EDDISON MUDIWA ZVOBGO APPLICANT
and
CECIL MADONDO N.O. 1ST RESPONDENT
JONAS ZVOBGO 2ND RESPONDENT
ESTHER ZVOBGO 3RD RESPONDENT
TENDAI ZVOBGO 4TH RESPONDENT
FARAI ZVOBGO 5TH RESPONDENT
THE MASTER OF THE HIGH COURT 6TH RESPONDENT

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 9 August 2006

Advocate De Bourbon, for applicant
Mr *Mutizwa*, for 1st respondent
Mr *Chibwe*, for 2nd, 3rd, 4th and 5th respondents

CHITAKUNYE J: The late Dr Eddison Jonas Mudadirwa Zvobgo (herein referred to as Dr Zvobgo) was during his life time and until his earlier death married to the late Julia Tukai Zvobgo (herein referred to as Julia) in terms of the Marriages Act [*Chapter 5:11*]. Their marriage was solemnized in 1961.

Doctor Zvobgo died on the 22nd August 2004 and his late wife Julia predeceased him and died on the 16th February 2004. Dr Zvobgo did not remarry for the remainder of his life. Three children were born to their marriage namely:-

1. Kerina Makaita Zvobgo born on the 2nd October 1962
2. Eddison Mudiwa Zvobgo born on the 20th June 1964 and
3. Tsungirirai Julia Zvobgo born on the 21st of December 1973.

Four other children were born to Dr Zvobgo outside his marriage to Julia and they are:-

1. Jonas Zvobgo born on the 1st January 1966
2. Tendai Zvobgo born on the 6th February 1983

3. Esther Zvobgo born on the 1st January 1985 and
4. Farai Emily Zvobgo born on the 26th June 1986.

In 1987 Dr Zvobgo and Julia executed a Mutual Will which was prepared by a law firm.

On the 20th November 1997 Julia revoking all former Wills, codicils and other testamentary dispositions made by her executed another Will which was prepared by another law firm. She was perfectly entitled to do so.

It is trite law that either party to a Mutual Will may, while both are alive revoke his or her share of the Mutual Will with or without communication to the other party. But after the death of one party the survivor may not revoke his or her share of the Mutual Will where both the following further conditions and circumstances occur:

1. the Mutual Will effects a 'massing' and
2. the survivor has accepted some benefits under the Will.

(See *Willie's Principles of South African Law*, 8th Edition at p 403).

The late Julia's Will of 20 November 1997 revoked her portion of the 1987 joint Will. Her estate was thus to be dealt with in terms of her 20 November 1997 will. Her revocation did not alter the portion of the joint Will relating to the late Dr Zvobgo. His intentions in that joint Will remained the same.

The joint Will created a Trust which was to terminate upon the death of the second of the testators. That has now happened with Dr Zvobgo's death. The issue is how Dr Zvobgo's share of the capital, which in effect is his estate falls to be distributed. The relevant provision of the joint Will on beneficiaries reads as follows:-

> "3(d) Upon the termination of the TRUST, the capital thereof shall devolve as follows:-
> (i) As to that portion of the capital thereof which accrued from the estate of the aforesaid EDDISON JONAS MUDADIRWA ZVOBGO, same shall devolve upon and be paid in equal shares to the children born of our marriage and to the lawful issue of the said EDDISON JONAS MUDADIRWA ZVOBGO, in equal shares.
> (ii) As to that portion of the capital thereof which accrued from the estate of the said JULIA TUKAI ZVOBGO, same shall devolve upon

> and be paid in equal shares to the children born of our marriage."

A clear distinction is apparent between beneficiaries to the estate of Dr Zvobgo and Julia. Beneficiaries to the estate of Julia comprise children of their marriage only where as beneficiaries to the estate of Dr Zvobgo comprise of children of their marriage and Dr Zvobgo's lawful issue. The word 'and' is underlined apparently to emphasize it is in addition to, hence a larger group. The late Dr Zvobgo's estate is to be divided in equal shares not only amongst the children of their marriage but also amongst his lawful issue.

The first respondent was appointed executor dative of the estate of the late Dr Zvobgo. The applicant, a child of their marriage brought an application on his behalf and that of the other two children of the marriage seeking an order restraining first respondent from selling assets in the estate of the late Dr Zvobgo pending an interpretation of the joint Will as it applies to the extent of beneficiaries to Dr Zvobgo's estate.

Legal opinion was sought but that did not resolve the dispute. The parties thus brought this matter as a stated case.

The main issue pertains to the term 'lawful issue' as used by Dr Zvobgo in the Will. Did the term include the four children born out of wedlock?

There are three basis principles in the interpretation of Wills namely:-

1. The main rule of construction is to ascertain the intention of the testatrix.
2. The testator's intention as ascertained from the Will maybe supplemented, if necessary, by an 'armchair' evidence that may be admissible, and
3. the court cannot make, or remake a testator's will for him. It cannot change the devolution of his estate as he has directed.

(See *The Law of Succession through the cases* by Lila E. Isakow 1995 page 259).

The cardinal rule is that a Will should be so construed as to ascertain from the language used therein the true intention of the testator in order that his wishes be carried out.

On page 264 (*supra*) the esteemed author epitomized the point when he said:-

> "If the testator clearly intends to benefit a particular person, the bequest will be valid despite his misdescription of that beneficiary."

In their written submission counsel for the parties alluded to the need to look at the surrounding circumstances to ascertain what Dr Zvobgo meant. Such is the armchair rule alluded to above. Under this principle court places itself in the armchair of the testator at the time he executed his Will, and considers his Will in accordance with the material facts and circumstances probably considered by him when making his Will.

In *Ex Parte Bosch* 1943 CPD 369 at p 372 SUTTON J had this to say:-

> "In order to understand the language employed the court is entitled, to use a familiar expression, to sit in the testator's armchair. I do not of course intend to suggest that settled rules of construction are to be disregarded. On the contrary I think they should be strictly observed. But they ought to be applied in a reasonable way. It is no doubt of great importance to lawyers that certain well known words and phrases will receive from the court the meaning that the court has for generations past attributed to them. Much confusion and uncertainty would be caused if this were not so. In other words, the rules of construction should be regarded as a dictionary by which all parties, including the courts, are bound. But the court should not have recourse to this dictionary for the purpose of construing a word or a phrase until it has ascertained, from an examination of the language of the whole will when read in the light of the surrounding circumstances, whether the testator has indicated his intention of using the word or the phrase in other than its dictionary meaning, in other words, to use another familiar expression, the testator has been his own dictionary."

Court must endeavour to ascertain what the words mean as used by the testator or what the testator meant by using them.

For instance the term issue has been taken to extend to varying categories of descendants.

In *Osborne's Concise Law Dictionary, 6th Edition*, by J Burke at page 184 the term issue is defined to mean a person's children, grand children, and all other linea descendants.

In *Board v Titterton* 1896 13SC 164 it was said that the word issue embraces all descendants, not just children.

On the other hand in *Horowitz v Brock & Others* 1988(2) SA 160, court recognized that the way the term issue was used drew a distinction between children on the one hand and issue and remoter descendants on the other hand.

In casu it was argued that as Dr Zvobgo was a lawyer by profession, he must have chosen words 'lawful issue' deliberately to exclude illegitimate children.

It is my view that if it is accepted that ordinarily the term issue includes one's children, lawful issue would be like lawful child. The words lawful child and legitimate child would really not mean exact the same. A legitimate child is one born of parents who are married.

The term lawful refers to recognised by law. The recognition can either be as a legitimate or illegitimate child. The important aspect is that of recognition by the law as one's child or issue.

Thus to try to say that by lawful issue Mr Zvobgo meant legitimate children, and none else would be to do injustice to his intentions. As a lawyer using the words 'our children and his lawful issue' as he did he meant two groups of beneficiaries. The group comprising his lawful issue was an addition to the group comprising 'our children'.

Being a lawyer did not deprive him describing beneficiaries in any way he desired. As long as it is evident he meant to include other issue of his he described as lawful issue it is incumbent upon court to ascertain what other issue that description encompassed.

A reading of the Will gives the impression that beneficiaries to the late Julia's estate comprised children of their marriage only whilst beneficiaries to

late Dr Zvobgo's estate included children of their marriage and his other issue not of their marriage.

I am of the view that the term lawful issue was meant to cover children recognised by law and by Dr Zvobgo himself as children sirred by him. This may have been meant to exclude any other child who may prop up claiming to be Dr Zvobgo's child without having been accepted and recognised as such by Dr Zvobgo.

To seek to exclude children recognized and accepted as born to him from the term 'lawful issue' would be an injustice to his intentions. Equally, now that it is common cause that he had no other children apart from the three legitimate and the four illegitimate to seek to say that by lawful issue he did not include the illegitimate children would be to say that he meant the three already covered by his marriage to Julia. That certainly was not his intention.

The fact that they chose to make a distinction between children born of their marriage and Dr Zvobgo's lawful issue means that they recognised and accepted that there were such children born out of wedlock.

I find that the only inference to be drawn from the surrounding circumstances under the joint Will was executed is that by lawful issue was meant Dr Zvobgo's four illegitimate children.

I accordingly rule that the beneficiaries described in clause 3(d) (i) of the joint Will are:-

1. Kerina Makaita Zvobgo born on the 2nd October 1962
2. Eddison Mudiwa Zvobgo born on the 20th June 1964
3. Tsungirirai Julia Zvobgo born on the 21st December 1973
4. Jonas Zvobgo born on the 1st January 1966
5. Tendai Zvobgo born on the 6th February 1983
6. Esther Zvobgo born on the 1st January 1985
7. Farai Emily Zvobgo born on the 26th June 1986

These are to benefit in equal shares from the estate of the Late Dr Zvobgo.

As agreed by the parties the costs shall be borne by the estate of the late Dr Zvobgo.

Messrs Gill, Godlonton & Gerrans, the applicant's legal practitioners
Messrs Chihambakwe, Mutizwa & Partners, the 1st respondent's legal practitioners
Messrs Coghlan, Welsh & Guest, the 2nd, 3rd, 4th and 5th respondent's legal practitioners