JENNIFER CHINHO
versus
LORRAIN CHINHO
and
ZESA HOLDINGS (PRIVATE) LIMITED
and
THE ZIMBABWE POWER COMPANY
and
ZESA PENSION FUND
and
THE MANAGER ZESA POWER STATION (BULAWAYO)
and
THE MASTER OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 6 February and 20 September 2006

**Opposed Court Application**

Mr *J Musimbe,* for applicant
Mr *Kandemiri,* for 2nd, 3rd, 4th and 5th respondents
No appearance from 1st and 6th respondents

KAMOCHA J: The applicant was seeking for an order in the following terms:

"IT IS ORDERED AND DECLARED THAT:

1. The applicant is the late IRVINE CHINHO'S surviving spouse and has all the rights and is entitled to privileges and benefits accorded by law to a spouse (wife) of the said deceased person;
2. The 2nd to 5th respondents be and are hereby interdicted from paying directly to the 1st respondent pensions, benefits or money owing or payable to the Estate of the late IRVINE CHINHO and be ordered to pay the same to the 6th respondent's office;
3. The 6th respondent be ordered to ensure that the pensions, benefits or money owing and payable to the Estate late IRVINE CHINHO be properly distributed or shared among the beneficiaries or dependants including the applicant through a duly appointed neutral executor; and
4. The respondents pay the costs of this application (if they contest this claim)"

The applicant based her claim on the fact that in early 19776 she married the late Irvine Chinho in terms of the customary law but their marriage was not registered. The marriage was, therefore, an unregistered customary law union. Their customary union was blessed with four children one of whom is still a minor attending school at Sanyati Baptist High School.

Irvine Chinho was employed as a shift charge engineer by the Zimbabwe Power Company and was based at Bulawayo Power Station directly under the manager of Zesa Power Company-Bulawayo. He unfortunately died on 12 October 2004 at Harare while still so employed. At the time of his death his customary law union with the applicant had been in subsistence for a period of 28 years.

During his life time, Irvine Chinho contracted a marriage with Lorrain Chinho in terms of the Marriage Act [*Chapter 5:11*] on 3 September 2001 which marriage subsisted at the time he passed away on 12 October 2004. It was three years old. There were no children to the marriage.

The applicant contended that as the result of Chinho's death his surviving dependants and spouses became entitled to receive pensions, benefits and other payments from Zesa Holdings (Private) Limited, the Zimbabwe Power Company, Zesa pension fund and the manager of Zesa Power Station-Bulawayo including cash in lieu of leave and bonus.

She claimed that despite the fact that she had been married to the deceased for more than 27 years and despite the production of the birth certificates of the children of the deceased including that of the minor child going to school and in alleged dire need of the support from his father's estate the 2nd to 5th respondent had allegedly refused to release adequate payment to the applicant and deceased's children. It was only the Zesa Staff Pension Fund which, with effect from December 2004, had been paying a meagre sum of $955 218.00 meant for the minor child without proffering any explanation of how that figure was arrived at.

She alleged that the respondents had preferred to pay a lump sum and almost all periodic payments to Lorraine the 1st respondent. They did so on the belief that she was the sole surviving spouse by virtue of her marriage to the decease in terms of the Marriages Act [*Chapter 5:11*]. The result was that the applicant had been left without any support from the time of the death of deceased. The minor child had found it very difficult to pay his school fees and other school requirements.

Applicant alleged that she had made representations to the employers of the deceased without any success. Instead, she was told to obtain an affidavit from the 1st respondent agreeing that either half or the bulk of the benefits from the deceased's employers be paid to the applicant for the sustenance of the family. That suggestion was not workable given the stance taken by the 1st respondent-towards the whole matter which had been worsened by lack of communication between the two.

Worse still, the 1st respondent had been appointed executrix to the estate of the deceased. Applicant had already written to the Master of the High court seeking to reverse that appointment so that a neutral executor could be appointed.

In the result, she contended that the 2nd to 5th respondents should be interdicted from making any payments to the 1st respondent and be ordered to channel any such payments to the Master's office which shall pay the same to the proven beneficiaries through a duly appointed and neutral executor unless the parties agree on another mutually acceptable method or mode of payment.

The 1st respondent hotly disputed the applicant's assertions. She contended that the applicant had separated with the deceased sometime in 2000 and by the time she was married to him on 3 September 2001 they were already on separation.

She asserted that the children of the deceased had been included in the death notice and their names had been forwarded to the pensions office which would give them whatever benefits due to them in due course. It was, therefore, not correct to suggest that the deceased's children had been receiving maintenance. However, the other children's shares had been stayed pending the finalisation of this matter.

The 1st respondent reiterated that applicant was not deceased's spouse at the time of his death since her union with him had been terminated at the time of their separation in 2000. She then concluded that applicant was not entitled to the spouse's benefits she was claiming. That being the case, she saw no need to advise applicant about the edict meeting but she duly advised those she deemed needed to be advised.

The stance taken by the 2nd to 5th respondents was basically that they acted within the confines of the Zesa Staff Pension Fund Rules of 1986. The Acting General Manager who deposed to an affidavit averred that they relied on the marriage certificate of the deceased and 1st respondent to determine who the surviving spouse was and concluded that it was the 1st respondent.

Having concluded that 1st respondent was the only surviving spouse, they would calculate the benefits accruing to her and the minor child in terms of the Zesa Staff Pension Fund Rules. The minor child's entitlement was in terms of rule 28(2) of the said rules. The respondents had no obligation to pay the applicant and children who are majors. Consequently, respondents held the view that the applicant had no legal basis for stopping the disbursement of pension benefits in terms of the Staff Pension Fund Rules.

The deponent averred that the deceased died before reaching pensionable age. He, therefore, did not leave a large sum of money for his beneficiaries. What was being paid to the minor child was what it was entitled to in terms of the rules.

What this court had to grapple with was the issue of which of the two women was the surviving spouse? There is no controversy that the applicant had been married to the deceased, in terms of customary law, for 28 years and the union had been blessed with four children. While the 1st respondent contracted a civil marriage with the deceased on 3 September 2001.

The 1st respondent did allege in her papers that applicant had separated with the deceased but failed to provide proof for her assertions. The applicant denied that she had been separated with the deceased. I, therefore, cannot make a finding that applicant had been separated from the deceased. I however, find that her customary law marriage with the deceased had not been registered as required by section 3 of the Customary Marriage Act [*Chapter 5:07*] "the Act" which provides thus.

"3 Marriages not to be valid unless solemnized

(1) Subject to this section, no marriage contracted according to customary law, including the case where a man takes to wife the widow or widows of a deceased relative, shall be regarded as a valid marriage unless-

(a) such marriage is solemnized in terms of this Act; or

(b) …………………………….

(c) …………………………….

(d) ……………………………

(2) ……………………………

(3) ……………………………

(4) ……………………………

(5) A marriage contracted according to customary law which is not valid marriage in terms of this section shall, for the purposes of customary law

and custom relating to status, guardianship, custody and rights of succession of the children of such marriage, be regarded as a valid marriage."

In the light of the above provisions of the Act this court in *Katiyo v Standard Chartered Zimbabwe Pension Fund* 1994(1) ZLR 225(H) held that the plaintiff was not regarded as a spouse in terms of the defendants Pension Fund Rules as she had failed to prove so by submitting a copy of a marriage certificate as proof that she was legally married to the deceased. Relying on section 3 of the Act above, an unregistered customary law union was held to be an invalid marriage and as such the plaintiff was not entitled to the annuity. The court however, stated orbiter that it was the responsibility of the law maker to amend the law so as to protect widows in unregistered customary law unions.

The legislature appeared to have paid heed to the court's call to amend the law and amended the Administration of Estates Act [*Chapter 6:01*] by the Administration of Estates Amendment Act Number 67 of 1997 which repealed section 68 of that Act and substituted it with a new part which caters for estates of persons subject to Customary Law. The new part defines a beneficiary as follows:

"beneficiary" in relation to a deceased person's estate means-

(a) a surviving spouse or child of the deceased person; or

(b) where the deceased person left no surviving spouse or child, any person who is entitled to inherit any property in the estate in terms of this part.

The amending Act validated marriages contracted in terms of customary law for purposes of estates of persons subject to customary law by providing the following in subsection 3 of section 68-

"(3) A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this part not withstanding that it has not been solemnized in terms of the Customary Marriages Act [*Chapter 5:07*], and any reference in this part to a spouse shall be construed accordingly.

Provided that such a marriage shall not be regarded as valid for the purposes of this part if, when it was contracted, either of the parties was married to someone else in accordance with the Marriages Act [*Chapter 5:11*] or the law of a foreign country under which persons are not permitted to have more than one spouse."

It is clear from the papers filed of record that when the deceased and applicant contracted the customary law union neither of the parties had been married to someone else in accordance with the Marriage Act.

Unlike the provisions of section 3(5) of the Customary Marriages Act which had limited the validity of a customary law to status, guardianship, custody and rights of succession of the children of such marriage, the Administration of Estates Amendment Act No. 6 of 1997 extends the validity to the estates of persons subject to customary law. It, therefore, admits of no doubt that the applicant is a spouse of the deceased.

When the 1st respondent married the deceased in terms of the Marriage Act [*Chapter 5:11*] 0n 3 September 2001 she knew that he was married to the applicant in terms of customary law. Infact that union had been in existence for 25 years. In the case of *Gwatidzo v Masukusa* 2000(2) ZLR 410(H) where like in *casu* the plaintiff contracted a civil marriage with a man she knew was already married to another woman in terms of customary law and practices the court held *inter alia* that both customary and civil marriages were valid and recognised at law and that rights under customary law union cannot be excluded by or subordinated to rights acquired under a civil marriage. The court had this to say at page 420B:

> "a woman to a customary union has acquired rights in that union. A woman to a civil marriage has also acquired rights in that marriage. Why should the one woman lose her rights merely because the other woman has acquired rights which purport to exclude the rights of the one?"

In the Administration of Estates Amendment Act No. 6 of 1997 the legislature enacted that when a person who is already married to someone else in terms of the customary law subsequently contracts a civil marriage, the latter is regarded as a valid marriage for the purposes of estates of persons subject to customary law provided the civil marriage shall be regarded as a customary law marriage. Section 68(4) provides-

> "(4) 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, when it was contracted, 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 Marriage Act [*Chapter 5:11*]
>
> Provided that, for the purposes of this part, the first mentioned marriage shall be regarded as a customary-law marriage" (emphasis added)

It seems to me that in the light of the above provisions the deceased cannot be said to have removed his estate from the ambit of customary law since the civil marriage he contracted must be regarded as a customary-law marriage for the purposes of persons subject to customary law.,

It was submitted on behalf of the respondents that the rules of the pension funds were sacrosanct and the applicant did not qualify to benefit in terms of those rules so long as she did not possess a valid marriage certificate. In my view, the submission seems to ignore the provisions of the law quoted *supra*. The pension fund rules seem to continue ignoring customary law as a law believed by the Zimbabweans and which they consider binding. CHINHENGO J in *Mutaisi vMuzondo* 1999(2)ZLR 435(H) at 437 called on this country's courts to recognize customary law. This court has heeded the call hence the decision in *Gwatidzo v Masukusa supra* and in the case of *Kusema v Shamwa* HH 46/2003 not yet reported. I therefore see no reason why the pension funds should not follow suit.

In the result I find that both the applicant and the 1st respondent are spouses of the deceased and are entitled to benefits in terms of rule 28(1) of the Zesa Staff Pension Fund Rules.

Consequently, I would grant an order in terms of the draft order on the first page of this judgment.

*J Musimbe and Associates*, Applicant's legal practitioners

*Mawere and Sibanda*, 2nd to 5th respondents' legal practitioners