

IN RE ESTATE LATE BELLINAH MHLANGA

HIGH COURT OF ZIMBABWE

MWAYERA J

HARARE, 26 May 2017; 14 & 15 June 2017, and 29 November 2017

The Master of High Court N.O

The Executor Dative Ms Chirawu N.O

Chamber Application

In Re Estate Late Bellinah Mhlanga Dr 143/13 Chamber application in terms of s 113 of the Administration of Estate Act [Chapter 6:01] request for a determination by a judge in chambers on a point of law arising from a difference of opinion between the executor and the Master on a question of law:

MWAYERA J: This matter was placed before me as a stated case for the court's opinion on the meaning and application of the *per stirpes* principle. The issues for determination as discerned from the stated case are firstly whether or not the *per stirpes* principle applies under general law in intestate succession in Zimbabwe and under common law in the absence of a specific legal provision in statutory law. Secondly, what is the legal interpretation of the *per stirpes* principle both under general law and as set out under customary law in the Administration of Estates Act Section 68F.

The factors informing the stated case are as follows: Bellinah Mhlanga, a widow (herein after called the deceased) passed away intestate on 28th day of January 2010, in Harare as per the death certificate. On 30 January 2013, the estate was registered by Cynthia Mhlanga a daughter of the deceased, through completion of a death notice. The death notice indicated that the deceased was married to the late Amon Mhlanga and she had six children in all, namely, Busisiwe, Lovemore, Dakarayi, Cynthia, Luwis and Erick. The deceased was married to her late husband under the Marriages Act [Chapter 5:11] hence general law applied to the administration of the estate. The deceased was the registered owner of property called 3513 – 13th road, Glen View, Harare. On the 8th February 2015 Slyvia Chirawu was appointed executrix of the estate of the deceased as per the letters of administration. The executrix duly completed form M.H.C 12 showing that one of the children of the deceased namely Tapuwa

Caroline Mhlanga predeceased the deceased but she was survived by three children namely Tafadzwa, Nyasha and Tatenda Chidywa. The executrix of the estate amended the account accordingly to award the share of Tapuwa Caroline Mhlanga on the basis of the *per stirpes* principle.

On the 9th of December 2016, the Master through a letter addressed to the executor directed that Tapuwa Caroline was not supposed to inherit on the basis that she predeceased the mother, the deceased whose estate fell for consideration. It is common cause the Master and executor have different opinions on the issue of the *per stirpes* principle and its applicability or otherwise in the estate under consideration.

The executrix maintained that the late Caroline Mhlanga's children ought to inherit from their grandmother's estate, the late Bellinah Mhlanga. The Master on the other hand insisted that the late Tapuwa Caroline Mhlanga's children were not supposed to benefit under the estate of their grandmother Bellinah Mhlanga because the grand children's mother predeceased her mother Bellinah Mhlanga, whose estate is under consideration. The resolution of the matter hinges on the nature of law applicable in the deceased estate in question. Further the interpretation of the *per stirpes* principle is central to the determination of the matter. The late Bellinah Mhlanga was married in terms of the Civil Marriages under [Chapter 5:11]. General Law would then be the applicable law. The late Bellinah Mhlanga did not leave a will as such her estate falls under intestate succession. It is important to mention that the constitution is the supreme law of the country. The Constitution of Zimbabwe Amendment (No 20) Act 2013 hereafter referred to as the Constitution clearly outlines the supremacy. In s 2 it states;

1. This constitution is the supreme law of the Zimbabwe, and any law, practice, custom, or conduct inconsistent with it is invalid to the extent of the inconsistency.
2. The obligations imposed by this Constitution are binding on every person, natural or juristic, including the state and all executive legislative and judicial institutions and agencies of government on every level and must be fulfilled by them."

It follows therefore that the administration of estate should be in line with the constitution to the extent that an entitled beneficiary ought to be recognised and not discriminated against. There is need to emphasise on equality before the law especially where the entitlement is anchored on law.

Common law is still applicable and the statutory provisions which have been made do not oust common law but complement each other. A close look at the Deceased Estate's Succession Act [Chapter 6:02] reveals how estates in situations where a deceased who dies intestate and leaves no spouse are disposed. In circumstances where such a deceased with no surviving spouse has children, descendant parents sister and brother then resort has to be made to common law. In this case the late Bellinah Mhlanga was married in terms of the Marriages Act [Chapter 5:11] giving automatic application of general law to the estate. She did not live a spouse but it is common cause she is survived by children and descendants and hence common law in conjunction with general law has to be resorted to in the administration of her intestate estate.

In discussing the position of common law in Zimbabwe it was held in the case of *Nzara and others v Kashumba NO and Others* HH 151-16 that by virtue of s 192 of the new constitution Roman Dutch law is also the common law of Zimbabwe.

The law applicable provides for the *per stirpes* principle under general law intestate succession based on common law, and also testate succession. The *per stirpes* principle is clearly set out under the general law and customary law. It is important to understand what the principle entails under customary law. The principle is well captured in the Administration of Estates Act [Chapter 6:01] part 111A. The part clearly spells out inheritance pattern in estates governed by customary law. Children and descendants inherit shares *per stirpes* as well defined and recognised in the event of the passing on of the benefactor. See section 68 F

“68F(2) (b) (ii) where the deceased person was a man and is survived by two or more wives and had one or more children, the remainder of his net estate devolves upon his child or children in equal shares as the case may be and any of their descendants *per stirpes*.

(2) (e) (ii) where the deceased person was a woman whose husband at the time of her death had more than one wife and she is survived by her husband and had one or more children, the remainder of her net estate should devolve upon her child or children in equal shares as the case may be and any of their descendants *per stirpes*.

(2) (h) (ii) Where the deceased person is not survived by a spouse and had one or more children, the net estate should devolve upon that child or those children as the case may be, and any of their descendants *per stirpes*.”

The same principle is applicable in other none customary law estates, be it testate or intestate. The common law of Zimbabwe gives the meaning of the principle. The general meaning of the *per stripes* principle is not distorted by the estate falling under the customary or general law regime. What is pivotal is the meaning of the “*per stirpes*” principle. According

to the *Advanced Oxford learners dictionary* it means the acquisition of inheritance by a deceased person's descendants in equal share.

In the case of *Rotmanskey and Another v Heiss* 89 Md 633 MD, the court of appeal 1898 at p 634 described the terms stirpes and per stirpes as follows:

“stirpes is root of inheritance, it designates the ancestor from whom the heir derives title and it necessarily presupposes the death of the ancestor. When issue are said to take per stripes, it is meant that the descendants of a deceased person take the property to which he was entitled, or would have been entitled if living.”

Per stirpes principle encupsules inheritance by representation by the deceased person's descendants. It is crucial for one to look at what descendants means so as to fully appreciate the inheritance by representation principle of per stirpes.

In their book DeWaal and Schoem in *Malon in the Law of Succession* reprinted edition of 2013 (Juta and Company Limited) on p 16 state that a person's blood relations can be divided into three categories- a person's descendants are those who descend directly from him for example, his children, grandchildren and great grandchildren”

In *Dera v Chimari* HH 177-13 in dealing with the principle of vesting the court made it clear heirs are determined once and for all at death. It follows therefore, that in inheritance *per stirpes* the right of representation is determined by what was prevailing at the date of death of the deceased. The principle of vesting is relevant in so far as it determines who predeceased the deceased and whether they left any descendants who can inherit by representation. Once descendants are determined and qualified then if the deceased who died intestate is not survived by a spouse but only descendants, children and grandchildren then division of the estate among the descendants takes place *per stirpes* and representation is permissible. By predeceasing her mother Tapuwa Caroline Mhlanga did not alienate the descendants rights of her children who qualify as beneficiaries and or descendants to their grandmother Bellinah Mhlanga's estate.

Administratively, the current prevailing situation in Zimbabwe is that the Master's office requires the executor to fill form M.H.C 12 before the Master authorises distribution of an Estate. It is crucial in determination of this matter for the form to fall under scrutiny in so far as its import and purpose is concerned. It is evident the following details are required in completion of the form

1. Relatives are to be accounted for
2. Names of relatives and degree or nature of relationship.
3. Address of each surviving relative and date of death of each deceased relative.

4. Surviving spouse-date and place of marriage.
5. Children of the deceased and dates of birth giving names of those who may be dead, dates of their deaths and names of their children. If the predecessor's children had no issue, this fact must be stated
6. Father and mother of the deceased (need not be answered if the deceased left children)
7. Brothers and sisters of the deceased stating whether full or half blood and their address and date of birth in case of half brothers and half sisters name of step parent should be stated only those brothers and sisters whether of full or half blood who survived the deceased are to be given in this answer. (Need not be answered if both parents survived the deceased or if the deceased left children.
8. Names of brother or sister, stating whether full or half blood who may be dead giving their dates of death and names, addresses and dated of birth of their children. If predeceased brothers and sisters had no issue, this fact must be stated. (need not be answered if both parents survived the deceased or if the deceased left children.)
[underlining my emphasis]

As a way of illustration it would be illogical to ask for the name of a child who predeceased the deceased parent and further ask if there are issues and their names and details if the grandchildren are not eligible to inherit by virtue of their parent having predeceased the grandparent.

In fact the questions and answers to form MHC 12 which are in line with the common law as imported from the Cape of Good Hope confirm the applicability of the *per stirpes* principle in intestate inheritance. The late Bellinah Mhlanga was predeceased by one of her children who were a descendant and child entitled to inherit from the mother's estate as there was no spouse to talk of since the father and or spouse of Bellinah Mhlanga predeceased the latter. The fact that Tapiwa Caroline Mhlanga predeceased her mother does not disqualify her children the grand children of Bellinah Mhlanga, who are rightfully descendants to inherit *per stirpes* principle.

My view is fortified by the general definition of *per stirpes* and descendants. To further buttress my view is the interesting definition and illustration given by Jamneck (ed) Rautenbach (ed) Paleker (et al) in *The Law of Succession in South Africa* (second edition, Oxford pres,

Southern Africa 2012) on p 13, they define *stirpes* as a line of descendants of common ancestry. A *stirpes* (plural: number of *stirpes* includes every descendant of the deceased who survives the deceased or a predeceased descendant of the deceased who leaves living descendants [underlining my emphasis]. In other words, a *stirpes* is a surviving child of the deceased and the descendants of a predeceased child. It follows therefore in this case that the fact that Tapuwa Caroline Mhlanga predeceased her mother does not take away the rights of her surviving children the grandchildren, of the late Bellinah Mhlanga, to inherit under the *per stirpes* principle. I must hasten to say it would be an absurd situation to have grandchildren who naturally would have been benefiting from their grandmother after the death of their natural mother stripped off the right to descendantship and inheritance from their ancestor because their mother died earlier than the grandmother. What is peculiar in this case is also the fact that the interests of minor children are at stake. The court has a duty to protect the best interests of minor children. Moreso in circumstances where the rights and interests, are clearly sanctioned by the law. Section 81 of the Constitution of Zimbabwe is instructive.

The definition of *per stirpes* certainly includes surviving children and descendants of predeceased children. It is succession by representation which in simple terms entails inheritance on the basis of blood relationship with a predeceased heir of the deceased, whose place the descendant fills. What occurs in *per stirpes* principle is that a descendant of the predeceased heir moves up into the place of the predeceased heir. The grandchildren are entitled to inherit by representation as they move into their parent's place. In the case of *Herold v Vissen and Ors* 1937 LPD 67 at 74 the court affirmed the principle set out in *Human v Human Executors* 1893 SC 172 wherein it was stated that only grandchildren from children who predeceased the testator must be included on the grandchildren to benefit under the estate. It was further made clear that grandchildren whose parent predeceased the grandparent were entitled to inherit and succeed by representation (success by representation) which is an acknowledgement of the *per stirpes* principle. Although the *Human* and *Herold* cases supra referred to testate succession the principle of *per stirpes* inheritance is equally applicable in an intestate estate. In the present case Bellinah Mhlanga did not leave a will. It is common cause that there is no surviving spouse, further it is not in dispute she is survived by children and grandchildren. From the foregoing discussion it has been established that the *per stirpes* principle is part of the common law of Zimbabwe and is applicable under general law. It is also applicable under customary law with equal force. There is no legal bar to the application of the

per stirpes principle in the current estate of Bellinah Mhlanga. It is evident that the definition of the *per stirpes* principle qualifies the child or descendant of a predeceased child to inherit.

According to the *per stirpes* principle the grandchild whose parent predeceased the deceased has a right to inherit by representation. He or she inherits what their deceased parent would have inherited had they been alive. In this case the grandchildren of the late Bellinah Mhlanga have a right to step into their deceased mother's place and inherit from their grandmother under the *per stirpes* principle. The death of their mother does not take away their blood line and descendant rights to inherit. As clearly discussed *per stirpes* principle is not anchored by predeceasing the deceased but rather blood relationship of children and descendants. Even if there is no Will and last Testament the right to inherit by representation is based on the blood relationship line.

In the circumstances I make a finding that Tapuwa Caroline Mhlanga's children are legally entitled to inherit *per stirpes* from the Estate of late Bellinah Mhlanga their grandmother.

Accordingly it is ordered that:-

1. The *per stirpes* principle is applicable in all estates regardless of being governed by customary law or general law and or common law.
2. Tapuwa Caroline Mhlanga's children are legally entitled to inherit *per stirpes* from the estate of late Bellinah Mhlanga their grandmother.