of the Married Persons Property Act does not apply. The subsection says:

> "Community of property and of profit and loss and the marital power or any liabilities or privileges resulting therefrom shall not attach to any marriage solemnized between spouses whose matrimonial domicile is in Zimbabwe entered into after the 1st January, 1929, unless such spouses shall, by an instrument in writing, signed by each of them prior to the solemnization of their marriage and in the presence of two persons, one of whom shall be a magistrate, who shall subscribe thereto as witnesses, have expressed their wish to be exempt from this Act."

[11] Counsel argued that the applicant does not contest that the properties were registered in the name of the testator; however, her claim was based on the fact that she made an equal contribution to the acquisition of the properties, hence she is a joint owner. *Counsel argued further that the respondents have mischaracterized the applicant's case, in that they argue that she seeks to have the Will invalidated on the grounds that she was disinherited as a surviving spouse, that was not the applicant's case. Her case was that she contributed to the acquisition of the properties bequeathed by the testator.* And that if the Will was not invalidated, she will lose what she worked for, and that she takes no issue with the deceased bequeathing to whosoever, as long as he bequeaths his half share. Ms *Nyika* submitted that a case had been made for the relief sought and prayed that an order be granted in terms of the draft order set out at the beginning of this judgment.

The 1st and the 2nd respondents' case

[12] The first respondent contended that the applicant had not met the requirements of a declaratory order, in that she had not established a "tangible and justifiable interest" in the relief sought in this matter. It was submitted further that she had not shown an existing, future or contingent right or obligation upon which the court has to exercise its jurisdiction to grant a declaratory order, in that no property of the applicant had been subjected testamentary disposition by the testator. It was argued further, that even if the Will is declared invalid, the

applicant has not shown that there is a right that will flow towards her. In other words, the applicant will not benefit from the granting of the declaratory order sought. It was submitted that the applicant is disabled from seeking a declaratory order.

[13] The first respondent avers further that the applicant has not been disinherited as no property belonging to her has been bequeathed by the testator. His testamentary dispositions relate to his own properties which he held in terms of the law relating to property of married persons. Reference was made to s 2(1) of the Married Persons Property Act quoted above. The first respondent submitted that the applicant has not adduced evidence to show that the testator included in his testamentary disposition any of her property.

[14] The second respondent avers that if the applicant was disinherited, she was lawfully disinherited as the testator executed a Will which on the face of it is complete and regular. It was contended that the applicant had not adduced evidence to show that the bequeathed properties were jointly owned. It was argued further that in any event, even if the property was jointly owned, that could not be a basis of invalidating the Will. It was contended further that the applicant had not been unfairly disinherited as a surviving spouse, and in any event if she was unfairly disinherited, that could not be a basis of invalidating the Will.

[15] The first and second respondents submitted that the applicant has failed to make a case for the relief she was seeking, and the application must be dismissed with costs of suit.

The law

[16] The applicant has come to court seeking a declaratory order. In *Musimhi v Public Service Commission & Ors* 2019 (3) ZLR 865 (H), CHIRAU-MUGOMBA J said:

> "In *Munn Publishing (Pvt) Ltd v Zimbabwe Broadcasting Corporation* 1994(1) ZLR 337(S), Gubbay CJ pronounced the remedy available in terms of s 14 of the High Court Act [Chapter 7:06] which reads:
>
> 14. High Court may determine future or contingent rights
> The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future and contingent right of obligation,

notwithstanding that such person cannot claim any relief consequential upon such determination.

The learned Chief Justice said at 343H-344F:

The condition precedent to the grant of s declaratory order is that the applicant must be an interested party, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. See *United Watch & Diamond Company (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C) at 415; *Milani & Anor v South African Medical & Dental Council & Anor* 1990 (1) SA 899 (T) at 902G-H. The interest may relate to an existing future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest. See *Anglo-Transvaal Colliers Ltd v SA Mutual Life Assurance Soc* 1977 (3) SA 631 (T) at 635G-H. But the existence of an actual dispute between persons interested is not a statutory requirement to the exercise by the court of jurisdiction. See *Ex parte Nell* 1963 (1) SA 754 (A) at 759-760A. Nor does the availability of another remedy render the grant of a declaratory order incompetent. See *Gelcon Investments (Pvt) Ltd v Adair Properties (Pvt)* 1969 (2) RLR 120 (G) at 128A-B; 1969 (3) SA 142 (R) at 144D-F.

This is the first stage of the determination by the court.

At the second stage of the inquiry, it is incumbent upon the court to decide whether or not the case in question is a proper case for the exercise of its discretion under s 14. What constitutes a proper case was considered by WILLIAMSON J in *Adbro Investments Co Ltd v Minister of the Interior and Ors* 1961 (3) SA 283 (T) 285B-C, to be one which generally speaking, showed that:

> '… despite the fact no consequential relief is claimed or perhaps could be claimed in the proceedings, yet nevertheless justice or convenience demands that a declaration be made, for instance as to the existence of or as to the nature of a legal right claimed by the applicant or of a legal obligation claimed to be due by a respondent. I think that a proper case for a purely declaratory order is not made out if the result is merely a decision of mere academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant's position with reference to an existing future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought.'"

See *Zvomatsayi & Ors v Chitekwe No & Anor* 2019 (3) ZLR 990 (H).

[17] The substantive relief is sought in terms of the Wills Act. Section 5 of the Wills Act provides for the capacity to make dispositions by Will. The provision states as follows:

"5 Power to make dispositions by will
(1) Subject to this Act and any other enactment, any person who has capacity in terms of section 4 to make a will may in his will-
(a) Make provision for the transfer, disposal or disposition of the whole or any part of his estate.

(2) Subject to this Act and any other enactment, a will shall not be invalid solely because the testator has disinherited or omitted to mention any parent, child, descendant or other relative or because he has not assigned any reason for such disinheritance or omission.

(3) No provision, disposition or direction made by a testator shall operate so as to vary or prejudice the rights of-
(a) Any person to whom the deceased was married to a share in the deceased estate or in the spouses' joint estate in terms of any law governing the property rights of married persons."

[18] In *Chigwada v Chigwada* SC 188/20 the Supreme Court held that the law that governs the property rights of married persons that is made mention of in section 5(3)(a) of the Wills Act is the Married Persons Property Act [Chapter 5:12] which states that Zimbabwean marriages are out of community of property. A marriage that is out of community of property entails that the property of the spouses obtained by either of the spouse in the course of the marriage is individually owned by the spouses in their individual names. Therefore, the position is now settled. There is now certainty that the law that regulates the property rights of spouses referred to in the Wills Act is the Married Persons Property Act.

[19] Thus the Supreme Court settled the conflicting interpretations of section 5(3)(a) of the Wills Act. See *Estate Wakapila v Matongo* HH 71/08; *Roche v Middleton* HH 198/16; *Chimbari v Madzima* HH 32/13; *Chiminya v Chiminya* HH 272/14. The Court held that section 5(3)(a) of the Wills Act could not assist an aggrieved spouse as the provision does not take away the freedom of testation that is entrenched in section 5(1) of the Wills Act. To be protected by section 5(3)(a) of the Wills Act, an aggrieved spouse had to prove that the testator executed a Will which its implications were to dispose her or him of her or his own property. The court stated that in terms of section 5(3)(a) of the Wills Act, a testator is at liberty to include in the disposition by Will assets containing of his or her estate. The Court held that a surviving spouse can be disinherited by a Will complying with the formalities of a Will. It reiterated that section 5(3)(a) of the Wills Act should not be read to mean that a husband or wife cannot disinherit the

surviving spouse by a Will and further stated that the requirements of Will writing are not to the effect that the testator must leave his or her estate to the surviving spouse. The court decision answered the question on the interpretation of section 5(3)(a) of the Wills Act. On one hand the implications of the court decision for testamentary dispositions are that based on the freedom of testation, a spouse can be disinherited through a Will.

[20] On the other hand a testator cannot bequeath property belonging to the other spouse. In *Chigwada v Chigwada* (*supra*) @ 17 of the cyclostyled judgment the court said:

> "The purpose of s 5(3)(a) of the Wills Act is to provide protection for the property of estate belonging to the other spouse from being disposed of by the testator by will as if it part of his or her own estate. The effect of s 5(3)(a) of the Wills Act is that, if the property belongs to the other spouse in terms of the law governing the property rights of married persons, the execution of the will disposing of that property is a nullity."

[21] It is against the backdrop of the law and these legal principles that I determine this application.

The application of the law to the facts

[22] The first respondent attacked the applicant's right to seek a declaratory order in this matter. In this case the applicant and the first respondent all hold marriage certificates. Both marriages are valid and at par for the purposes of inheritance. See *Ndlovu v Ndlovu* 2011(1) ZLR 81 (H); *Musimhi v Public Service Commission & Ors* 2019 (3) ZLR 865 H. The applicant is a spouse for the purposes of inheritance. She therefore has an interest in the estate of the testator. I am satisfied that she has direct and substantial interest in the subject matter of this litigation. This is not a case of mere academic interest to the applicant. In the event she succeeds, and the Will is declared invalid there would be tangible and justifiable advantage to her, in that she will be a beneficiary in the estate of the deceased. I repeat, the applicant is a spouse for the purposes of inheritance. See s 68(4) of the Administration of Estates Act [Chapter 6:01], which says:

> "A marriage contracted according to the Marriage Act [*Chapter 5:11*] or the law of a foreign country under which persons are not permitted to have more than one spouse shall be regarded as a valid marriage for the purposes of this Part even if, when it was contracted, either of the parties was married to someone else in accordance with

> customary law, whether or not that customary law marriage was solemnised in terms of the Customary Marriages Act [*Chapter 5:07*]:
> Provided that, for the purposes of this Part, the first-mentioned marriage shall be regarded as a customary-law marriage."

[23] Therefore, the applicant meets the jurisdictional requirements to approach this court seeking a declaratory order this matter. She has established a procedural right to approach this court seeking a declaratory order. The contention that she has not made a case to approach the court by way of a declaratory order has no merit.

[24] In oral argument Ms. *Nyika* abandoned the challenge based on that at the time the testator executed the Will he was in a diminished health and mental state, and that he was too old to execute a valid Will. This concession was well taken, I say so because in terms of s 4(4)(a) of the Wills Act the burden of proving that at the time of making a Will, the testator was mentally incapable of appreciating the nature and effect of his act shall rest on the person alleging it. The applicant adduced no evidence to support the challenges anchored on these grounds. See *Tavengwa v Tavengwa* HB 173/04.

[25] The attack anchored on the contention that the applicant was disinherited as the surviving spouse was not abandoned, and therefore it has to be determined. It is incumbent upon a court before which an issue is made to determine it. See *Heywood Investments (Private) Limited t/a GDC Hauliers v Zakeyo* SC 32/13. The issue therefore is whether a surviving spouse can be disinherited in a Will? The Supreme Court in *Chigwada v Chigwada* (*supra*) decisively settled this question on whether a surviving spouse can be disinherited in a Will. The court held that a surviving spouse can be disinherited by a Will complying with all the formalities of a Will. Precedent has been established and is binding. Precedent established by the court is binding on this court. Therefore, the issue of whether a surviving spouse can be disinherited in a Will cannot be re-visited by this court. It is settled.

[26] The remaining challenge on the validity of the Will is that the properties bequeathed by the testator were jointly owned. In *Chigwada v Chigwada* (*supra*) the court held that effect of s 5(3) of the Wills Act is that a testator must not include in the disposition the property belonging to the other spouse except by his or her consent. He or she must include in the

disposition by will assets consisting of his or her own estate. Any inclusion in the Will of the property belonging to the other spouse, without their consent renders the Will nullity.

[27] The burden of proof rests on the applicant to prove the existence of the joint ownership of the properties bequeathed by the testator. The rule is "he or she who avers, must prove." This starts with the rule that the party who brings the case must also adduce evidence to prove the case. Bearing the burden is not merely about bringing an abundance of evidence to court, but rather it is about bringing the most relevant evidence to prove the facts relied on. The standard of proof is on a balance of probabilities, this means that the evidence relied on by the party shows that it is more probable than not that the situation happened as the evidence suggests. See *Millier v Minister of Pensions* [1947] 2 AII ER 372, 374; *Pillay v Krishna & Another* 1946 AD 946 at 952-953; *Lungu & Ors v Reserve Bank of Zimbabwe* SC 26/21. If there is a deadlock, where both parties have brought evidence which presents an equally probable version of the event, then the party bearing the burden of proof has failed to reach the required standard of proof to show that their version is more probable than the other party's version.

[28] The applicant has not adduced acceptable evidence of the joint ownership of the property bequeathed by the testator. In fact, she says that the first respondent cannot expect her to produce proof of ownership to the property, because she acquired the properties together with her husband for their benefit and that of their children. I disagree. The law of evidence is that she who avers, must prove. The applicant brought this case to court and it is her who must adduce evidence to prove her case. There must be evidence of joint ownership of the property, and there is none.

[29] It is clear that properties bequeathed are in the name of the testator, e.g., stand 1405 Maphisa, Kezi; stand number 184 Maphisa Township; Ford Ranger vehicle; stand 27 Maphisa Township; and stand 195 Maphisa Township. There is no evidence to gainsay the fact that the properties bequeathed by the testator are his own property. Based on the freedom of testation, the testator had a lawful right to bequeath his property to whosoever he so wished by testamentary disposition.

[30] My view is that a case has not been made for the relief sought. The question raised by the second respondent that even if the property was jointly owned, that could not be a basis of

invalidating the Will does not arise. I say so because the applicant has not overcome the first huddle of proving joint ownership. She has not discharged the *onus* on her of showing that she has made a case for the relief she is seeking. It is for these reasons that this application must cannot succeed. It stands to be dismissed with an appropriate order of costs.

Costs

[31] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule. The first respondent had initially sought costs on a legal practitioner and client scale. Mr. *Ncube* abandoned costs on a legal practitioner and client scale and sought costs on a party and party scale, contending that the applicant is just a victim of poor legal counsel. Accordingly, the applicant must pay the first and the second respondents' costs on a party and party scale.

In the result, it is ordered as follows:

i. The application be and is hereby dismissed.
ii. The applicant to pay the first and the second respondents' costs on a party and party scale.

Magaracha Law Chambers, applicant's legal practitioners
Ncube Attorneys, 1st respondent's legal practitioners
Mhishi Nkomo Legal Practice, 2nd respondent's legal practitioners