

NYASHA DZANGAI
(In her capacity as the mother of two minor children
namely Tasimba and Keith Chingarire)
versus
ESTATE LATE JOHN CHINGARIRE
(Represented by F Chimbari in terms of Letters of
Administration)
And
SIBAMBANISO KUNDAI
(In her capacity as the surviving spouse)
And
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 16 March 2011 and 11 May 2011

FAMILY LAW COURT

Opposed Application

M D Hungwe, for the applicant
F Chimbari, in person for the first respondent
T K Hove, for the second respondent

MAWADZE J: This is an application for maintenance made in terms of the Deceased Person Family Maintenance Act [*Cap 6:03*] (hereinafter referred to as [*Cap 6:03*]). The application is opposed by the second respondent.

The applicant is the mother of the two minor children namely Tasimba and Keith Chingarire aged 11 and 12 years respectively. The two minor children are born to the deceased John Chingarire. The applicant and the late John Chingarire had a customary law union which was dissolved before the death of John Chingarire.

The first respondent is the Estate of the late John Chingarire represented by Mr F Chimbari who was appointed the executor of the Estate in terms of the letters of administration.

The second respondent is the surviving spouse of the late John Chingarire. The fourth respondent is the Master of the High Court cited in his official capacity.

It is common cause that during the life time of the deceased the two minor children Tasimba and Keith Chingarire resided with the deceased and the second respondent at the matrimonial house number 148 Emerald Hill, Harare and that the deceased was solely responsible for their maintenance and upkeep which included *inter alia* school fees, clothing, food, shelter, medical expenses and all that issues incidental thereto. The two minor children were attending school at Gateway Private School and each child paid US\$1000-00 per term. After the death of the deceased the applicant took custody of the two minor children and relocated to South Africa where she apparently enrolled the two minor children at St Peters Preparatory College. It would appear that the company which used to employ the deceased ceased to pay for the school fees of these minor children on the basis that they were now outside Zimbabwe. Apparently the applicant's reason for taking the children into her custody was that they were discriminated against and ill treated by the second respondent. No specific averments were made and these broad allegations are refuted by the second respondent.

The applicant contends that she has been paying school fees for these two minor children in South Africa but is now unable to shoulder the burden. She believes the two minor children's school fees and other incidentals thereto should be borne out of the estate of the minor children's late father. Although the Estate is illiquid it is not insolvent as there are several assets namely motor vehicles and immovable asset being the matrimonial house in Emerald Hill Harare.

During the hearing the applicant amended the amount of money claimed as maintenance for the two minor children and converted the sum from South African Rand to US dollars.

The order sought by the applicant is in the following terms; (as amended):

- “1. A lump sum maintenance in the sum of US \$10 000-00 in respect to Tasimba Chingarire born on 5 February 1997 and US\$10 000-00 in respect to Keith Chingarire born on 1 February 1998.
2. In the event that movable assets available are not enough to meet the requirements enunciated in paragraph above in respect of each minor child, then the matrimonial home namely 148 Blake Close Emerald Hill, Harare be sold to the best advantage and the proceeds be used to make payments referred to in para 1 and the remainder thereof will be to the respondent (*sic*) and her minor child namely Simbaniso Kundai and Stephanie Chingarire respectively.
3. Costs of this maintenance application should be born by the Estate late John Chingarire represented by the first respondent, Fredrick Chimbare in his capacity as the Executor Dative”.

The basis of the applicant's claim is itemised in paragraphs 11 to 15 of the applicant's founding affidavit which figures however are in South African currency. What is important to note is that the maintenance claim covers tuition fees, boarding fees, development loan, PA levy, outings, photographs, linen, hot lunch, school uniforms inclusive of sports and swimming attire. Keith should now be in Grade 7 and Tasimba in Form I or equivalent. The lump sum claim for maintenance covers the period up to the completion of "A" level or equivalent by each minor child or such time the children attain the age of 18 years.

The first and final Administration and Distribution Account in the Estate of the Late John Chingarire is filed of record (reference DR 737/09). The account shows the assets of the estate both movable and immovable, the liabilities of the estate, and the distribution plan. The net value of the Estate is US\$115 000-00 and the estate is illiquid.

The Master of the High Court both in the initial and supplementary reports made the following pertinent comments;

- (a) That the lump sum amount claimed by the applicant (before amendments) far exceeds the value of the estate;
- (b) That apart from the applicant's two minor children there are other potential beneficiaries to be maintained like the surviving spouse and her minor child and one Taonga born out of wedlock.
- (c) That the winding up of the estate has been stalled by the application for maintenance which in terms of the law should be disposed of first before the distribution of the estate can be authorised. See s 3(8) of [*Cap 6:03*].
- (d) That the executor is still to formally file the first and final liquidation and distribution account to allow for objections and winding up of the Estate.

The contents of the master's reports were not put into issue.

Mr *F Chimbari* who represents the first respondent indicated in his submissions which were not controverted that he had availed the first and final liquidation and distribution account to all parties and that consensus was reached on all issues. He indicated that he was therefore surprised as to why this application had to be made. He indicated that there are virtually no challenges in winding up the estate and all things being equal he would take at least 30 days to wind up the Estate.

The two minor children Tasimba and Keith Chingariri are dependants as defined in s 2(1)(c) of [Cap 6:03]. They are therefore eligible for maintenance in terms of s 3(1) of [Cap 6:03] which provides as follows:

“3. Application for Maintenance

- (1) Any dependant of a person who dies after the 9th January, 1979, may subject to this Act, make an application for an award from the net estate of the deceased”.

The net estate is defined in relation to a deceased as all the property of his deceased estate which but for the provisions of [Cap 6:03] would be available for distribution to his heirs and legatees.

Let me briefly comment on the concerns raised by Mr *Hove* for the second respondent in respect to the state of the papers filed of record by the applicant and the impolite language used by the applicant especially in the answering affidavit. It goes without saying that the language to be used in affidavits should be courteous rather than insulting of the other party. Judicial proceedings should be respected by all those who approach the court and intemperate language which adds no value to the issues to be determined by the court should be avoided as it also offends the sense of justice of the court. The remarks by the learned CHIEF JUSTICE CHIDYAUSIKU in the matter involving *Jonathan Nathiel Moyo & Ors v Austin Zvoma N O & Ors* SC 28/2010 in this respect are poignant and need no further elaboration.

It is not in issue that the papers filed by the applicant were not paginated and indexed. Some of the documents referred to as schedules for school fees payable were not attached. The copies filed of record and those served upon the second respondent are materially different. As an example in the applicant’s founding affidavit filed of record there are 17 paragraphs but in the founding affidavit served upon the second respondent there are 12 paragraphs. In the submissions the applicant in response to the allegation of filing this application out of time indicated that an application for condonation was made on 19 October 2009 and was granted on 16 November 2009. Reference is made to annexures A and B supposedly attached to the submissions but none is attached. Such conduct by counsel for the applicant Mr *Hungwe* deserve censure as it is misleading to the court. Mr *Hungwe* had profusely apologised to the court for failure to properly index and paginate the papers and for serving different copies of the application on the second respondent. I was tempted to accept his passionate apology only for him in his closing submissions to refer to non existent

annexures in a bid to dispose of a point in *limine* raised by Mr *Hove*. Such indiscretions are unacceptable.

Let me turn to the merits of the application.

Mr *Hove* raised a point in *limine* which if resolved in his favour should dispose of the matter, according to him. The issue raised by Mr *Hove* is that this application falls foul of the mandatory provisions of s 3 (2)(b) of [*Cap 6:03*] and that no such condonation has been sought and granted.

Section 3 (2)(b) provides as follows:

“(2) An application referred to in subs (1) shall be –

- (a) ...
- (b) Lodged with the Master or where there is no office of the Master in the province where the applicant ordinarily resides, the provincial magistrate of the province –
 - (i) Within three months of the date of the grant of the letters of administration to the executor of the deceased estate concerned;
or
 - (ii) ...

Provided that the Master may, on good cause shown, grant an extension of the relevant period referred in subpara (i) or (ii) within which the application shall be made”.

It is common cause that this application has been made almost six months after the granting of the letters of administration which is well after the stipulated three months. Apparently the Master did not address this issue and from the record the applicant did not seek an extension of the relevant period. One may infer that by referring the matter for hearing in terms of s 4 of [*Cap 6:03*] the Master had by conduct condoned the non compliance with the provisions of s 3 of [*Cap 6:03*]. The issue which arises is whether this application is properly before this court. The applicant did not even seek condonation orally during the hearing of the matter. In fact Mr *Hungwe* on that point submitted that his view was that the applicant’s failure to comply with the provisions of s 3 of [*Cap 6:03*] was condoned by the Master by implication and that the applicant would leave that issue to the court to decide.

In the closing submission Mr *Hungwe* was now singing a different tune and I quote his submissions:

“At time of argument counsel for the applicant did not have full instructions and as such laboured under the impression that the application was never made and that

condonation could be discerned from the Master of the High Court's conduct of placing the application before a judge. However, counsel for the applicant has since discovered that an application for condonation was made indeed in writing on 19 of October 2009 and failure to comply was condoned by letter dated 16 November 2009. See Annexure A and B hereto. On the premise of a foregoing, the objection raised by the second respondent in *limine* thus fails away”.

The issue raised by counsel for the applicant is not part of both the founding and answering affidavit. It was not raised in argument. It is a new issue raised under the guise of closing submissions. It is not a legal issue but a factual issue. To start with the so called Annexures A and B are not even attached. It would be improper for the applicant to raise new factual issues by way of written closing submissions. As a fact therefore it has not been shown that an application for condonation was made before the Master. The master did not even indicate so in both the first and supplementary reports. The extension of the period envisaged in s 3 of [Cap 6:03] is not by conduct. An application should be made to the Master and good cause must be shown. In fact the respondent may, at the hearing challenge such finding of good cause by the Master. In my view no facts have been placed before me to show that such an application for the extension of the period was made and I am not privy as to what good cause could have been provided. It would be wrong for this court to substitute the Master's statutory obligations with its own discretion. I am inclined therefore to dismiss the application on the basis that it is improperly before the court as it was made out of time.

Assuming I may be wrong in my finding stated above I am still inclined to dismiss this application on the basis that it falls far short of the requirements of s 7 of [Cap 6:03] which outlines the requirements to be met in granting a maintenance award in terms of s 7 of [Cap 6:03]. It provides as follows:

“7. Award of maintenance

- (1) After the inquiry into an application, the appropriate court may, subject to the provisions of this Act, if it considers that a dependant who has made an application is in need of maintenance from the estate of the deceased concerned and that it is just and equitable that an award should be made, make an award against the net estate of the deceased in favour of such dependant. (underlining is mine)
- (2) In the determination of an application, the court shall have regard to-
 - (a) whether or not the dependant is in need of maintenance, taking into account, where the deceased died leaving a will, the benefits of any, to which the dependant will be entitled under the will or where the deceased died intestate, the benefits if any to which the dependent will be entitled on intestacy;
 - (b) the period for which maintenance of the dependant is required;

- (c) the ability of the dependent to maintain himself and whether or not it is desirable that he should work;
- (d) the number of persons to be maintained by the estate;
- (e) the general standard of living of the dependant and, during his lifetime of the deceased;
- (f) the reason for the deceased failing to make provisions for maintenance of the dependant and, in this connection, whether or not, the behaviour of the dependant was responsible in any way for such failure;
- (g) where the deceased died leaving a will, the interests of the beneficiaries in respect of whom provision has been made under the will;
- (h) where the deceased died intestate, the interests of the persons who would normally succeed on intestacy;
- (i) the size and nature of the net estate; and
- (j) any other matter which in the opinion of the appropriate court, is relevant to the determination of the issue”.

As already stated the two minor children are dependants and are in need of maintenance from the estate of the deceased. However the applicant's founding affidavit does not in view give any useful breakdown of the lump sum required for both minor children. Even if the court was to accept the minor children are in school in South Africa at the said college the actual breakdown of the needs of the minor children was never made in any meaningful way. This schedule of expenses was never made when the figures were converted to US dollars. In short there is no objective and rational basis upon which the total lump sum payment of US\$20 000-00 is arrived at. The applicant did not even show how much she will contribute herself towards this total figure of US\$20 000-00 as the natural mother of the minor children who has a duty to maintain the children.

The benefits which the two minor children are entitled to are similar to those of other dependants of the deceased's estate as deceased died intestate. The period for which the maintenance of the two minor children is sought is unjustifiable. One would have thought the applicant would seek interim maintenance pending the winding up of the estate. Instead the applicant seeks maintenance for the whole period up to the time the minor children turn 18 years or complete their education. One wonders what then will happen if a lump sum payment is made and the minor child dies or drops out of school at a certain level.

In my view this claim fails to take into account the number of persons to be maintained by the estate, the interests of those who are to succeed on intestacy *vis-à-vis* the size and nature of the net estate. The estate is illiquid. What is available for distribution are only the motor vehicles valued at about US\$40 100-00 and a house valued at US\$75 000-00. The liabilities amount to about US\$13 303-18 thus leaving a balance of about US\$100 000-

00 for distribution, the bulk of which is made of the matrimonial house valued at US\$75 000-00. This would mean excluding the house what may be available for sharing is US\$15 000-00 to US\$20 000-00 at most. The amount of US\$20 000-00 claimed by the applicant in my view would prejudice other dependants and beneficiaries. Besides the two minor children there is the surviving spouse (the second respondent) Sibambaniso Kundai, her minor child Stephanie, the other child Sona born out of wedlock and other beneficiaries who are children of the deceased Kimberly, Laura and Janathan.

The interests of all these persons should be taken on board. In my view the nature and the size of the net estate and the interests of the dependants and or beneficiaries are such that an award cannot be meaningfully made.

While the court should always give preference to the best interests of the minor children in such applications, it nonetheless has to consider the interests of other beneficiaries. If the court is to order the sale of the matrimonial house for purposes of making an award in terms of [Cap 6:03] the rights and interest of the surviving spouse as provided for in s 68 F (d)(1) of the Administration of Estate Act [Cap 6:01] and s 3 A(a) of the Deceased Estates Succession Act [Cap 6:02] would in all essence be defeated. In my considered view if the maintenance order sought by the applicant is awarded there would be nothing left for the Executor to administer as all assets of the estate would have been disposed of under the guise of a supposedly interim maintenance award.

The correct approach in dealing with matters of this nature was pointed out by SMITH J in *Ponter v Ponter* 2000 (1) ZLR 336 (H) at 340 F in which the learned judge cited with approval the case of *Shaw v Shaw & Anor* 1992 (2) ZLR 134 (S). The learned judge SMITH J at 340 F quoting GUBBAY JA (as he then was) had this to say in discussing the meaning of maintenance in the context of [Cap 6:03]:

“... it covered such things as food, clothes, a house and all other ‘necessaries and conveniences of life, having regard to various factors specified in subs (2) and (3) of s 7 of [Cap 6:03] the trigger of an order was two fold, firstly there must be need, and secondly it must be just and equitable”. (emphasis is my own)

I am satisfied that this application falls far short of the requirements of s 7 of [Cap 6:03]. It is not just and equitable to grant an award prayed for. The executor in my view should be allowed without undue delay to finalize the administration of the estate.

Accordingly, the application is dismissed with costs.

Chinyama & Partners, applicant's legal practitioners
T K Hove Partners, second respondent's legal practitioners