

BRIAN NDUMISO NYATHI **1ST APPLICANT**

AND

BRIDGET NYATHI **2ND APPLICANT**

VERSUS

SILIBAZISO NCUBE N.O **1ST RESPONDENT**

AND

ESTATE LATE SIPHIWE NYATHI DRB 502/07 **2ND RESPONDENT**

AND

ESTATE LATE DERICK NYATHI DRB 132/07 **3RD RESPONDENT**

AND

ASSISTANT MASTER OF THE HIGH COURT **4TH RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 6 SEPTEMBER 2011 AND 15 SEPTEMBER 2011

Advocate L. Nkomo for applicants
Mr G. Nyoni for respondents

Opposed Application

MATHONSI J: The two applicants are the surviving children of the late Derick Nyathi who died intestate on 16 January 2007. At the time of his death, the late Derick Nyathi was married to the late Sphiwe Nyathi who survived him they having been married on 14 April 1989 in terms of the Marriages Act [Chapter 5:11]. They had no children.

Sphiwe Nyathi died intestate 5 months after the death of her husband on 22 June 2007. She is survived by her parents. At the time of her death, the late Sphiwe Nyathi had been

appointed executrix dative of the estate of her husband by letters of administration issued on 3 April 2007. She had, in the process of administering the estate, advertised it according to law and prepared a First and Final Distribution account in terms of which she, as the surviving spouse, was to inherit among other properties, stand 2182 Emganwini Bulawayo. The two applicants were to each inherit a child's share of their father's estate. That distribution account was yet to be approved by the 4th Respondent when she died intestate.

After the death of Sipiwe Nyathi, the first applicant and the first respondent were appointed joint executor and executrix dative respectively of her estate by letters of administration dated 16 October 2007. The first respondent then prepared a First and Final Distribution account in terms of which the bulk of the property of the late Derick Nyathi and the late Sipiwe Nyathi was to devolve to the parents of the latter Madli Ncube and Jester Ncube in equal shares.

The first applicant, as co-executor, refused to sign the account and instead this application was launched in which the applicants seek an order declaring that the estate of the late Sipiwe Nyathi is incapable under intestacy law of inheriting from the estate of the late Derick Nyathi. They would like a declarator that the two of them are the rightful beneficiaries of the estate of their late father.

Advocate *Nkomo* appearing for the applicants argued that under the common law of intestate succession, a deceased estate cannot inherit as heir ab intestate. He relied heavily on the case of *Swift v Pichanick N.O 1981 ZLR 622(S)* in which the Supreme Court discussed the concept of the common law of intestacy that estates do not inherit on intestacy.

While appearing to accept that statute has made inroads into the common law of intestate succession in that section 3A of the Deceased Estates Succession Act, [Chapter 6:02] clearly allows the surviving spouse to inherit from his/her deceased spouse, Advocate *Nkomo* argued that only a surviving spouse is entitled to inherit and not that spouse's deceased estate. In his view, the fact that Sipiwe Nyathi died before she could take over the estate of her late husband means that her entitlement in terms of section 3A died with her as holding otherwise would offend the common law position set out in *Swift v Pichanick N.O (supra)*.

Mr Nyoni for the respondents strongly argued that in respect of the intestacy of Derick Nyathi, the date of such intestacy should be reckoned at the time of his death and not at a subsequent date and that the late Sipiwe Nyathi did in fact inherit from the estate of her husband in terms of the provisions of the Deceased Estates Succession Act. The inheritance of the applicants should be limited to that provided for in the relevant statute.

In my view the decision in *Swift v Pichanick N. O* (supra) has been completely misunderstood as it certainly does not support the argument made on behalf of the applicants. While the Supreme Court discussed the common law concept that estates do not inherit intestacy in the context of a failed Will resulting in intestacy, the court was never in doubt that what is paramount is the fact that the intestate heirs are in all cases to be ascertained at the date when the intestacy occurs. That is what is contained in the majority decision delivered by Lewis JP with Barons J.A agreeing.

In the present case, the intestacy of Derick Nyathi occurred on 16 January 2007 when he died without a Will. At that point the provisions of section 3A of the Deceased Estates Succession Act, took effect and it provides:

“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 may be, lived immediately, before the persons death; and
- (b) the household goods and effects which, immediately before the persons death, were used in relation to where such house or domestic premises referred to in paragraph (a);

Where such house, premises, goods and effects form part of the deceased person’s estate.”

It means therefore that by clear provisions of a statute Sipiwe Nyathi; as the surviving spouse of Derick Nyathi, became entitled to receive from the free residue of his estate the effects set out in that provision. Indeed, she even set in motion the winding up process which was to result in the effects being transferred to her name and produced a distribution account which was filed with the fourth respondent before she died.

In my view, the situation obtaining in this case is distinguishable from that where an estate inherits intestate from another as would happen if the intestate heir dies before the intestacy occurs. That view seems in line with that adopted by the Supreme Court much later than *Swift* (*supra*) in *Chaumba v Chaumba* 2002 (2) ZLR 51(S) where the heir apparent according to customary law, Ishmael, had died before the estate was transferred to him. In arriving at the conclusion that Ishmael's son should inherit, Cheda JA stated at 53F;

“The fact that Ishmael may not have been formally appointed heir before he died should not make any difference, as his death cannot change the custom.”

In the present case it is unthinkable that after the legislature gave Sipiwe Nyathi an indisputable right to inherit from her husband's estate, such right would be wiped away by her death as to allow the applicants to inherit from their father as if his wife had pre-deceased him. Such a construction would make nonsense of the legislative intent to empower spouses to inherit, undisturbed, from the estates of their deceased spouses.

The applicants are certainly entitled to each inherit a child's share from their father's estate in accordance with the provisions of the law but certainly not to eclipse their step mother's entitlement.

I therefore come to the conclusion that the application is without merit. It is accordingly dismissed with costs.

Cheda and partners, applicant's legal practitioners
Messrs Moyo and Nyoni, respondents' legal practitioners