

VIOLA MABIKA  
versus  
PAMELA MUTIMUDYE  
and  
BELINDA MUPANJE  
and  
AVIRIL MARGARET JOSEPH  
and  
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE  
HUNGWE J  
HARARE, 10 October 2018 and 5 June 2019

### **Opposed Application**

Adv Mrs *R Mabwe*, for the applicant  
*S D Chivore*, for the 2<sup>nd</sup> & 3<sup>rd</sup> respondents

HUNGWE J: The respondent took a point *in limine* that the applicant was not properly before this court. This issue was raised crisply by the following facts. By her own admission, on 31 January 2018 the Master of the High Court indicated in a letter to her legal practitioners, that since a customary law union existed between her and deceased husband, the view of the office was that customary law should apply in the administration of the Estate of the late Gilbert Mupanje. Clearly, she held a legitimate expectation that she would consequently be appointed executrix dative. This was not to be because, on 18 May 2018 the office of the Master of the High Court wrote to Gambe & Partners, first respondent's legal practitioners, recanting the office's earlier position spelt out on 30 January 2018. In essence, the subsequent position taken by the forth respondent effectively appointed first respondent the Executrix Dative. Applicant was devastated by the sudden turn of events.

Her lawyers also protested and wrote to Gambe & Partners. A stalemate was reached. Applicant filed the present papers seeking an order that she be declared the surviving spouse of her late husband and that the determination by the Master dated 11 May 2018 be declared of no force or effect. The first respondent pointed out to her that she could not do so. There were appropriate remedies available for her. She could appeal that decision or bring it on review. She however persisted with the application notwithstanding the advice from the first respondent's legal practitioners.

Respondent's legal practitioners resist her application for a declaratur. On first respondent's behalf, they argue that where a party is dissatisfied with the Master's administrative action, he/she must either appeal that action or seek a review of the same. The dissatisfied party cannot seek an order declaring his or her right as if the matter is in court for the first time.

Everyone is entitled to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.<sup>1</sup> Where an administrative authority fails to live up to this constitutional exhortation, the law provides that aggrieved person may enforce these rights by seeking a review of the administrative conduct in question.<sup>2</sup> In furtherance of these constitutional rights, the Administration of Estates Act<sup>3</sup> provides:

**68G Determination of whether customary law applied to deceased person**

(1) Section 3 of the Customary Law and Local Courts Act [*Chapter 7:05*] shall apply in determining the question whether or not customary law applied to a deceased person for the purposes of this Part:

Provided that it shall be presumed, unless the contrary is shown, that—

(a) customary law applied to a person who, at the date of his death, was married in accordance with customary law; and

(b) the general law of Zimbabwe applied to a person who, at the date of his death, was married in accordance with the Marriage Act [*Chapter 5:11*] or the law of a foreign country, even if he was also married to the same person under customary law.

(2) Where there is a dispute among the beneficiaries of an estate as to whether or not customary law applied to the deceased person for the purposes of this Part, the question shall be referred to the Master, who shall determine it in the speediest and least expensive manner consistent with real and substantial justice.

Although the appellant has a right to approach this court for redress, she can only do so only after exhausting the remedies available to her under the appropriate Act. In this case the Act

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<sup>1</sup> Section 68 (1) of the Constitution.

<sup>2</sup> Section 68 (2) of the Constitution.

<sup>3</sup> [*Chapter 6:01*]

provides that where a party is dissatisfied with the decision of the Master, that party ought to appeal the decision within the time and in the manner prescribed in the rules of court.<sup>4</sup>

Where a matter is already before a *quasi-judicial* authority, in this case the Master of the High Court, the rights of the parties before that office are regulated by both the applicable legislation as provided for in the Administration of Estates Act. A decision rendered in pursuance of the provision of that Act is subject to the usual appeals and reviews as a matter of course. There is no need for a declarator when those rights have already been spelt out by another competent authority in the matter<sup>5</sup>

By seeking a declaratur the applicant adopted a wrong procedure. She ought to have filed an appeal against the conclusion of law by the Master. First respondent's legal practitioner's advice to applicant was sound from the day it was offered to her. Had she heeded it, she could have saved everyone's time.

I therefore uphold the point *in limine* taken by the respondent and find that the applicant adopted the wrong procedure. It appears to me that applicant adopted this route in order to avoid seeking condonation for noting an appeal out of time. There is no other explanation for avoiding the clearly provided for procedure in s 68J of the Act. She cannot avoid it if she wants to properly ventilate her grievance in this court.

Consequently, the application is dismissed with costs.

*Rufu-Makoni Legal Practitioners*, applicant's legal practitioners  
*Gambe & Partners*, respondents' legal practitioners

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<sup>4</sup> Section 68J of the Administration of Estates Act, [Chapter 6:01]

<sup>5</sup> Hapaguti vs Madondo & Anor HH 94-15