

THULISILE SIBANDA

And

MTHOKOZISI SIBANDA

And

SUKOLUHLE MATAYAYA (nee SIBANDA)

Versus

**THE ADDITIONAL MASTER OF THE
HIGH COURT, BULAWAYO**

And

LIKWA SIBANDA (nee NKALA)

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 19 SEPTEMBER 2022 AND 20 APRIL 2023

Opposed Application

N. Mazibuko, for the applicants
No appearance for the 1st respondent
Ms J. Mugova, for the 2nd respondent

MOYO J: This is an application wherein applicant seeks the following relief:-

1. It be and is hereby declared that by virtue of the operation of proviso
(1) to section 11 of the Administration of Estates Act (Chapter 6:01), the 1st respondent did not have the power to declare the Last Will and Testament of the late Andrew Sibanda executed on 16 December 2013 null and void.
- (2) It be and is hereby declared that by operation of section 16 (4) and (5) of the Wills Act (Chapter 6:06), the Last Will and Testament of the late Andrew Sibanda executed on the 16th December 2013 be and is hereby declared to be

valid notwithstanding the marriage of the late Andrew Sibanda to Likwa Nkala, the 2nd respondent herein.

3. It be and is hereby declared that having registered the Last Will and Testament of the late Andrew Sibanda executed on the 16th of December 2013 upon registration of his estate under case number DRB 1168/20 the 1st respondent became *functus officio* and did not have the power to reverse her decision.

An amendment was sought during the hearing of the matter so that paragraph 4 of the draft order would read:-

4. It be and is hereby declared that the 1st respondent is obliged to have the estate of the late Andrew Sibanda registered under DRB 1168/20 taking into account the provisions of the Last Will and Testament of the late Andrew Sibanda executed on 16 December 2013 unless the High Court through an appropriate legal action, by any interested party, declares the same to be invalid.

Clause 5 of the draft order was sought to be deleted during the hearing.

Clause 6 then became clause 5 and therein applicants asked for costs of suit.

At the hearing of the matter, respondent's counsel raised preliminary objection to the relief being sought in the draft order in that paragraphs 2-5 therein applicant was claiming consequent relief.

The 2nd objection was on the procedure used in that applicant should have used the review procedure as opposed to an application for a declaratur and that the matter should be struck off the roll with costs. Looking at the relief sought indeed there are numerous problems with it.

Applicants seek a declaratur that the Master wrongly declared the Last Will and Testament of the late Andrew Sibanda executed on 13 December 2013 as null and void as the Master used powers that she did not have since clearly in terms of the law only the High Court has those powers. The applicants further state that following the declaration on the Master's powers, this court ought to direct that the estate devolves per the Will.

The problem with this relief is that applicants seem to have sought to do a hybrid application that incorporates a review and a declaration in that applicants seek that the Master's actions be declared null and void thus set aside, but the applicants also seek that the Will be reinstated and a declaration be made that the estate should devolve per the Will. I hold the view that even if it were to be held that the Master exceeded her powers in declaring the Will invalid, this court cannot on this platform proceed to declare the Will as valid as clearly that is a power that the court can only exercise on review, that is to set the decision aside and then substitute it. In other words whilst a case may well be made for the declaration against the Master exercising powers she does not have, whether the Will is valid or not amounts to reviewing the Master's decision which is why respondent's counsel attacks the relief as not being appropriate. In essence the applicants want this court to set aside the Master's decision and then go on to review same and substitute it with its own. The appropriate platform for such a remedy is a review.

Applicants' intention right from the face of the application is to claim a declaratur accompanied by a substitution of the Master's decision which is clearly a power I can exercise on a review of the Master's decision.

I agree with the respondents that applicant is seeking a review and substitution of the Master's decision under the guise of a declaratur. The appropriate remedy is therefore a review. It does not matter in my view what applicants call their application, what matters, is the substance of the application as well as the relief sought, hat is what makes the application regardless of what applicants choose to call it.

It is for these reasons that I will strike the matter off the roll.

The application is accordingly struck off the roll with costs.

Calderwood, Bryce Hendrie & Partners, 1st – 3rd applicants' legal practitioners
Messrs Majoko and Majoko, 2nd respondent's legal practitioners