OLIVER CHAMIRAI MACHEKA
versus
TIRESI CHASARA

HIGH COURT OF ZIMBABWE
CHITAKUNYE AND NDEWERE JJ
HARARE, 15 March 2016 and 9 March 2017

Civil Appeal

S Mpofu, for the appellant
Respondent in person

CHITAKUNYE J: This is an appeal from a decision by a Magistrate in an inquiry purportedly to confirm whether Tiresi Chasara was customarily married to the Late Elias Macheka or not.

The appellant is the father to the late Elias Macheka who died at Harare on 4 May 2014.

The respondent was previously married to Clement Macheka, an elder brother to the late Elias Macheka, who died in the year 2000.

The respondent was married to Clement Macheka for about 16 years. After Clements's demise the Macheka family held a customary inheritance rites ceremony in which they invited the respondent to indicate which of her late husband's relatives she preferred to inherit her. This ceremony involved respondent giving a dish of water to the person she wished to marry. When the respondent was given this opportunity, she gave the dish of water to her son which traditionally was viewed as a sign that she did not wish to be inherited by any of her late husband's relatives.

Elias Macheka was then appointed as "Sarapavana", a customary practice of giving him responsibility over the late Clement's children. Later Elias and the respondent began staying together in the manner of husband and wife. No children were born to their relation. As fate would have it on 4 May 2014 Elias died intestate.

An edict meeting for the Estate Late Elias Macheka DR 1552/14 was called for by the Master of the High Court in terms of s 68 B of the Administration of Estates Act, [*Chapter 6:01*]. At the edict meeting, the respondent presented herself as the surviving spouse of the late Elias Macheka. The appellant and the deceased's family members objected to her being recognised as the surviving spouse. The proceedings were thus aborted without the appointment of an executor and the parties were referred to the magistrate for an inquiry.

The record of proceedings did not contain any documents that may have been put before the magistrate setting out the cause of action and the facts of the case. Instead the proceedings start and end with the magistrate putting questions to those who appeared before her.

The question and answer session appeared to be very informal as the record of proceedings does not reflect that the persons who were being questioned had either taken oath or affirmed. None of the disputants was given the opportunity to challenge the other's answers by way of cross examination. It appeared the process was an information gathering exercise where none of the providers of the information were put under any moral or legal obligation to tell the truth and nothing else.

After exhausting her questions the magistrate proceeded to pass judgement in which she concluded that the respondent was a surviving spouse of the Late Elias Macheka.

The appellant being dissatisfied with the judgement has appealed to this court.

The grounds of appeal were couched as follows:

1. The court *a quo* erred at law in failing to find that there was no marriage between the deceased and Tiresi Chasara in terms of Shona custom, particularly in failing to appreciate the invalidity of the marriage as occasioned by the respondent's refusal to accept 'nhaka' and any subsequent non-compliance with Shona laws and traditions where a man takes to wife the spouse of a deceased relative.
2. The court *a quo* grossly misdirected itself on the facts in confirming the marriage after finding the difficulty of believing the secret payment of lobola.
3. The court *a quo* erred at law in failing to appreciate that the effect of its decision was to abrogate Shona traditions and customs without justification and contrary to legal tenets mandating preservation of same.

The appellant thus prayed for the setting aside of the decision by the magistrate and substituting it with an order denying confirmation of the marriage of Tiresi Chasara to Elias and a declaratory order to the effect that the late Elias died single and unmarried.

When the matter was first placed before us we queried the basis upon which the proceedings had been referred to the magistrate. We also indicated that the appeal record appeared incomplete as there were no founding papers establishing the facts and the cause of action. The parties undertook to have the record of proceedings attended to.

When the matter was reset we raised the same query as the record of proceedings still did not contain the founding papers to the matter. It was then that a document was tendered purporting to be a referral letter from the Master's office to the magistrate court. The main body of that note reads as follows:-

> "RE: Estate late Elias Macheka
>
> The above estate refers.
>
> I hereby refer Tiresi Chasara to your good office for determination of his/her customary law spouseship status to the deceased."

Apart from this note there was nothing else that was placed before the magistrate before she proceeded with the inquiry.

As this was a case of a deceased estate that was before the Master in terms of the Administration of Estates Act [*Chapter 6:01*], the first issue to address was the appropriateness of the referral of the matter to the magistrate. It would appear that the Master in referring the matter to the magistrate and the magistrate in accepting the matter and proceeding to make a determination may have been acting in terms of the repealed s 68 of the Administration of Estates Act. Subsection (2) of that section provided that:-

> "If any controversies or questions arise among relatives or reputed relatives regarding the distribution of the property left by him, such controversies or questions shall be determined in the speediest and least expensive manner consistent with real and substantial justice according to African usages and customs by the provincial magistrate or a senior magistrate of the province in which the deceased ordinarily resided at the time of his death, who shall call and summon the parties concerned before him and take and record evidence of such African usages and customs, which evidence he may supplement from his own knowledge."

This section was however repealed by Act 6 of 1997. Section 3 of Act 6/97 repealed the entire old s 68 and substituted it with Part III A. Part III A of the Act appeared to give extensive powers to the Master and no longer required the Master to refer controversies or questions that arise before him to the Magistrate.

In *casu*, the Master's role was to preside over the edict meeting for the purposes of appointing an executor and make a determination on any disputes that would have arisen in

the process. As that edict meeting was in terms of the Administration of Estates Act [*Chapter 6:01*], any processes to be undertaken were to be in terms of that Act.

Section 68B of the Administration of Estates Act, on the appointment of an executor provides that:-

> "(1) Upon the death of a person referred to in subsection (1) of section *sixty-eight* A, the Master shall summon the deceased person's family, or such members of the family as are readily available , for the purpose of appointing a person to be the executor of the deceased person's estate."

This is the edict meeting that the Macheka family members and Tiresi had attended Whilst the issue of whether there is a surviving spouse or not is important, the amendment has given the Master wide powers on how to handle disputes at the stage of appointing an executor. In this regard s 68 B (2) (i) provides that:

> "If the relatives are not able to agree upon a person to be appointed executor, the Master shall appoint a person as provided in section *twenty-six* ……."

If for some reason the Master felt hamstrung to appoint the executor before the issue of respondent's status was determined it was upon him to receive information from the family members and the respondent on the subject and make his decision. The current provisions did not give the Master authority to refer the matter to the Magistrate court as he did.

If any party was aggrieved by the Master's decision they were entitled to appeal to the High Court. In this regard section 68 J clearly states that:-

> "Any person who is aggrieved by any decision of the Master in terms of this Part may appeal against the decision to the High Court within the time and the manner prescribed in rules of court."

This was unlike the old s 68 (2) whereby the Master was required to refer the question or controversy to the provincial or senior magistrate for determination.

In *re Estate Chirunda* 2006 (2) ZLR 264 (H) the deceased divorced his wife 11 years before his death. They had two children together. At the time of his death he was living with another woman in the manner of husband and wife though the relationship was not formalised in anyway. When an executor dative was appointed, a dispute arose as to whether this second woman was a surviving spouse in the estate. The acting deputy Master wrote a minute to the legal practitioners for his ex-wife to the effect that the second woman was the only surviving spouse of the deceased.

The continued dispute over the second woman's status prompted the executor to refer the matter to the Provincial Magistrate seeking a determination of the marital status of the second woman.

The Provincial Magistrate held an inquiry and ruled that the Master was correct in recognising the second woman as the only surviving spouse in the estate. Being dissatisfied with the magistrate's decision the two children of the first marriage appealed to the High Court.

At p 265 G-266 F thereof MAKARAU J (as she then was) stated that:-

> "One issue exercised our minds in this appeal. It is the jurisdiction of the magistrates' court to hold an inquiry of the nature it did. That it was invited to hold the inquiry by the letter from the executor that I have largely reproduced above is not disputed. The invitation to the provincial magistrate is in that part of the letter that I have highlighted. What exercised our minds is whether the magistrates' court should have accepted the invitation of the executor to hold an inquiry in the matter.
>
> It is trite that prior to 1997, the law provided for a manner of settling disputes or controversies arising from the administration of estates of Africans dying intestate in a speedy and less expensive way than ordinary litigation. This was through the provisions of the old s 68(2) of the Administration of Estates Act [*Chapter 6:01*]."

After citing the section the learned judge proceeded to state that:-

> "The law relating to the administration of estates was radically amended by Act No. 6 of 1997. The amendment to the law saw the deletion and substitution of the entire s 68 dealing with the administration of the estates of intestate Africans. A new Part IIIA has now substituted the old s 68 of the Act and it now deals with estates of persons subject to customary law where such estates are not disposed of by will.
>
> Apart from the noticeable change in the language employed in the amendment which now progressively refers to "persons subject to customary law" rather than to "Africans", reference of disputes arising from such estates to a provincial magistrate or senior magistrate was repealed and was not re-enacted. This may have been by design or was an oversight on the part of the draftsperson. A new manner of dealing with questions or controversies arising from the estates of persons subject to customary law has been introduced. A reading of the Act appears to give the Master extensive powers to determine whether an estate is to be distributed in terms of customary law or not and the plan in terms of which the estate is to be distributed. It also provides that any party aggrieved by the decision of the Master in regard to his powers under this new law may appeal to the High Court."

The learned judge proceeded to conclude that the executor was wrong in referring the matter to the magistrate and the magistrate was also wrong in holding the inquiry and even issuing a ruling when he had no such jurisdiction.

In *casu*, though it was not the executor who referred the matter to the magistrate, but the Master, the same issue of the magistrate's jurisdiction arises. The question of respondent's marital status arose during an edict meeting which meeting was being held in

terms of the Administration of Estates Act. The Master as the convenor of the meeting was expected to make his decision or ruling on issues arising during such a meeting. Any aggrieved party would then be entitled to appeal to the High Court against the Master's decision. There is no reference of disputes arising in the performance of the Master's duties in terms of Part III A of the Act to the magistrates' court.

If the parties had their own issues based on whatever cause of action they could approach the appropriate court for a determination.

It was thus wrong of the Master to abdicate his responsibility and refer the dispute to the magistrate. The Magistrate was also wrong in accepting the referral and proceeding to hold the purported inquiry.

The proceedings before the magistrate were thus a nullity as the magistrate had no jurisdiction to purport to hold an inquiry in a dispute arising during proceedings in terms of the Administration of Estates Act. Anything that came out of this nullity is of no consequence and so the appeal will be dismissed.

The Master should proceed in terms of the Act to perform his duties as there is nothing for us to make a determination on.

In so far as this decision is premised on an aspect neither side had raised, it is my view that each party should bear their own costs for this appeal.

Accordingly the appeal be and is hereby dismissed

Each party to bear its own costs.

NDEWERE J agrees: ……..

Munangati & Associates, appellant's legal practitioners.