

ANNA-MERCY MUNANGATIRE
versus
NOREEN CHIKAKA
(In her capacity as executrix of the estate late Samuel Zachary Dick Munangatire)
and
GRACE NYANDORO
and
THE MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 28 March 2017 and 18 January 2018

Opposed application

B. Mtetwa, for applicant
L. Rufu, for 1st respondent
O. Nakoma, for 2nd respondent

CHITAKUNYE J. On the 26th December 1970, the applicant married the late Samuel Zachary Dick Munangatire (herein after referred to as Samuel) in terms of the civil marriage laws of the United Kingdom (UK). They were then resident in the UK. The applicant and the late Samuel returned to Zimbabwe after independence and in 1989 they acquired an immovable property namely, The Remaining Extent of Lot 1 of subdivision of Lots A & B called Adyllinn of Bluffhill, also known as No. 36 Marlborough Drive, Marlborough, Harare through mortgage finance. The property was registered in the name of the late Samuel. The parties resided in that property as their matrimonial home.

In the 1990s the late Samuel commenced an adulterous relationship with the 2nd respondent resulting in the birth of some children. That relationship did not go down well with applicant hence in 1996 she instituted divorce proceedings against the late Samuel. One of the factors she alleged had contributed to the breakdown of the marriage was the adulterous relationship between the 2nd respondent and the late Samuel. In that suit applicant claimed, *inter alia*, a distribution of the matrimonial home.

In 1998 the applicant returned to the United Kingdom leaving behind the late Samuel and their children. Later the children joined her in the UK, thus leaving the late Samuel alone. The 2nd respondent thereafter moved in to cohabit with the late Samuel in the applicant's

matrimonial home. Around 2001 the 2nd respondent and the late Samuel also relocated to the UK. The 2nd respondent's brother moved into the property with his family. Later the late Samuel's nephew also moved in to stay in the cottage at the matrimonial home.

In the meantime the late Samuel and 2nd respondent, whilst in the UK, jointly acquired a house. The applicant had also acquired her own house in the UK without the late Samuel's input.

On the 12th November 2012, the late Samuel passed on. At the time of his death he was no longer cohabiting with 2nd respondent. Upon the late Samuel's demise the 2nd respondent took transfer of the late Samuel's half share of the jointly owned house in UK.

The 2nd respondent unsuccessfully presented herself as the late Samuel's surviving spouse. The applicant also presented herself as the lawful surviving spouse. The nature of what was to follow led to the appointment of the 1st respondent as Executrix Dative on the 25th March 2013. The only contentious asset was the Marlborough home.

In her first distribution account 1st respondent sought to award the Marlborough property to all the beneficiaries after taking into account the claims by 2nd respondent of improvements she alleged she effected to the property and a claim for maintenance for two children. The net effect of the claims was such that applicant would only get a child's share of about USD 2 993-00 from a property valued at about USD 120 000.00.

The correspondence attached to the application shows that there were virtually quarrels on how the Marlborough property should be handled. The applicant argued that the Marlborough House was her matrimonial home and in terms of sections 3 and 3A of the Deceased Estates Succession Act, chapter 6:02, it should devolve to her as the surviving spouse. Such arguments did not find favour with the 1st respondent. Requests to the 3rd respondent to intervene did not yield positive results. Consequently, applicant filed this application seeking a declaratory order that:

1. The property known as No. 36 Marlborough Drive, Harare, was the matrimonial home between Applicant and her deceased husband Samuel Zachary Dick Munangatire.
2. The property devolves onto the Applicant as surviving spouse in terms of sections 3 and 3A of the Deceased Estates Succession Act, chapter 6:02

Alternatively to 1 and 2 above;

3. That the 1st respondent be and is hereby removed as the Executrix of the Estate of the late Samuel Zachary Dick Munangaire.
4. That the 3rd Respondent appoints a replacement executor within seven days of the service of this order on him.
5. That the 1st respondent pays costs of this application.

The 1st respondent opposed the application. In her opposition she refuted suggestions of bias on her part. The 1st respondent contended that as the applicant was not living in the house in question immediately before the late Samuel's demise she cannot be awarded the house. The 1st respondent further contended that applicant and the late Samuel had jointly acquired a property in the UK and this is the address at which applicant was residing at the demise of the late Samuel. As far as she understood, this is the property applicant should inherit.

Though the 2nd respondent purported to file opposing papers, these were not properly done. Mr. Oliver Nakoma who appeared for 2nd respondent conceded that he was not a legal practitioner and that his appearance was by virtue of a Power of Attorney given to him by 2nd respondent.

It is pertinent to note that the 2nd respondent's notice of opposition was not properly before this court.

Anomalies with 2nd respondent's notice of opposition included that the notice of opposition was filed out of time without seeking condonation for the late filing of the notice of opposition. In terms of Rule 233(3) of the High Court Rules, 1971, a respondent who does not file his/her notice of opposition and opposing affidavit within the period provided for by the rules is barred. Where one is barred rule 239(b) provides that:-

“... if one of the parties has been barred the court shall deal with the application as though it were unopposed, unless the bar is lifted.”

In casu, the 2nd respondent did not seek to have the bar lifted and so, as against 2nd respondent, the application may be treated as unopposed.

See *National Foods Operations v Perfect Bakery (Pvt) Ltd & Another* HH209/15.

It may also be noted that the belated opposing papers were prepared and filed by a Mr. Oliver Nakoma of Standard Management Services (Pvt) Ltd and no explanation was proffered on who this Mr. O Nakoma is.

The notice of opposition was signed by Mr. Nakoma who is neither the 2nd respondent nor a legal practitioner yet in terms of r 227(2) (b) only a respondent or his/her legal practitioner

is allowed to sign such notice of opposition. There is therefore no proper notice of opposition on that basis as well.

A further anomaly is that the said Mr. Nakoma purported to depose to the opposing affidavit by virtue of a power of attorney given to him on the 24th May 2013 and not that he had personal knowledge of the facts he was deposing to. Rule 227(4), provides that an affidavit can only be made by either the applicant or respondent, or by a person who can swear to the facts or averments set out in the affidavit. In *Dobbie & Others v ZB Bank Ltd & Another* HH126/16 ZHOU J aptly stated that:-

“A deponent to an affidavit is only a witness and the competency of such a witness to depose to an affidavit must be assessed by reference to Order 32 r 227(4) (a) of the High Court Rules 1971 which requires that such person must be a person who can swear to the facts or averments’ set out in the affidavit to which he or she deposes.

In *casu*, Mr. Nakoma had no personal knowledge of the facts he was deposing to hence he could not swear to the facts or averments in the affidavit. The power of attorney did not imbue him with knowledge of facts on issues that occurred before he was engaged. He was clearly deposing to hearsay and this cannot be allowed.

Upon being quizzed on the above anomalies Mr. Nakoma conceded that there were no proper opposing papers for the 2nd respondent. The same fate would befall the purported counter application as it was prepared by the said Mr. Nakoma in the same circumstances already alluded to. There is therefore no proper counter application before me.

The 3rd respondent submitted his report in response to the application. In that report 3rd respondent basically stated that in terms of sections 3 and 3A of the Deceased Estates Succession Act, for a surviving spouse to be awarded the matrimonial house that spouse must have been living in the property at the time of the deceased’s demise. In *casu*, applicant had not been living in the house in question. She thus cannot have sole ownership but the property must be distributed amongst all beneficiaries including applicant.

The 3rd respondent also alluded to the applicant having jumped the gun by not firstly seeking domestic remedies as provided for in the Administration of Estates Act , [*Chapter 6:01*]. According to 3rd respondent applicant should have awaited the filing of the first and final distribution account and only then raised objections to that account. If not satisfied with the determination of the objection, applicant could then have approached this court.

The 3rd respondent's contention would have some merit but for the circumstances of this case. A flurry of letters from applicant's legal practitioners to the respondents shows that applicant had on a number of occasions asked 3rd respondent to make a determination of the route the administration of this estate should take but 3rd respondent had remained mum on many occasions. It was as a result of frustrations from 3rd respondent's silence that applicant approached this court. For instance in a letter dated 22 July 2013 addressed to the 1st respondent and copied to 3rd respondent, the 3rd respondent was asked to make a decision in these terms:

“Kindly make a decision on the correct status of the immovable property which the widow contends is the matrimonial home.”

In a letter to the 3rd respondent dated 25 August 2014 applicant's legal practitioners expressed frustration at 3rd respondent's indecision on issues raised in these terms:

“It appears that we are going in circles in this matter without being anywhere near winding up the estate. In our letter to you dated 12th May 2014, we requested that your office make a decision on the issues we raised so that whoever is unhappy with your decision can have it reviewed.”

The issues remained undecided hence this application.

It is my view that where a fundamental question on how to treat a surviving spouse *vis a vis* a third party has arisen 3rd respondent should provide guidance on how the administration was to proceed. In *casu*, the 3rd respondent did not do so. That inaction pushed applicant to approach this court. Had the applicant not approached 3rd respondent with a request for a decision on the issue at hand I would have considered 3rd respondent's contention favourably. But this was not so. Clearly this application is a consequence of 3rd respondent's failure to act when called upon to determine the issues at hand.

From the papers filed of record and the submissions made the real issue pertains to the interpretation of sections 3 and 3A of the Deceased Estates Succession Act. This is so because it is common cause that though applicant had in 1996 filed for divorce that matter was not finalised and so she remained the late Samuel's lawful wife to the time of his death. It is also common cause that both applicant and her late husband were resident in the UK at the time of his demise albeit living on separation. It was further common cause that the property in dispute was acquired during the subsistence of the marriage and was their only immovable property here in Zimbabwe. Though 1st respondent had originally believed that applicant and the late Samuel had jointly acquired another property in the UK, this was not true. The property in the UK was acquired by applicant on her own as parties were already on separation and the late Samuel was cohabiting with 2nd respondent. The parties who jointly acquired a property were

the late Samuel and the 2nd respondent. That property has since been taken over by 2nd respondent purportedly in terms of the UK laws.

The only immovable property acquired by applicant and the late Samuel is thus no. 36 Marlborough Drive, Harare. The applicant therefore argued that as the surviving spouse she is entitled to the Marlborough property as the only matrimonial house. Her presence in the UK was temporary for economic reasons only and so court should consider that her only home in Zimbabwe is the Marlborough house. The applicant's counsel argued that to find to the contrary would result in the absurdity where applicant is a surviving spouse on paper when the legislative intention was to protect surviving spouses from marauding relatives, step children and mistresses who were bent on disinheriting the surviving spouse.

The major issue for determination is thus whether that immovable property should devolve to the applicant in terms of s 3A of the Deceased Estates Succession Act or it should be subject of distribution to all beneficiaries.

Section 3A of the Deceased Estates Succession Act, [*Chapter 6:02*], provides that:-

“The surviving spouse of every person who, on or after the 1st November 1997, dies wholly or partly intestate shall be entitled to receive from the free residue of the estate-

- (a) The house or other domestic premises in which the spouses or the surviving spouse, as the case maybe, **lived immediately before the person's death**; and
- (b) The household goods and effects which, immediately before the person's death, were used in relation to the house or domestic premises referred to in paragraph (a) where such house, premises, goods and effects form part of the deceased person's estate.”
(emphasis is mine).

The question is thus can it be said that applicant lived in the house immediately before Samuel's death?

It is trite that generally the literal rule of interpretation is the first port of call when construing legislation.

In *Endevour Foundation and Another v Commissioner of Taxes* 1995(1) ZLR 339(S) at pp 365F to 357A GUBBAY CJ had this to say on the principals of interpretation:

“The general principle of interpretation is that the ordinary, plain, literal meaning of the word or expression, that is as popularly understood, is to be adopted, unless that meaning is at variance with the intention of the legislature as shown by the context, or such other *inducia* as the court is justified in taking into account, or create an anomaly or otherwise produces an irrational result. See *Stellenbosch Farmers' Winery Ltd v Distillers' Corp (SA) Ltd & Another* 1962 (1) SA 458(A) at 476E-F. The same notion was expressed in another way by Margo J in *Loryan (Pvt) Ltd v Solarsh Tea & Coffee (Pvt) Ltd* 1984(3) SA834(W) at 846G-H.”

The words of WESSELS JA in *Stellenbosch Farmers' Winery Ltd v Distillers Corp (SA)* (*supra*) are apposite. The learned judge said that:-

“It is the duty of the court to read the Section of the Act which requires interpretation sensibly, i.e., with due regard, on the other hand, to the meaning which permitted grammatical usage assigns to the words used in the section in question, and, on the other hand, to the contextual sense, which involves consideration of the language of the rest of the statute as well as the matter of the statute, its apparent scope and purpose, and within limits, its background.”

It is thus pertinent to consider the section or statute to be interpreted in its context, purpose and, to a limited extent, its background. The circumstances of each case must be viewed *vis –a-vis* the mischief intended to be suppressed or addressed.

In *Chimhowa & Others v Chimhowa & Others* 2011(2) ZLR 471(H) at 475G-476C CHIWESHE JP opined that:-

“In reading the legislation governing deceased estates in so far as the rights of surviving spouses are concerned, it is important to bear in mind the intention of the legislature, bearing in mind that this branch of that law has in the last decade been the subject of much debate and controversy. A number of amendments have been brought to bear to this branch of the law. The chief driver of this process has been the desire by the legislature to protect widows and minor children against the growing practice by relatives of deceased persons of plundering the matrimonial property acquired by the spouses during the subsistence of the marriage. Under this practice, which had become rampant, many widows were deprived of houses and family property by marauding relatives, thus exposing the widows and their minor children to the vagaries of destitution. In many cases, the culprit relatives would not have contributed anything in the acquisition of such immovable and movable properties, often the result of years of toil on the part of the deceased and the surviving spouse. This is the mischief that the legislature sought to suppress in introducing provisions such as s3A of the Deceased Estates Succession Act and s 68F of the Administration of Estates Act and the Deceased Persons Family Maintenance Act[*Chapter 6:03*]”

Clearly the protection of surviving spouses and minor children against deprivation of their domestic premises was central in these amendments.

Equally in *Dzomonda & Others v Chifamba & Others* 2014 (2) ZLR 473(H) @ 479B-C in commenting on provisions of section 3A of the Act TSANGA J aptly stated that: -

“That the primary thrust of the Act is to start off by being spouse centred is clear from the above provisions. A spouse inherits household goods and effects. He or she also inherits the domestic premises. If the estate still has residue after this has been done, then the spouse together with the children inherit specified statutory legacies. Inheritance by children therefore clearly depends on the size of the estate. Where the marital home is the only asset as in the present case, then the law is clear that it should go to the surviving spouse.”

In *Dzomonda & Others v Chifamba & Others* case court was dealing with the sole right of a lawful spouse to inherit the house without sharing such right with other beneficiaries and court concluded that the lawful spouse can be the sole beneficiary of the house if it is the only

property in the Estate, as the other beneficiaries ‘right of inheritance comes from the residue which remains in the estate, after the house has been appropriated to the surviving spouse.

The court was not faced with the second rung of the inquiry which pertains to the issue of where the spouse lived immediately before deceased’s death as required in s 3A(a) of the Act.

In instances where court has been called to determine the second rung of the inquiry the circumstances of each case were pertinent.

In *casu*, the applicant was not living at the house with the late Samuel at the time of his demise. In fact both applicant and the late Samuel were living in the UK and were living apart. It is in those circumstances that applicant argued that the interpretation of the term ‘lived immediately before the person’s death’ be construed to include her situation since she was the only surviving spouse. Counsel for the applicant argued that a purposive approach is what would meet the justice of the case. The mischief intended to be addressed by the legislature must be considered.

It is clear that in terms of s 3A for someone to benefit under that section one must establish two things namely that the person seeking to inherit the house is the spouse of the deceased and that the person seeking to inherit the house must have been living in that house immediately prior to the deceased’s death.

In *casu*, it is common cause that applicant is a surviving spouse of the late Samuel. So the first hurdle is resolved. The contentious issue is on the second hurdle that is whether she lived in the house immediately before Samuel’s death. The applicant argued that her stay in the UK was temporary for economic purposes.

The facts of the case must be examined to determine whether the absence was temporary or not.

In *Ndoro v Ndoro* HH198/12 GUVAVA J (as she then was) opined that:

“In order for a spouse to inherit the house they must show that they lived in that house immediately before the deceased’s death. The Applicant in my view has failed to show that she lived at 4 Mimosa Road Kadoma immediately before the death of deceased. The evidence shows that she left the property. She was not just staying in Norton because of her work commitments but she had separated from the deceased. However it was clear from the evidence that during the period February 2008 to June 2009 she passed through the property for a few minutes in order to collect her belongings. This cannot be said to be living at the residence particularly in view of the fact that she had issued summons for divorce....”

In *Margret Chirowodza v Freddy Chimbari & Others* HH725/16 I recognised that where a spouse leaves their matrimonial home on a temporal basis to seek resources to fend for the family such absence would not deprive them of the protection provided in section 3A. In that case applicant was able to show that her absence was temporary and I stated as follows:-

“... applicant clearly showed that marital links were still there. Her stay in the UK was for purposes of employment only and not that she had abandoned or deserted her matrimonial home and husband. It was by mutual agreement that she went to work in the UK to raise money for the family. Whenever she came on vacation she went to that property as the matrimonial property. It is the home she always had the intention to return to even when she was working abroad. That was her permanent residence where she kept her personal property herein Zimbabwe. Her sojourn in the UK was for employment purposes. She maintained her place of domicile or permanent residence as Zimre Park, Ruwa.”

In casu, the applicant left the house in question to return to the UK in 1998 and has not returned to live in the property. Even after deceased's death it was not argued that she has ever come back to live in the property. Her excuse is that she is working in the UK to fend for the family and so her absence from the house is temporary. It is however common cause that prior to leaving she had in fact issued summons for divorce thus confirming the separation.

It is true that as argued by applicants' counsel the intention of the legislature was to afford protection to surviving spouses against the previous practice whereby relatives and other persons would pounce on the deceased's estate and deprive surviving spouses and minor children of properties including houses they lived in leaving them homeless.

The manner in which applicant's counsel argued applicant's case was as if s 3A merely required one to be a surviving spouse for them to inherit the house. She argued that to hold that applicant lost the protection just because she returned to UK for economic reasons as a result of her temporary relocation to the UK would be placing a restrictive and prejudicial interpretation of 'Matrimonial home' and this would result in the absurdities referred to by CHIWESHE JP in *Chimhowa & Others v Chimhowa & Others* (*supra*).

It is my view that the protection is to ensure a spouse is not uprooted from their domestic premises but are left to continue with their life. This is the spouse centredness alluded to by TSANGA J in *Dzomonda* case (*supra*). However for a spouse to succeed s 3A (a) requires that the spouse must show that they lived in that house immediately prior to the deceased's demise. Had the legislature intended that the surviving spouse should inherit the house acquired during the subsistence of the marriage even when they were no longer living in that house but purely on the basis that it was the only asset owned by the deceased it would have clearly stated so.

The aspect of ‘lived immediately before the person’s death’ would have been left for instances where there were more than one property or spouses as guidance in identifying the property to be inherited by the surviving spouse or spouses as the case maybe.

I am of the view that the circumstances of this case show clearly that applicant’s stay in UK was not as temporary as applicant alleged. It is in UK that the parties married and when they relocated to Zimbabwe and things did not go well she returned to the UK and that is where she has been since 1998. Unlike in *Margret Chirowodza v Freddy Chimbari & Others* (supra) where the applicant would occasionally return to Zimbabwe and be with the family at the matrimonial home, in this case, applicant did not do that. If anything parties lived on separation minding their own affairs. There was virtually no matrimony to talk about serve for the fact that the action for divorce had not been concluded and so they remained husband and wife.

I thus conclude that applicant was not living in the property immediately before the late Samuel’s death.

Though the applicant has failed to qualify to be the sole beneficiary of the immovable property in terms of s 3A of the Act, she is still entitled to the deceased’s household goods and effects and to a child’s share in the immovable property.

The next point to consider is the claims made by 2nd respondent for herself and maintenance for children. In terms of s 43 of the Administration of Estates Act [chapter 6:01], the executrix is enjoined to receive and consider claims by all creditors of the estate. In this regard the 2nd respondent lodged her claim for alleged improvements to the property valued at USD 37 000.00. The 2nd respondent also lodged a maintenance claim for two children in a total sum of \$85 071.00 purportedly in terms of the Deceased Persons Family Maintenance Act chapter 6:03. The maintenance sum was later reduced to \$38 444.00 when the claim for one of the children was removed in the amended distribution account.

The manner in which 1st respondent gullibly accepted the claims is cause for concern. The 1st respondent seemed to have accepted the claims without interrogating them. Clearly the estate was faced with what 1st respondent’s described as a case in which two women were embroiled in acrimonious combat, after the deceased’s demise, for the control of an immovable property . That battle was likely to be dirt and so any executrix faced with such a scenario must interrogate claims that have the tendency of virtually taking away the estate from the lawful surviving spouse and awarding it to the other under the guise of refund for improvements and maintenance for children.

In *casu*, the total claim made and accepted by 1st respondent was USD75 444.00 from a property worth USD120000. After taking into account other liabilities associated with the administration of the estate, only a paltry sum of \$26 939.50 remained for distribution among 9 beneficiaries including the child whose maintenance claim had been allowed. The child was thus double dipping.

The evidence adduced to justify the claim for improvements ought to have been scrutinised for its authenticity. The quotation obtained on the 3rd June 2013 was for the current cost of construction and installation of some of the items and not a refund of what 2nd respondent claimed to have expended.

The quotation was for the current cost of construction and installation of the following: a cottage; a Garage (incomplete); Two Dura walls (measuring 215mts); gate and entrance wall; tiling (kitchen and dining); Carpeting (lounge and passage); Bedrooms toilet renovations. The actual costs of the alleged improvements were not tendered and 2nd respondent did not provide her testimony of such. It is clear that 2nd respondent through her agent, Stanford Management Services was intent on depriving applicant of all benefits from the estate. This is evident from a letter to 1st respondent dated 3rd June 2013 wherein after asserting numerous unsubstantiated claims the agent stated thus:

“We therefore claim:

- i. 100% of the total value of the estate;
- ii. \$ 37 000.00 in respect of Developments and improvements effected on the property.
- iii. \$6 480.00 an equivalent of medical cover.”

In making such a claim the agent was alive to the fact that the property in question was acquired when applicant and the late Samuel were living together as husband and wife and that 2nd respondent had intruded in the marriage when the property had already been acquired.

The above only served to exhibit the greediness by the 2nd respondent and the 1st respondent should have sought proof of the expenses alleged to have been incurred rather than depend on estimated current costs for construction and installation of items. The 2nd respondent had not proved that such items were in fact effected by her after her intrusion. Unless 2nd respondent proves such claim it would be unjust to grant the claim on her mere asking; yet this is what 1st respondent did in her distribution account.

As regards maintenance 1st respondent accepted the claims as quantified without any credible proof. The 1st respondent alleged that she accepted the claim in terms of the Deceased Persons Family Maintenance Act. That Act does not provide for the acceptance of any claim

as valid but provides for an application for any maintenance to be made and to be subjected to a process of assessment and determination.

In this regard section 3(1) of that Act provides that:-

- (1) Any dependant of a person who dies after the 19th January, 1979 may, subject to this Act, make application for an award from the net estate of the deceased.”

The procedure for making the application is clearly provided in subsection (2) as follows:-

“(2) An application referred to in subsection (1) shall be—

- (a) made in the prescribed form, if any; and
- (b) lodged with the Master or, where there is no office of the Master in the province where the applicant ordinarily resides, the provincial magistrate of the province—
 - (i) within three months of the date of the grant of letters of administration to the executor of the deceased estate concerned; or
 - (ii) in the case where the Master has, in terms of paragraph (b) of subsection (1) of section 32 of the Administration of Estates Act [*Chapter 6:01*], dispensed with the appointment of an executor dative, within three months of the date of death of the deceased:

Provided that the Master may, on good cause shown, grant an extension of the relevant period referred to in subparagraph (i) or (ii) within which the application shall be made.

(3) On receipt of an application, the Master or the provincial magistrate, as the case may be, shall—

- (a) make such initial investigation in connection with the application as he considers necessary; and
- (b) take such steps as he considers necessary and practicable in the circumstances to obtain the view of the heirs and legatees and the executor of the deceased estate concerned in regard to the application.

(4) Where an application is made to a provincial magistrate, the provincial magistrate shall report to the Master any steps taken or any directions given by him and shall act in accordance with such directions as the Master may give to him.

(5) For the purposes of subsection (3), the Master or provincial magistrate, as the case may be, may—

- (a) direct the executor to take such measures within such period as the Master or provincial magistrate, as the case may be, may specify and, without derogation from the generality of the foregoing, may direct the executor to submit such report or statement to him as the Master or provincial magistrate, as the case may be, may specify;
- (b) call upon all or any of the heirs or legatees of the deceased to make to him such representations as they may wish in connection with the application.

(6) An executor shall comply with any directions given to him by the Master or provincial magistrate, as the case may be.”

Whilst the above process is underway the Act provides in subsection 3(8) that:-

“(8) Where an application has been made in terms of this section no distribution of the net estate of the deceased concerned shall take place until the application is finally determined:

Provided that nothing in this subsection shall be construed as preventing the executor, before the application is finally determined, from disbursing any part of the estate for the purpose of providing maintenance for any person who was totally or partially dependent on the deceased immediately before his death.”

At the end of the maintenance inquiry court is enjoined to make an award which the executor can then employ in his/ administration. In this regard s 7 states that:-

“(1) After due inquiry into an application, the appropriate court may, subject to the provisions of this Act, if it considers that a dependant who has made an application is in need of maintenance from the estate of the deceased concerned and that it is just and equitable that an award should be made, make an award against the net estate of the deceased in favour of such dependant.”

It is apparent from the above provisions that it was improper for the 1st respondent to have included a claim for maintenance when such claim had not been adjudicated upon and a proper determination made in terms of the Act. No other justification was proffered save to say that it was a claim that had been made by 2nd respondent and 1st respondent felt duty bound as executrix to include it in her distribution account.

I am of the view that when a claim for maintenance is made the executrix should refer it to the Master for the process of a proper inquiry to be done in terms of the appropriate Act. This is an aspect that should be done without delay.

Accordingly I hold that the claims by 2nd respondent cannot hold in their current state.

The applicant's counsel did not persist with her argument for the removal of the executrix as this would not bring finality to the issue.

Upon considering the issue I am inclined to say that the grounds raised for the removal of the executrix would not have sufficed. In my view what was required was for the 3rd respondent to have responded with decisions on the status of the Marlborough house and the issue of maintenance when such decisions were requested by the applicant.

On the question of costs I am of the view that each party should bear their own costs as clearly the issues raised by applicant needed to be decided upon for the proper administration of the estate.

Accordingly the application is hereby dismissed with each party to bear their own costs.

Mtewa & Nyambirai, applicant's legal practitioners
Dzimba, Jaravaza & Associates, 1st respondent's legal practitioners