IN RE: ESTATE LATE AMOS JOHN CHIRUNDA

HIGH COURT OF ZIMBABWE
MAKARAU JP and CHATUKUTA J
HARARE, 2 and 8 November 2006

CIVIL APPEAL

Mr. R Fitches for the appellant
Mr S Hwacha for the respondent.

MAKARAU JP: The deceased, Amos John Chirunda, passed away in Harare on 8 December 1997. On 23 July 1986, this court granted a decree of divorce between the deceased and Margaret Sumbureru, his wife of some 8 years standing. Two children were born of the marriage. At the time of his death, the deceased was living with one Prisca Chinamora after the manner of husband and wife. The union between the deceased and Prisca was not solemnized in terms of any recognized law.

On 19 April 2005, Wilbert Nyamupfukudza was appointed executor dative to the estate. A dispute then arose as to whether Prisca Chinamora is a surviving spouse in the estate. From the papers filed before us, it is not clear whether the matter was formally referred to the Master for a ruling on the status of Prisca Chinamora. However, by letter dated 1 July 2005 and addressed to Margaret Sumburero's then legal practitioners, the Acting Deputy Master wrote that the Master's office acknowledged that Prisca Chinamora is the only surviving spouse of the deceased.

The dispute did not die down prompting the executor to address a letter to the Provincial Magistrate at Harare, part of which reads:

> "The above estate is registered with the Master of the High Court and we were appointed Executors by copy of the attached Letter of Administration.

> At the time of the death, the deceased is said to have been customarily married per Death Certificate and it is not disputed that he was living with one Prisca Chinamora/Chirunda.
>
> However the deceased's children and most probably other family members seem to be of the view that even though the two were staying together there was no binding(legal) customary marriage to enable her to have the status of surviving spouse.
>
> It is that determination of the deceased's marital status that we are obliged to request this Honourable Court to make."(The emphasis is mine).

The Provincial Magistrate held an inquiry and on 22 June 2006 ruled that the Master's decision to recognize Prisca as the only surviving spouse in the estate would be upheld. Dissatisfied with that ruling, the two children of the deceased filed an appeal with this court, seeking an order for the ruling to be set aside and for the recognition of Prisca Chinamora as a surviving spouse of the deceased by the Master to be set aside.

One issue exercised our minds in this appeal. It is the jurisdiction of the magistrates' court to hold an inquiry of the nature that 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 section 68(2) of the Administration of Estates Act [*Chapter 6:01*] that used to read:

> "(2) If any controversies or questions arise among his 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."

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 section 68 dealing with the administration of the estates of intestate Africans. A new Part 111A has now substituted the old section 68 of the Act and it now deals with estates of person subject to customary law and 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 or senior magistrate was repealed and was not reenacted. 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 dealt with 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 the new law may appeal to the High Court.

Whether or not the Master is empowered by the Act to make a determination of who is a spouse to the estate and whether such determination is appealable or reviewable by this court is an issue that could have arisen in this matter as it is common cause that the Master accepts the respondent as the only surviving spouse in the estate. The

issue does not specifically arise in the appeal before us, as the decision on appeal is that of the provincial magistrate. In a future and appropriate case, the issue raised above will have to be determined, as the Act appears to have made no specific provisions on the matters we have highlighted.

In our view, the executor in the estate erred in referring the dispute to the provincial magistrate at Harare. He most probably was proceeding under the repealed section 68 of the Act. Equally, the provincial magistrate erred in accepting the dispute and proceeding to issue a ruling on it. While the appellants were prompted by that ruling to note an appeal to this court, there is nothing to appeal against and therefore nothing for us to preside over, as the ruling by the provincial magistrate is a nullity. She had no jurisdiction to determine the dispute and make a ruling in the matter. That the respondent's legal practitioner accompanied her on her futile journey does not lend any validity to her ruling. It remains a nothing from which nothing valid can be derived.

When we highlighted our concerns to counsel during the hearing of the matter, they both graciously conceded the point and for this, we express our appreciation.

After requesting us to declare the purported appeal before us a nullity, Mr Fitches then made an oral application for condonation of late noting of an appeal against the decision of the master acknowledging Prisca Chinamora as the deceased's sole surviving spouse. In support of his application, he cited the time that has lapsed since the untimely death of the deceased and highlighted that it would be in the best interests of the beneficiaries and indeed of justice that the dispute is resolved and the estate wound up. His argument in this regard is quite compelling.

However, in my view, there is uncertainty surrounding the status of the letter by the Master in which he accepts Prisca Chinamora as the sole surviving spouse of the deceased. It is not clear to us whether this letter is a decision envisaged in Part 111A of the Administration of Estates Act and against which an appeal lies to this court.

Further, as highlighted above, the power of the Master to make such a decision does not appear clearly from a reading of the law and if such a power is to be inferred from some express provision of the law, in my view, a formal application becomes ideal.

Further and more compelling in my view, the Master, whose alleged decision the appellants now wish to challenge is not before us and as pointed out by Mr Hwacha, and correctly so in my view, an informal application for condonation may work an injustice against some of the parties interested in the dispute.

Based on the foregoing, we decline to entertain the oral application for condonation for the late noting of the appeal against the decision of the master.

In view of the fact that this appeal turns on a point that was not raised by either of the parties in their arguments, we see no basis for rewarding any party with an award of costs or of burdening the estate.

In the result, we make the following order:

1. The appeal is dismissed.

2. Each party will bear its own costs.

CHATUKUTA J agrees.

Hussein Ranchod & co, appellants' legal practitioners.
Dube, Manikai & Hwacha, respondent's legal practitioners.