MALYAM MATSINDE
versus
PATRICIA NYAMUKAPA

HIGH COURT OF ZIMBABWE
MAKARAU J
Harare 28 June and 4 October 2006

Opposed application

Mrs J *Pratt*, for the applicant
Mr *L Kabote*, for the respondent

MAKARAU J: In October 1993 one David Zhuwaneti issued summons out of the magistrates' court, seeking a decree of divorce against one Ebba David (Zhuwaneti). At the end of the hearing, the trial court made the following order:

> "Divorce is granted on grounds of irretrievable breakdown of the marriage with the consent of both parties. House number 2388 Kambuzuma to remain with the applicant. Further evidence to be led on its value for the court to consider contributions made by respondent. Respondent is awarded all the movable property. Each party bears his or her costs."

As fate would have it, both David Zhuwaneti and Ebba David died before the parties returned to court to lead further evidence on the value of the immovable property to enable the court to assess Ebba's contribution in the immovable property. The property "remained" with David until his demise on 1 March 1999.

On the date of his death, David "married" the first respondent in terms of the Marriages Act [*Chapter 5:11*]. Prior to the civil marriage, the parties were in a customary union that subsisted from 1995. The marriage between David and the first respondent literally on his deathbed was the subject of an investigation by the Registrar-General whose findings are unknown. For reasons that I shall detail later, it is not

necessary in my view that I make a determination on the validity of this marriage.

Upon the demise of David, the first respondent, armed with her marriage certificate to David, had the estate registered and in terms of intestate succession, was entitled to inherit all the property in the estate. This included the immovable property that had been the subject of litigation in the divorce proceedings of 1993 between David and Ebba.

Ebba passed on in September 1999, six months after the death of David. On 17 May 2000, the applicant was appointed executrix dative in the estate of Ebba David, also known as Ebba Tagarira. In her capacity as such, she filed this application seeking an order setting aside the appointment of first respondent as the executrix dative of the estate of David Zhuwaneti, and also seeking to set aside the marriage under the Marriages Act of the first respondent to David.

The application was opposed on the grounds on the grounds that the first respondent was validly married to David and that the applicant's mother passed on before she had led further evidence before the trial court.

I now turn to consider the issues rising from this application.

During the hearing of the application, it was argued by the applicant that the first respondent was not legally married to the later David Zhuwaneti as she allegedly married him on the same day that he passed away at a city hospital. In my views, there is a basis for the concerns raised by the applicant. Certain other irregularities attendant upon the alleged marriage were brought to the attention of the Registrar of Marriages by one of his officers in a statement, a copy of which was attached to the applicant's papers. On the basis of these irregularities, the applicant has prayed for an order that I set aside the marriage.

I hesitate to make a definitive pronouncement on the validity of the marriage in these proceedings. Firstly, there is evidence before me

that the Registrar of Marriages, a competent authority to do so, investigated the marriage. Whether such investigation has been completed and with what result, I have not been told. In the absence of an indication as to the stage at which the investigation is, I would withhold the court's inherent jurisdiction to allow the Registrar to make his findings known.

A marriage relates to one's status and a pronouncement on its validity or otherwise binds the world at large. Such a pronouncement should not be lightly made in my view. It should be made on the clearest of evidence and after a thorough investigation of al the relevant facts.

Further, it is not necessary for the disposal of the matter before me that I make a finding on the validity of the 1st respondent' marriage to David. The first respondent was in a customary union with David before the alleged marriage. Thus, even if she was not a wife at common law, she was a wife at customary law and thus a surviving spouse and eligible to be appointed executrix of David's estate in that capacity. Wives at customary law are not disqualified from appointment as executrixes of their deceased husbands' estates.

Thus, it is my finding that the validity of her marriage certificate has no direct bearing on her appointment at executrix dative and cannot be used as a ground for having such an appointment set aside.

I now turn to consider whether there is any other basis for removing the first respondent as executrix of the estate.

From a reading of the applicant's affidavit, it would appear that the applicant desires to have the first respondent removed as executrix because she drew up a distribution plan that did not take into account the alleged share of Ebba in the estate especially in respect of the immovable property, the subject of the dispute. The issue of the validity of the first respondent's marriage to David is also brought in as a further ground for the removal of the first respondent as executrix of the estate.

I have already expressed my views on the validity of the first respondent's marriage to David and its materiality to the dispute before me. It is the issue raised by the other ground that in my view raises an interesting legal point. This relates to whether the first respondent erred in disregarding the alleged share that Ebba had in the immovable property forming part of David's estate.

I pause here to observe that the removal of an executor dative in my view should primarily be done by the Master on good ground shown. The appointment of an executor is an administrative function in the hands of the Master. It is therefore to him that allegations of unbecoming conduct by an executor should be made in the first instance. The decision of the Master to remove or to retain the executor after complaints have been lodged with him is then brought on review to this court on the recognized grounds of review of an administrative decision.

None of the above procedure was observed in the application before me. On that basis alone I would dismiss the application.

Assuming that I have erred in holding that the application to have the first respondent removed from office has been improperly brought, I still would have dismissed the application on its merits.

Mrs *Pratt* for the applicant argued passionately that the applicant should be authorized to file a claim on behalf of her late mother's estate, to quantify her mother's contribution to the immovable property that is part of David's estate. She vividly described the injustice that will result should the court disallow an action by the applicant to proceed to lead evidence as to the contribution made by her late mother towards the acquisition of the property. She was quite clear in her argument that what was being sought at this stage was not a distribution of the matrimonial estate of the late David and Ebba in terms of s7 of the Matrimonial Causes Act but a declarator allowing an action by the applicant to quantify a claim that was recognized by the lower court. She

placed the claim on the same level as a real right that the late Ebba had in terms of the lower court's judgment and one that the applicant could proceed to enforce. She labeled the right an "economic value" as opposed to a personal right. I understood her argument to be that share Ebba was held to have in the immovable property is an asset in her estate, one that the applicant can collect.

Mrs *Pratt's* argument in this regard is quite compelling and rooted in equity and common sense. It is however not legally sustainable for a number of reasons.

As correctly observed by Mrs *Pratt*, some causes of action survive the deceased and can be continued by the executor. As observed by CHATIKOBO J in Ex parte Masimirembwa N O 1995 (1) ZLR 144 H at page 148D:

> "It would appear that the transmissibility of rights or actions depends on whether they are rights or actions in *rem* or in *personam.* Real rights are transmissible, even where the holder dies before *litis contestatio*, whereas personal rights die with the holder. The situation appears different where the holder of personal rights dies after *litis contestation.*"

It would appear to me that the above remarks by CHATIKOBO J are a reflection of the correct common law position under Roman Dutch Law for under English law, it would appear that through the intervention of statute, all causes of action subsisting against or vested in the deceased survive against or for the benefit of his estate.[1]

While actions for general damages for personal injury may survive the plaintiff if the plaintiff dies after *litis contestatio*, it is my understanding of the law that not all personal claims can survive the plaintiff even after *litis contestatio* had been reached. Claims mainly in the realms of family law appear to me to die with the plaintiff. Such claims as claims for divorce, maintnenance, custody and guardianship of minor children quite clearly do not survive the claimant and cannot be pursued by the executor.

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[1] See The Law Reform (Miscellaneous Provisions) Act 1934.

Claims for the redistribution of matrimonial property pose some difficulties especially where the plaintiff dies after *litis contestatio*. In *Ex parte Masimirembwa* NO, (*supra*) CHATIKOBO J held that such a claim is not transmissible even if the plaintiff dies after *litis contestatio.* In coming to this conclusion, the judge reasoned thus at page 151F-G:

> "I now have to grapple with the most difficult aspect of this case, does the fact that Georgina died after the proceedings had reached *litis contestatio* mean that, if I am satisfied on the evidence that she was entitled to a property adjustment order, I should proceed to make such an order as if she was still alive? If so, how do I satisfy the criteria laid down in section 7 (3) of the Act, which enjoins me to 'endeavour as far as is reasonable and practicable and having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses?' Georgina is not alive to be placed in that situation."

It is necessary in my view that the nature of the claim that the applicant alleges to have against the respondent be examined in detail. To her credit, she does not seek to complete the divorce proceedings between the two deceases spouses. She seeks to be authorized to claim a share in the immovable property, based on the observation by the lower court that the late Ebba had contributed to the acquisition of the immovable property and further evidence had to be led on the value of the property to enable the court to quantify the late Ebba's contribution.

In my view, the observation by the lower court did not amount to a grant of a real right to Ebba. It did not confer on her rights of ownership. It simply recognized her right in equity to be awarded s a share in the property so as to achieve the purpose intended by s7 of the Matrimonial Causes Act [*Chapter 7.13*]. In my view, it remained a finding of fact that would have converted to a right in equity under the matrimonial causes act had sufficient evidence been led before the lower court. It remained a personal right that Ebba could have enforced against David. It was not a debt that her successors in title could collect after her demise.

Whilst it appears attractive to hold that after Ebba's contribution had been accepted by the court, that finding locked value in favour of Ebba, which value she and her estate were entitled to benefit from, that position in my view is fraught with many legal problems.

Firstly, it would seek to elevate the considerations of equity under section 7 of the matrimonial Causes Act into principles of property law in that where the court finds that a spouse contributed towards the acquisition of an asset, then that finding amounts to a grant of ownership in that asset. In my view, that was not the intention of the legislature in enacting section 7. As observed by CHATIKOBO J at page 149E, a spouse who claims for an order of redistribution is not claiming what belongs to her, but in essence, is asking the court to make a property adjustment order to strike a balance between her assets and those of the other spouse.

Secondly, in my view, the distribution of the joint estate of spouses is a personal claim that is peculiar to husband and wife or former husband and wife. It is not a cause of action founded on a principle of common law. It is an action created by Parliament to achieve justice as between husband and wife in an area where the strict application of the principles of property law may work an injustice on those spouses who contribute towards the acquisition of assets registered in the other spouse's name. It is not a right that can be enforced against a creditor for instance or shield the property from attachment in execution. It is not a preferred claim at liquidation. It remains a personal right that one spouse can enforce against the other.

It is thus my view that a claim for the distribution of a matrimonial estate cannot be transmitted to the estate of the deceased's spouse. It remains incapable of transmission even when one of the parties dies after *litis contestatio* has been reached.

I am keenly aware of the injustices that my finding appears to work on the heirs of the deceased's spouse. The remedy for the injustice in my view does not lie in us distorting the existing principles on the transmissibility of claims but in granting spouses real rights in all assets of the matrimonial estate during their lifetime so that husband and wife are joint owners of their joint estate. Anything short of this reform in the law in my view will not do away with the injustices such as have been graphically described by Mrs *Pratt.*

While I feel constrained to dismiss the application, in my view, it will be onerous on the estate of the late Ebba that I burden it with an award of costs in the circumstances of this matter. The applicant fails due to a palpable injustice wrought by the law itself and where equity and common sense decree that there be redress. I will therefore order that each estate shall bear its own costs.

In the result, I make the following order:

1. The application is dismissed.

2. Each party shall bear its own costs.

Mushonga & Associates, applicant's legal practitioners
L M Kabote, 1st respondent's legal practitioners