

OTILLIA BHEBHE (NEE TSHUMA)

Versus

**ESTATE LATE ELIAS BHEBHE (represented by Barbara Lunga
of Impact Trust and Executor (Pvt) Limited)**

And

SIZZIE BHEBHE (NEE NCUBE)

And

THE ASSISTANT MASTER (N.O.)

And

THE CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 18 OCTOBER 2011 & 14 JUNE 2012

Miss Y. Mbayiwa for plaintiff

K. Phulu for defendants

Civil Trial

NDOU J: The plaintiff seeks an order declaring her marriage to the now deceased invalid. She also seeks an order declaring her the exclusive owner of all the assets acquired by herself personally and in the name of the deceased on the basis of the invalid marriage including stand number 7095 Nkulumane, Bulawayo. She also seeks an order barring the 2nd defendant from laying any claims against any assets that were acquired by plaintiff and the deceased between 18 June 1984 and 2 April 2000.

The salient facts of this matter are the following. The 1st defendant is the Estate Late Elias Bhebhe represented by Barbara Lunga in terms of the letters of administration issued by the Assistant Master of the High Court (3rd defendant).

The 2nd defendant is the surviving spouse in terms of her marriage with the deceased contracted on 12 July 1975. The late Elias Bhebhe separated from his wife, 2nd Defendant around 1980. Thereafter the late Elias Bhebhe started a relationship with the plaintiff. Notwithstanding the fact that his civil marriage to the 2nd defendant was not yet dissolved, on 18 June 1984, the late Elias Bhebhe got “married” to the plaintiff in terms of the African Marriages Act (Chapter 238) (now Customary Marriages Act [Chapter 5:07]). The plaintiff’s case is basically that until his death, the late Elias Bhebhe never disclosed to her that his civil marriage to 2nd defendant was still in subsistence. Prior to their separation, the late Elias Bhebhe and the 2nd defendant had been allocated stand number 7665 Pumula North by the 4th defendant (City of Bulawayo). On the date the late Elias Bhebhe got “married” to the plaintiff, he applied to the 4th defendant for a rented dwelling house. In the said application, the late Elias Bhebhe recorded the plaintiff as his wife. As the late Elias Bhebhe was already a holder of the right, title and interest in and to stand number 7665 Pumula North, the 4th defendant allocated him stand number 7095 Nkulumane, *supra*, by simply transferring the late Elias Bhebhe’s right, title and interest in and to stand number 7665 Pumula North to stand number 7095 Nkulumane. This transfer was done on 15 November 1985. On 23 December 1985, 4th defendant issued the late Elias Bhebhe and plaintiff a certificate of occupation and both the late

Elias Bhebhe and the plaintiff signed on it as husband and wife. The late Elias Bhebhe was not employed at the time that stand number 7095 Nkulumane was allocated to him. The plaintiff's case is that she single-handedly contributed towards the requisite deposit and loan repayments to the 4th defendant through monthly deductions from her salary even up to the date she issued summons in this matter. When stand number 7095 Nkulumane was allocated to the late Elias Bhebhe it was a four-roomed house. The property has since been extended by additional four (4) rooms. The plaintiff's case is that all this was largely through her contributions. At the commencement of the trial plaintiff's claim was amended by consent to add the following prayers:

"ALTERNATIVELY

- (e) an order that the immovable residential property being house number 7095 Nkulumane, Bulawayo be valued by an independent estate agent and from the value so determined the plaintiff be awarded 50% thereof; and
- (f) an order that the costs of the valuation be shared equally between the plaintiff and 2nd defendant."

Plaintiff, Otilliah Bhebhe, testified as the sole witness in support of her case. She is a nurse employed by the City of Bulawayo from 1 January 1987. Prior her joining the City Council she had been employed by the Ministry of Health from 1976 to 1986. As alluded to above she got "married" to the late Elias Bhebhe on 18 June 1984 and she produced the marriage certificate as an exhibit. At the time of the "marriage" she was resident in Plumtree and the late Bhebhe at Mpopoma. She said at the time she got "married" she asked the late Bhebhe whether he had a house and he said he had been resident in Pumula but the City Council ended up repossessing the house because he failed to pay rates as he was unemployed.

Sometime in 1985, when she was still resident in Plumtree, the late Bhebhe contacted her telephonically and said he had found a house in Nkulumane and told her to come and pay deposit for it. The late Bhebhe had applied for the house. She travelled from Plumtree. She collected her marriage certificate and proceeded to Tshabalala Housing Office. She paid the deposit required by the City Council. She paid a deposit of Z\$408,11. She paid because the late

Bhebhe was unemployed at the time. They took occupation of the house in December 1985, but they were not physically staying there but had found a boy to live there. They were still resident in Plumtree. In 1987 she was transferred from Plumtree to Bulawayo and she moved into the house. The late Bhebhe had moved into the house in 1986. She produced a certificate of occupation for house number 7095 Nkulumane. The late Bhebhe introduced the plaintiff as his wife and this was accordingly reflected in the certificate of occupation. The late Bhebhe stated his children with her being Thembinkosi, Nompilo and Sipiwe and his children with 2nd defendant being Mkhululi, Mqondisi and Zwelithini as the family members occupying the premises. She said when they took occupation it was a four roomed structure. They extended the house to an eight-room structure. At that stage the late Bhebhe was employed by the Cold Storage Commission. At first he was employed as a cleaner of tanks and then promoted to being a driver and later a buyer of small stock (goats). The extensions were started in 1987 and both she and the late Bhebhe were gainfully employed. She said the extensions were necessitated by the size of the family as they were living with six children in the house. They would pool their income and budget for family requirements and house extensions. Because she was living with 2nd defendant's children in the house, she asked the late Bhebhe about the whereabouts of their mother. The late Bhebhe indicated that they were once married but their marriage was dissolved. She was not aware that they had contracted a civil marriage until 2000 after the death of the late Bhebhe. She said she had been to the late Bhebhe's parents' home and the 2nd defendant was not there as a wife. She only became aware of 2nd defendant's status after Impact Trust Executors advertised in the newspaper in connection with the Estate Late Elias Bhebhe. She confronted Impact people about their advertisement and they showed her the marriage certificate between the late Bhebhe and the 2nd defendant. Before seeing this advertisement she had gone to Bulawayo Magistrates' Court at Tredgold Building to register the estate of the late Bhebhe. They had given her the requisite forms to fill and bring the late Bhebhe's relatives along. She had taken to the magistrates' court the late Bhebhe's burial order and death certificate. She testified that this Nkulumane property was on rent-to-buy scheme. Initially they used to make cash payment across the counter at the City Council offices.

As from 1992 she paid by stop order from her salary as she was employed by the City Council. She produced several pay slips to evince deductions from her salary towards the repayment of the house in issue. Even as she testified such deductions were still being made from her salary well after the death of the late Bhebhe. There was a balance of Z\$2 630,41 when she testified in July 2005. She disputed the 2nd defendant's assertion that she was responsible for the demise of her marriage to the late Bhebhe. She said the 2nd defendant was given the late Bhebhe's pension at the Cold Storage Commission. She said her own minor child got part of the pension so did two other children born of the late Bhebhe and another woman not involved in these proceedings. Under cross-examination she said that she met the late Bhebhe in 1977 when he was working at Chibuku Breweries at Masvingo. She said he did not wear a wedding band. She went to his rural home in Matshetsheni, Gwanda sometime in 1983. She said she went there with her aunt to meet the late Bhebhe's mother and her other in-laws. She said they built a homestead at the late Bhebhe's rural home in Gwanda. She said in fact when they got married they initially stayed at late Bhebhe's homestead at Muzimuni, Matshetsheni in Gwanda. He later sold the homestead and they built another one from scratch in 1989. She said that she started living with the late Bhebhe's children with 2nd defendant in 1986. She was still working in Plumtree. She said her relationship with these children was extremely good until 2000.

The 2nd defendant, Sizzie Bhebhe (nee Ncube) testified as the defendant's first witness. She said she was married to the late Bhebhe in Kezi and they had another marriage in Gwanda. She said she has three children with the late Bhebhe. When they got married they initially lived at Mpopoma at a maternal uncle's place. Whilst at Mpopoma they made attempts to acquire their own property. They were eventually allocated stand number 7665 Pumula North in 1979. She stated that she lived there until 1980 when she separated from the late Bhebhe. She said she left because of the late Bhebhe's relationship with the plaintiff. She said after the late Bhebhe had a child with the plaintiff, his mother went to perform some traditional rituals at the plaintiff's place in Plumtree. This was the final straw so she left the matrimonial home. She left her three children behind at the late Bhebhe's rural home in the custody of her mother-in-law.

Her husband later sold the rural homestead and left with their children. He went to live with them together with the plaintiff. She said she was not allowed access to the children. She went to the Pumula Housing Office to enquire about their house stand number 7665 Pumula North. She was informed that it had been “transferred” to Nkulumane. She said when she confronted the late Bhebhe about this transfer he assured her that their names still appear in the new Nkulumane property. She stated that their problems over the plaintiff started when they were still staying at Mpopoma. Even at that stage the late Bhebhe would tell her that he was on his way to visit plaintiff in Plumtree. If she objected he would subject her to physical abuse. She, however, never considered divorcing her husband and the latter also indicated that he had no intention to divorce her. Under cross-examination she said she deserted her husband from the rural homestead. She also said that between 1979 and 1980 she was not gainfully employed. She conceded that she did not make any payments towards the purchase of the Pumula house but claimed her right on account of her marriage to the late Bhebhe. She also accepted that their Pumula property was three-roomed compared to the eight-roomed Nkulumane property subject matter of this matter. She said she only entered the Nkulumane property for the first time after the death of her husband. She said she did not take any action against the plaintiff for adultery as she did not know her rights and also as a rural dweller she tried to have the matter resolved in a customary manner. She said she was also afraid that her husband would beat her up if she took action. Dissimulation and compromise are inevitable in such marriages by a person with a strong rural background. She said she believed they would eventually resolve their differences. That never happened between 1980 and 2000 when her husband passed on. She waited for twenty years and she was still hopeful.

The second witness called by the defendants was the Regional Housing Officer at the City of Bulawayo one Christopher Moyo. He said he has been employed in this capacity for twenty-five (25) years. He said according to his knowledge and their records, the late Elias Bhebhe applied for a house in 1974. In 1979 they allocated him stand number 7665 Pumula North. In 1985 the late Bhebhe requested to be transferred to Nkulumane. This was permissible as far as the City Council was concerned. He said the application for transfer could

not have been made in 1984 because the Nkulumane house had not been built then. He explained that when the late Bhebhe was allocated the Pumula house he did not pay any deposit as it was rented accommodation. He, however, had to pay a deposit when he transferred to the Nkulumane house because the latter was under home ownership scheme. He said in 1979 a woman could apply for a stand only if she was not married. He said because the 2nd defendant's marriage certificate had been used in the application for the Pumula North property she would only qualify for allocation of a house upon production of a divorce order against the late Bhebhe. He said that the change of the marriage certificate to that of plaintiff when the transfer was done was improper. He said according to their records the Pumula property was never repossessed for non-payment of rates and rentals. In any event if there was such non-payment the City Council would not have approved and facilitated the transfer. He confirmed that the Application For Use of Dwelling House/Flat (Exhibit 2) is part of the records in his office. But he said there were four additions made in a hand writing different from the original one that made the entries. The new additions were, under marital status, "married 28/84" and also "Ottilliah Tshuma" was added. He said on transfer the late Bhebhe would have collected the relevant documents (rent card) from the Pumula Housing Office and take them to the Nkulumane Office together with the marriage certificate and the deposit of Z\$480,11.

The third witness called by the defendants was Mkhululi Bhebhe, i.e. the 2nd defendant's son by the late Bhebhe. He said that he ordinarily resided at the rural homestead between 1979 and 1980 because he was very young then. He reflected that the plaintiff came to their rural home to be introduced to late Bhebhe's family. He said a beast was slaughtered for the ceremony. His grand-mother introduced the plaintiff as his "mother". Thereafter when schools closed he came to Bulawayo for holidays the plaintiff would visit them at the Pumula house from Plumtree. She used to come over weekends and by then he knew her as their stepmother. He was adamant that the plaintiff used to visit the Pumula North house. He also said that the plaintiff would come home very drunk and argue with his father as she demanded to know why he was not divorcing his mother. He said when his father passed on in 2000 he

stopped staying with the plaintiff as he was not happy and did not feel safe. He also stated that the plaintiff had another house in Plumtree so it would be unfair if she got 50% of the Nkulumane property.

Assessment of evidence and the law

I find that the plaintiff gave a credible account. I am satisfied that she was truthful when she said that the late Bhebhe did not disclose to her that he was still married to the 2nd defendant. It is for this reason that she paid deposit for the Nkulumane property. She went on to repay the balance of the loan over a period of time. She even effected a stop order against her salary for such repayments. The reason why she expended so much on the house is because she was under the impression that she was lawfully married to the late Bhebhe. For twenty years the 2nd defendant never visited the Nkulumane house nor the rural homestead. She was introduced to the Bhebhe family at the rural homestead at described by the 2nd defendant's own son. She was formally introduced to the 2nd defendant's children as their step-mother by the late Bhebhe's mother. In the said twenty years the 2nd defendant never asserted her matrimonial rights. She let the plaintiff bring up her own children as their step mother. It is not surprising that the plaintiff contracted a customary marriage with the late Bhebhe. The 2nd defendant in her own words only featured after the death of the late Bhebhe waving a civil marriage certificate. She also used her son to get a copy of the death certificate from the plaintiff. The 2nd defendant does not say where she was and what she was doing in all the twenty years when the plaintiff brought up her children and paid for the Nkulumane property. I am satisfied that the 2nd defendant and her son are untruthful witnesses. The 2nd defendant's son obtained the death certificate from plaintiff by way of misrepresentation and gave it to his mother. Using the said copy of the death certificate they clandestinely registered the estate of the late Bhebhe without even informing the later Bhebhe's mother. The 2nd defendant even managed to go and collect pension form the late Bhebhe's employer even though she had not lived with him for over twenty years. The 2nd defendant does not even state what her contribution was towards the estate. My finding is that the plaintiff was not aware of the existence of a monogamous civil marriage between the late Bhebhe and the 2nd

defendant. It is however, trite that there was no valid marriage between the late Bhebhe and the plaintiff as the marriage was bigamous – *Makwiramiti v Fidelity Life Assurance & Anor* 1988 (2) ZLR 471 (S). At 473C-F GUBBAY CJ said:

“The learned judge was undoubtedly correct in his view that the marriage of the deceased and Rosemary was bigamous and consequently, illegal and of no validity. This was because at the time it was contracted the deceased was married to Rosaria under a monogamous or civil type marriage entered into under the Marriage Act. By embracing a monogamous regime, the deceased was deemed by law to have waived his customary privileges in respect of polygamy and, for as long as he remained married, to have submitted to the general law of the land. He is precluded from marrying another person, not only under the general law, but under customary law as well. He suffered from absolute incapacity to marry.” – see also *Sibanda v Sibanda & Anor* 2002 (1) ZLR 622 (H) at 626; *Makovah v Makovah* 1988 (2) ZLR 82 (S) at 89B-C and *Muringaniza v Munyikwa* 2003 (2) ZLR 342 (H) at 349-50.

Since I have found that the plaintiff was not aware, in June 1984 that the late Elias Bhebhe was married to the 2nd defendant that means that their “marriage” is in fact a putative marriage. The plaintiff should benefit from the estate. If not it would work an injustice and hardship on the plaintiff who labored and contributed towards the marriage and the accumulation of the property of the estate under the impression that the marriage was valid. It would unjustly enrich the estate of the dishonest, the late Elias Bhebhe, simply because the property in question was registered in his name. Indirectly it unjustly enriches the 2nd defendant who has not made a discernable contribution towards the estate beside waving the marriage certificate. The plaintiff offered the 2nd defendant a percentage of the Nkulumane property.

The Supreme Court in *Makovah v Makovah supra*, and this court in *Sibanda v Sibanda and Anor supra* and *Muringaniza v Muringaniza supra*, held that the provisions of the section 7(1) of the Matrimonial Causes Act [Chapter 5:13] cover putative or bigamous marriages. Using the same reasoning I hold that the provisions of section 3 and 3A of the Deceased Estates

Succession Act [Chapter 6:02] cover putative marriage, such as the present one which is declared null and void. If a putative marriage can give rights to innocent spouse in her lifetime, it should equally do so after death of the husband. In the circumstances, the plaintiff is entitled to the share of the Nkulumane property. As alluded to above, she was the major contributor to the conversion of the Pumula North property under the rent-to-buy to the Nkulumane property ownership scheme. She paid the deposit required for such transfer. The Nkulumane property was four roomed when it was acquired. She contributed towards repayment of the loan to the City Council. She contributed towards its extension from a four-roomed house to eight-roomed house. At the time of the commencement of the trial she was still repaying the Nkulumane property through monthly deductions from her salary. She has not benefited from the late Elias Bhebhe's pension, 2nd defendant did.

Accordingly, it is ordered that:

- (a) The immovable residential property being stand number 7095 Nkulumane, Bulawayo be valued by an independent estate agent and from the value so determined the plaintiff be awarded 50% and 2nd defendant 50% thereof.
- (b) The costs of the evaluation be shared equally between the plaintiff and the 2nd defendant.
- (c) Each party bears own costs.

Lazarus & Sarif, plaintiff's legal practitioners

Phulu & Ncube, 1st and 2nd defendant's legal practitioners