

**WINNIE MPOFU**

**Versus**

**FLOPPA LEAH MLAVU**  
**a.k.a LEAH FLOPPHEL MLAVU**

**And**

**ESTER KELLI (NO)**

**And**

**THE ASSISTANT MASTER**

IN THE HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 21 JANUARY & 11 FEBRUARY 2016

**Civil Trial**

*M. Ndlovu* for the plaintiff  
*C. N. Dube* for 1<sup>st</sup> defendant

**MATHONSI J:** The late Korosi Matiyasi Soraidema (“the deceased”) was a businessman of repute who owned a shopping complex in Njube Township, Bulawayo, one of the pioneering suburbs in town, among other valuables. He may have passed away on 15 September 2003 with his estate registered as DRBY 1435/03 and perhaps gone to meet his maker, but those that claim to have been closest to him during his lifetime have never allowed his soul to rest in peace. Brickbats have flown all over the place for over 15 years as a titanic battle over his estate rages on. The main antagonists pitted against each other have been Winnie Mpofo (“Winnie”), the plaintiff herein and Floppa Leah Mlavu (“Floppa”) the 1<sup>st</sup> defendant herein. Over the years there has been one litigation after the other over the control of the estate with alleged relatives of the deceased taking turns to disown one or other of the 2 while supporting the other.

In the present matter Winnie instituted action against the defendants seeking a declaratur that Floppa is not a spouse of the deceased in terms of customary law or the Administration of Estates Act [Chapter 6:01], that she (Winnie) is the only surviving daughter of the deceased and as such the sole beneficiary of the estate. Alternatively, in the event that the court finds Floppa to be a spouse, that she is only entitled to inherit Centenary Farm and all the property therein while she, Winnie, is entitled to inherit the remainder of the estate. As a further alternative, Winnie would like both of them to be declared joint heiresses to the estate entitled to inherit the whole estate in equal shares.

Winnie averred in her declaration that she is a child born of the marriage between the deceased and the late Ettah Sibanda (“Ettah”), the two having been married to each other at Bulawayo on 18 June 1948 which marriage subsisted until the death of the deceased on 15 September 2003. Although the deceased is alleged to have contracted a customary marriage with Floppa, the latter has failed to prove such marriage only succeeding in producing an unauthenticated photo-copy of the marriage certificate.

Winnie further averred that the deceased and Floppa had separated in 1975 until the death of the deceased. During that period of 28 years separation, Floppa had gone on to contract another marriage in terms of the Marriage Act [Chapter 5:11] with one Ronnie Brown Masiso on 7 February 1986 as a “spinster”. They later divorced but Floppa and the deceased never revived their marriage.

The action is contested by Floppa who denied that Winnie is the child of the deceased or that Ettah was ever married to the deceased. She averred that her marriage to the deceased subsisted until his death and although she once married Masiso by civil rites, that marriage was void and as such it had no effect on the validity of her marriage to the deceased. She denied that Winnie was entitled to inherit anything from the deceased’s estate.

The issues for trial as contained in the joint pre-trial conference minute drawn by the parties following a formal pre-trial conference held before a judge are:

1. Whether Winnie is a surviving child of the deceased.
2. Whether Floppa is a surviving spouse of the deceased.
3. What assets constitute the estate of the deceased?

At the trial, 4 witnesses, including Winnie, testified on behalf of the plaintiff while only Floppa gave evidence on her behalf as the 1<sup>st</sup> defendant.

It was Winnie's evidence that her mother Ettah got married to the deceased on 18 June 1948 in terms of the then Native Marriages Act. She produced a certified copy of the marriage certificate issued by the Customary Law Court on 3 June 2010 showing that Ettah was the deceased's second wife. That marriage was blessed with 2 children namely Norman and herself. The 2 commenced living in separation when Ettah became ill and returned to her parents' rural home in Lupane. When she was born she lived there with her mother. Her father had previously married another woman with whom he had 2 children both of whom are now deceased. Even her brother Norman is now deceased.

Winnie testified that it is her mother who obtained a birth certificate for her and in so doing had used the surname Mpofu, his father's totem. She said that as far as she was aware in the Shona tradition they sometimes use totems and the deceased was always known as Mpofu even though his records reflected the surname Soraidema. She had grown up at her mother's rural home in Lupane where she got her first birth certificate. Although she was born in 1952, as was the norm during the colonial era, her date of birth was brought forward to 1956 because then the administration would not allow an older person to repeat a grade at school.

She lived in Lupane until she was about 20 years old when she came to town to try and hook up with the deceased who initially did not readily accept her and even refused to change her birth certificate to reflect the surname he was using. This is because she had been born

during the period of separation. The cold reception did not last long as the deceased soon accepted her, contributed to her maintenance and even paid her fees when she was attending nursing school in Masvingo. Ironically it is Floppa, then employed by the deceased as a shop keeper, who was sending her groceries in Masvingo obviously on the instructions of the deceased. The Registrar of Births and Death subsequently issued her with an amended birth certificate showing her surname as Soraidema.

She knew Floppa as an employee and treated her as a sister. She does not know when Floppa and the deceased upgraded their relationship to a sexual one and if ever they got married. She queried the alleged marriage because even the marriage certificate Floppa has produced is hardly legible and records her as a first wife when the deceased had already married twice before Floppa came. More importantly the clerk of court, who is the custodian of all such marriages, has said there is no record of it. She produced a letter dated 11 December 2009 written by the clerk of Customary Law Court to Cheda and Partners, then representing her, which reads in relevant part:

“Re: Confirmation of Marriage

The above matter refers. We have made a check on our marriage records and we could not find the said marriage record which is said to have been contracted in 1974 between Floppa Leah Mlavu and Korosi Matiasi Soraidema.”

As Floppa had produced a copy of a certified copy of the marriage certificate, the witness' investigations took her to the office whose certification stamp appears on that copy, but was told that the “lawyer” could not remember what had transpired. Because of that and the fact that there was no one who had witnessed the marriage, she formulated the opinion that Floppa was never married to the deceased.

She said that if Floppa had any relationship with the deceased such terminated as far back as 1975 when she left and never returned until the deceased's death. In fact Floppa later married one Ronnie Brown Masiso at Bulawayo on 7 February 1986 in terms of the Marriage Act

[Chapter 5:11]. When she applied for a marriage licence she did so as a spinster. Copies of the application for a marriage licence made and signed by Floppa on 7 February 1986 under oath in which she vowed that not only was she a spinster but also that “there (was) no lawful impediment to (their) marriage” was produced together with the marriage licence and marriage certificate.

While still on that marriage I might as well mention that according to Floppa she indeed got married to Masiso as alleged but that marriage was fraudulent and a fake. Apart from the fact that she could not lawfully enter into a valid marriage by reason that she was already married to the deceased, she had assisted her nephew obtain a marriage certificate which he needed in order to apply for a house with the municipality. She produced a divorce order as proof that the marriage in question was later nullified. As I shall demonstrate later in this judgment Floppa’s explanation of the marriage with Masiso is far from satisfactory and completely unreliable.

Winnie insisted that as a daughter of the deceased she is entitled in law to inherit from his estate but the same cannot be said about Floppa who has not proved that she is a spouse of the deceased. Winnie called 3 relatives of the deceased to vouch for her namely Ndatanda Echo Nevana, Martin Soraidema and Vorster Soraidema. The thread running through their evidence is that Winnie was born of the second marriage between the deceased and Ettah. The latter went on to obtain a birth certificate for Winnie to enable her to attend school using the surname Mpofu which was the surname also used by the deceased. It was not uncommon then for Shona speaking people coming to settle in Matabeleland to adopt such surnames for the benefit of the people of Matabeleland region who always insisted on surnames not used by the former, who are called by their totems.

Nevana, who says he was so close to the deceased that it is the deceased who sent him to school and paid his school fees from standard 1 to standard six and he is the one who interviewed Floppa for a job as a shop keeper, was adamant that the deceased later had a relationship with

Floppa. He however never witnessed any marriage between them. In fact according to Nevana Floppa left the deceased and went on to marry someone else. He was shown a letter written to the deceased by the husband warning the deceased to stay away from Floppa as she was then lawfully married.

Winnie and her witnesses gave their evidence very well. The only blemish was in the evidence of Martin Soraidema who took a tangent on the use of the surname Mpofo. He said Winnie got it because it was her mother's totem and not the deceased's. What was clear though was that apart from Nevana, all the members of the Soraidema clan have always been based in Magunje in Mashonaland and were not part of the life of the deceased in Bulawayo. I was however very impressed by the evidence of Nevana who was the closest witness to the deceased. The deceased confided in him. I have no hesitation in relying on his evidence.

It is surprising that Floppa could not secure evidence from any of the deceased's relatives to support her claim that Winnie is not the daughter of the deceased or that she was lawfully married to the deceased. As hers was a customary marriage at least she should have her own relatives who witnessed it to come and say it did take place. She produced none. She forlornly stood on her own and as a single witness she had the onerous task of persuading the court that it is her version which should be believed. Her credibility in that regard therefore became very critical in tilting the scales in her favour.

Her version is that she was married to the deceased in 1974 at a time when he was not married to anyone. She did not know Ettah and only met her after the deceased's death at the police station. She does not know if there is any relationship between the deceased and Winnie and does not accept that she is the deceased's daughter because her surname was Mpofo which is not the deceased's surname. The deceased's totems are Sinyoro, Masikamoto, Mawongera. Mpofo does not feature there. She only knew 4 children of the deceased, that is Laisa, Daisy, Gift and Norman. The existence of Winnie was never brought to her attention.

On why she could not produce her original or properly certified copy of her marriage certificate, Floppa said she used to have the original which she had photocopied and then had it certified by the Master of the High Court, which copy was later photocopied and produced as an exhibit in her bundle of documents. However, the original was taken away from her by the police when she was prosecuted for forgery where it was alleged she had forged a marriage certificate. She produced an extract of the criminal record book CRB 593/05, CR B/C 827/11/04 the outcome of which was an acquittal. Floppa said the police never gave the certificate back to her.

The explanation on the non-existence of the original marriage certificate or a certified copy is far from satisfactory. If the police took the original from her upon her arrest and never gave it back as she alleged, that must have been done in November 2004 as shown by the criminal record number (827/11/04). It therefore cannot be correct that she had taken the certificate for certification by the Master on 25 March 2008 when the Assistant Master allegedly appended his stamp. Either that or the Assistant Master certified a photocopy without seeing the original which confirms the evidence of Winnie that the “lawyer” said he could not remember anything about certification of the marriage certificate.

I also find it strange that Floppa, with the assistance of her legal practitioner, could not secure the release of her marriage certificate from the police or from the criminal record at the Magistrates’ Court. One can only draw adverse inferences from that scenario, especially when the copy that she produced records that hers was a first marriage for the deceased when we have confirmation from the custodian of customary marriages that the deceased had been married twice before he met Floppa and that Ettah’s marriage subsisted until the deceased’s death. In addition we have the vexing inability of Floppa to bring any relative or friend from both families who witnessed her marriage to the deceased.

Regarding her marriage to Masiso, Floppa stated that it was fraudulent and designed only to help him, as a nephew to apply for a house. The moment he got one, they quickly nullified it.

Meanwhile she continued being validly married to the deceased. It is not easy to dismiss that marriage out of hand just like that. This is because in order for her to obtain a marriage licence, Floppa made an oath that she was a spinster and there was no impediment to the marriage with Masiso. If her present oath is to be believed, it would mean that she lied under oath on 7 February 1986 when she made the deposition in the marriage licence application. On the other hand, if we believe her oath in the application for a marriage licence, it must therefore follow that she lied in court. Whichever way, her 2 sworn statements are mutually destructive. It is trite that where a witness is shown to have lied under oath, then everything that the witness says should be rejected. The logic for that is that a court of law may never know when the truth is told by such a witness and as such it is safe to reject everything the witness says: *Trinity Engineering (Pvt) Ltd v Karimazondo & Ors* HH-672-15.

The issue of Floppa's marriage to Masiso however does not end there. I have obtained the record, HC 724/86 which I am entitled to take judicial notice of as it is a record of this court. The papers filed therein show that Masiso filed a divorce summons out of this court on 21 October 1986 through the medium of his legal practitioners Coghlan & Welsh. In the declaration Masiso averred that his marriage to Floppa had irretrievably broken down because;

- “(a) Defendant (Floppa) has been dishonest with plaintiff about the number of children she has had from previous associations and has further refused to disclose the full parental history of any of the aforesaid children.
- (b) Defendant is a spend thrift and cannot handle her financial affairs properly and moreover her numerous creditors have not been discriminative in the execution of property from the matrimonial home, thereby causing plaintiff great embarrassment and anxiety.
- (c) Defendant has deliberately provoked numerous arguments with plaintiff.
- (d) Defendant has appeared in court on serious criminal charges thereby causing plaintiff great embarrassment and anxiety.
- (e) Defendant has frequently subjected plaintiff to outbursts of violent temper and used abusive language to and concerning him.”

Quite detailed and pointed reasons for seeking a divorce and an indictment indeed on the personality of Floppa. If those ground are juxtaposed against Floppa's story that this was a fake



marriage meant to assist Masiso obtain a house, it is extremely difficult to accept that story as true. For one thing it is unlikely that as late as 1986, the Municipality of Bulawayo still required applicants for low cost housing to produce marriage certificates for a housing form. In addition, Masiso is not shown as a person who required low cost housing at all because the couple lived at number 42 Greystoke Way Morningside, Bulawayo, an up market residential area by any standard. In any event Masiso owned that house because he averred in paragraph 8 of his declaration that:

“Plaintiff is the sole beneficial owner of house number 42 Greystoke Way, Morningside, Bulawayo, which is presently occupied by the defendant and which defendant refuses, despite demand, to vacate.”

What is clear therefore is that not only did Masiso own a house in Morningside but such house was occupied by Floppa who was refusing to vacate. That is certainly not a person who required the assistance of his aunt to enter into a paper marriage to obtain a house.

As if that was not enough, when Floppa received the summons, she engaged the services of a firm of legal practitioners, Ben Baron and Partners of Bulawayo who caused an appearance to defend to be entered on her behalf on 23 October 1986. It would appear that what followed were negotiations of a settlement between the parties, regard being had to the affidavit deposed to by Floppa’s legal representative, Dipak Naik on 8 February 1987. It was only after the successful conclusion of those negotiations, one would presume, that the divorce was granted on 27 February 1987 on the grounds of “irretrievable breakdown” of marriage.

If one relates to that court record it is clear that what it achieves is to tear Floppa’s testimony into smithereens. If the marriage was fake, it would have been nullified instead of being dissolved on the grounds of irretrievable breakdown. Even if one were to assume in Floppa’s favour, and generously so, that the 2 of them decided to continue with the charade and sought a divorce instead of a nullity, human experience suggests that they would have given

cursory grounds of breakdown instead of the accusatorial and pointed ones which were relied upon.

I therefore have no hesitation in concluding that indeed Floppa was married to Masiso which marriage was dissolved as shown in the record. Everything points to a very acrimonious divorce as would not happen in the situation she sought to create in her evidence. The question therefore is where does that leave us? I have already said that Floppa failed to prove the existence of a valid customary law union between herself and the deceased. She did not even enlighten the court as to where and when it may have occurred and failed to produce single witness who witnessed it.

The marriage certificate that she produced was an uncertified photo-copy which was disowned by the clerk of the Customary Law Court, the custodian of records of such marriages. The explanation that she gave for her failure to prove the customary law marriage was a dog's breakfast. I agree with Mr *Ndlovu*, who appeared for Winnie, that Floppa has a propensity to misrepresent in an alarming way which is a trait that she has carried for a long time. In 1986, Masiso was accusing her of being "dishonest" even about the number of children she had and of appearing in the courts "on serious criminal charges". All this is contained in a court record whose contents Floppa was aware of and its contents were put to her under cross-examination thereby presenting her with an opportunity to explain her side of the story. She chose to down play it and dismissed it as a non-event.

In light of the available evidence I have no choice but to reject the evidence of Floppa that she was married to the deceased. Her conduct of marrying Masiso does not point to a person who was validly married to someone else, a businessman at that.

Mr *Dube* for the defendant did not say anything in his closing submissions about the existence or validity of Floppa's marriage *viz-a-viz* the evidence. He was content simply to

continue challenging the paternity of Winnie forgetting that Floppa also bore the onus of proving the existence of her marriage.

In terms of s 68 (3) of the Administration of Estates Act [Chapter 6:01] a marriage contracted in terms of customary law is recognized as a valid marriage for purposes of inheritance. If Floppa was married to the deceased, even without a marriage certificate, she would be a spouse for purposes of inheritance. She has not discharged that onus.

Section 68 (4) is an interesting provision. It reads:

“A marriage contracted according to the Marriage Act [Chapter 5:11] or the law of a foreign country under which persons are not permitted to have more than one spouse, shall be regarded as a valid marriage for the purposes of this Part even if, either of the parties was married to someone else in accordance with customary law, whether or not that customary law marriage was solemnized in terms of the Customary Marriages Act [Chapter 5:07].

Provided that, for the purposes of this Part, the first marriage shall be regarded as a customary law marriage.”

Can that section be interpreted grammatically? The Supreme Court said in *S v Nottingham Estates (Pvt) Ltd* 1995 (1) ZLR 253 (S) 256 E:

“The primary rule of interpretation is, of course, to endeavour to ascertain the intention of the law maker from an examination of the provision under consideration placed in proper context. A court will commence its inquiry by giving the word its grammatical signification, unless it is clear that the literal sense, when so applied, defeats the legislative intendment. In such event a deviation from the ordinary meaning is justified, provided always that the word is sufficiently flexible to admit of another meaning by which such intention can be better effected.”

If the section is given its grammatical signification it means that a party who is married in terms of customary law, whether in the form of a customary union or a marriage solemnized in terms of Chapter 5:07, is entitled to contract a marriage in terms of Chapter 5:11 and for purposes of Part IIIA of the Administration of Estates Act [Chapter 6:01] that marriage will be

valid. The section used the phrase “either party” meaning that a woman married in terms of customary law can contract a marriage in terms of Chapter 5:11 with another man and such marriage shall be regarded as valid for inheritance purposes. She cannot of course contract a marriage in terms of Chapter 5:11 if she is married in terms of Chapter 5:07. However a customary union is not a marriage but is recognized for limited reasons, such as inheritance and maintenance. It is only such a construction of s 68(4) which does not lead to an absurdity.

In our law, a woman cannot marry 2 different men. What that provision means therefore is that when she elects to contract a marriage with another man in terms of Chapter 5:11, the latter marriage automatically terminates the preceding customary marriage. That is where Floppa stands. Even if she was married to the deceased in terms of customary law such marriage terminated the moment she took marriage vows with Masiso by civil rites on 7 February 1986. So even if such marriage was dissolved later, the act of dissolution could not have the effect of reviving what had already been terminated.

It is regrettable that there was absolutely no benefit to be derived from submissions made by both counsel in this matter regarding the pertinent legal issues arising from this dispute. Both closing submissions were spectacular by their lack of legal argument. Perhaps the litigants, self-acting, would have done better. I express that indignation because quite crucial legal issues arise from the dispute which needed to be exhaustively dealt with. For instance, the legal effect of Floppa’s disappearance for almost 3 decades before resurfacing after the deceased’s death to lay a claim to his estate was not canvassed. So is the issue relating to the status of Ettah Sibanda who only died after the death of the deceased and had remained legally married to him until his death. These are issues with legal implications on the rights of the present parties.

In *Ndlovu v Ndlovu & Ors* 2011 (1) ZLR 81 (H) 88E – F I had occasion to express the view that:

“The time has come to declare, in no uncertain terms, that parties cannot invest in a paper marriage only to surface after the death of the other person they had long abandoned to commence a new life. It is an unacceptable and extremely indecent habit which should be discouraged. If the marriage has failed, it should be terminated to release the parties to start afresh.”

Floppa’s situation is worse than that because not only did she abandon the deceased for decades to commence a new life, she also contracted a civil marriage. She then re-surfaced after the deceased’s death even without the dignity of attending his funeral to lay a claim to his estate. Alice in Wonderland.

On the issue of whether Floppa is a spouse of the deceased for inheritance purposes, I have no hesitation in answering that question in the negative.

On the issue of whether Winnie is the daughter of the deceased, credible evidence has been led to prove her parentage. There is therefore no basis whatsoever for holding otherwise. In fact, the only factor which Floppa was clinging on to, was that she used the surname Mpoфу instead of Soraidema. That argument is as opportunistic as it ridiculous. Quite often children are born of biological parents and use other names than those of their fathers. The use of surnames on its own cannot possibly disinherit a person.

There is however another factor which was not considered by counsel. It is that at the time the deceased died in 2003, Ettah was still alive and was still legally married to the deceased. In fact that is common cause. Even according to the evidence of Floppa at the time the parties had started fighting over the estate, she met Ettah at the police station. According to the evidence of Winnie, Ettah had resumed living with the deceased at the time of his death. She even deposed to an affidavit explaining the parentage of Winnie and the late Norman on 18 May 2004 which is part of the record in HC 2445/12.

The fact that Ettah survived the deceased triggered the application of s3A of the Deceased Estates Succession Act [Chapter 6:02] regard being had to the fact that the intestacy of the deceased occurred on 15 September 2003 when he died without a will. Section 3A 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 person’s death; and
- (b) the household goods and effects which, immediately before the person’s 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.”

So, even if Floppa had also been a spouse, Ettah would have been entitled to inherit. While it is true that according to common law, estates do not inherit intestate; *Swift v Pichanick* NO 1981 ZLR 622 (S), Ettah was a surviving spouse and the fact that she may not have been appointed heiress at the time of her death does not make a difference, she was still entitled to inherit; *Chaumba v Chaumba* 2002 (2) ZLR 51 (S) 53 F; *Nyathi & Anor v Ncube & Ors* HB-123-11.

In any event, as the only surviving spouse Ettah would still inherit in terms of the Administration of Estates Act [Chapter 6:01].

Happily, it is common cause that Winnie is again the only surviving progeny of Ettah and as such would still inherit from the latter’s estate. That therefore resolves the conundrum posed by the failure to recognize the rights of Ettah in the equation. I conclude therefore that Winnie as the only surviving progeny of both Ettah and the deceased inherits the entire estate. No evidence was led on the third issue which I therefore leave for the executor.

In the result it is ordered and declared that;

1. The 1<sup>st</sup> defendant, Floppa Leah Mlavu is not a spouse of the late Korosi Matiyasi Soraidema under the law and is therefore not entitled to inherit from the estate registered as DRBY 1435/2003.
2. The plaintiff is the only surviving daughter of the late Korosi Matiyasi Soraidema and Ettah Soraidema (nee Sibanda) and as such is the sole beneficiary of the estate DRBY 1435/2003.
3. The 1<sup>st</sup> defendant shall bear the costs of suit on an ordinary scale.

*Mlweli Ndlovu & Associates*, plaintiff's legal practitioners  
*Legal Resources Foundation*, 1<sup>st</sup> defendant's legal practitioners