SPIWE KAPFUDZA
(In her capacity as Guardian for Tanaka Thokozani Dhliwayo)
versus
RUTH BONGANI MUSHIRI
and
THE MASTER OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS
HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE October 21, 2010 and January 20, 2011

P Musendo, for the plaintiff
J Mambara, for the first defendant
No appearance for 2nd and 3rd defendants

CHITAKUNYE J: The plaintiff is a female adult and mother to a minor child, namely, Tanaka Thokozani Dhliwayo, who she claimed was fathered by the late Joseph Hlupani Dhliwayo.

The first defendant was a sister to the late Joseph Hlupani Dhliwayo who died on the17 June 2002 at Harare. Upon his death the first defendant was appointed executrix dative of his estate. She was given letters of administration on 17 July 2002.

In pursuance of her duties as executrix dative, the first defendant lodged the first and final distribution account in the estate late Joseph Hlupani Dhliwayo with the Master's office on 3 October 2004. In that account the first defendant omitted the plaintiff's child as beneficiary to the estate. According to that account the only immovable property, stand number 2919 Mabelreign Township, Harare, was awarded to Ruth Bongani Mushiri and Maritawana Dhliwayo. Maritawana Dhliwayo was the late Joseph Hlupani Dhliwayo's child with another woman. The movable property, namely a Nissan motor vehicle, was awarded to Ruth Bongani Mushiri, the first defendant.

A deed of transfer was issued in respect of the immovable property in the names of Ruth Bongani Mushiri and Maritawana Tanatswa Dhliwayo in 2003. In 2004 the plaintiff raised objections to the distribution account/plan especially the exclusion of her daughter/child from benefiting from the estate and the fact that the first defendant appeared to have benefited from the estate by awarding herself a share of the estate. She filed the requisite application objecting to the manner in which the first defendant had distributed the estate in HC 10993/04.

As a self actor she was advised to withdraw that application as she had not done it well and to re-file the application in a proper way.

On 8 December 2006 she filed a court application objecting to the distribution plan and the exclusion of her child. In that application the plaintiff sought an order to the effect that:

1. The deceased's estate Registered under DR 96/04 be re-administered. All transactions made in pursuance of the administration of the estate be nullified;

2. Transfer of stand no. 2919 Mabelreign Township into the first respondent's name be cancelled;

3. The deceased's two minor children Maritawana Tanatswa Dhliwayo and Tanaka Thokozana Dhliwayo be declared the beneficiaries of the estate in equal shares;

4. The first respondent be ordered to account for all proceeds arising out of the deceased estate; and

5. The first respondent to pay costs of suit.

The first defendant, who was the first respondent in that application, opposed the application. The second defendant who was the second respondent had no objections to the relief sought as he was of the view that it was in the best interests of the children and the first respondent had erred by awarding herself a share of the estate.

On 14 June 2007, MAKARAU JP (as she then was), heard the application after which she referred the matter for trial as she was of the view that the matter could not be resolved on the papers filed of record. In that regard she directed that the plaintiff must file her declaration within ten days of the date of the order. The plaintiff duly filed her declaration on 27 June 2007. In the declaration her prayer was for:

1. An order for the re-administration of the estate late Joseph Hlupani Dhliwayo registered under DR 96/04.
2. An order declaring Maritawana Tanatswa Dhliwayo and Tanaka Thokozani Dhliwayo as the beneficiaries in equal shares of the estate Joseph Hlupani Dhliwayo.
3. An order canceling transfer of stand 2919 Mabelreign Township into the first defendant's name.
4. An order for the maintenance of the two beneficiaries, aforementioned from the estate.

The first defendant's response was to firstly raise a plea in bar. In that regard she contended that:

1. The declaration was vague and embarrassing;
2. The prayer is for several relief, some of which could only be granted if certain prescribed procedures under say, the Administration of Estates Act, chapter 6:01 are followed.
3. Some of the items prayed for especially the declaration of the plaintiff's daughter to be a beneficiary or an order for her maintenance are prescribed in terms of the Deceased Persons Family Maintenance Act, *Chapter 6:03*.

The first defendant went on to plead on the merits. In that plea she contended that the late Joseph Hlupani Dhliwayo had denied paternity of the plaintiff's child. She said the deceased never married the plaintiff at all and so that child cannot benefit from the estate.

She contended that she did not benefit from the estate. The inclusion of her name on title deeds to the immovable property was only as guardian to Maritawana and not that she was to get a half share of the estate. This is an arrangement the family had agreed on. In support of this contention she submitted an affidavit from Abel Thuso Dhliwayo. The first defendant went on to say that when she prepared the account and advertised it no objections were received before the estate was wound up.

At the close of pleadings a pre-trial conference was held. The issues referred for trial were captured as follows:

1. Whether or not the plaintiff's claim was prescribed.
2. Whether or not Tanaka Thokozani Dhliwayo is the late Joseph Hlupani Dhliwayo's child with the plaintiff.
3. Whether or not the first defendant properly administered the estate late Joseph Hlupani Dhliwayo;
4. Whether or not Tanaka Thokozani Dhliwayo should be a beneficiary in respect of the estate; and
5. Whether or not the estate should be re-administered.

It was agreed during that pre-trial conference that the onus of proof lay on the first defendant on the first issue and on the plaintiff for the rest of the issues.

1. **Issue of prescription.**

The first defendant in her plea in bar contended that:

> "Some of the items prayed for especially the declaration of the plaintiff's daughter to be a beneficiary or an order for her maintenance are prescribed in terms of the Deceased Persons Family Maintenance Act [*Cap 6*:*03*]".

In his closing submissions counsel for the first defendant submitted that this matter was once referred to the High Court by a magistrate. For some reasons the application based on that referral failed. Another fresh application not related to the referral was filed and it too hit a brick wall. The plaintiff subsequently filed summons out of this honorable court that resulted in the present trial action. This trial action is coming well after more than five years after the demise of the late Joseph Hlupani Dhliwayo. The Summons is dated 27 June 2007.

This is basically what counsel hoped would show that the action is prescribed in terms of the Deceased Persons Family Maintenance Act.

The history of this matter shows that the plaintiff upon realizing that her child had been left out of the distribution plan approached the courts for relief. The distribution plan was finalized in the year 2004. The plaintiff's latest application was filed on 8 December 2006. On 14 June 2007 MAKAKARAU JP (as she then was) heard the application and ruled that the matter cannot be resolved on the papers. She therefore referred the matter for trial and gave directives for the parties to file necessary papers. For all intents and purposes this trial is a continuation of the application filed on 8 December 2006. It is therefore incorrect to say this action was only instituted in June 2007. It was incumbent upon the first defendant's counsel to put flesh to the contention. Section 3 of the Deceased Persons Family Maintenance Act states that:

"(1) Any dependant of a person who dies after 19 January 1979 may, subject to this Act, make application for an award from the net estate of the deceased.

(2) an application referred to in subsection (1) shall be-

(a) made in the prescribed form, if any; and

(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 letters of administration to the executor of the deceased estate concerned; or

(ii) in the case where the Master has, in terms of paragraph (b) of section 32 of the Administration of Estates Act [*Cap* 6:*01*] dispensed with the appointment of an executor dative, within three months of the date of death of the deceased.

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

In *casu* all what the plaintiff was required to do was to apply to the Master for an extension of the period within which to apply for maintenance of the child. It would then be upon the Master to determine the application. It is however my view that that omission may not be fatal as the plaintiff's fundamental claim is for the recognition of her child as the late Joseph Hlupani Dhliwayo's child and for the child to then be declared a beneficiary to the estate. This action was triggered by the fact that the child had been left out of the distribution plan filed in October 2004.

I did not hear counsel to suggest that the three months period under s 3 of Act [*Cap 6:03*] applied to a situation where one was seeking to be recognized as beneficiary entitled to benefit from the estate in terms of the Administration of Estates Act.

I am of the view that counsel failed to show that the plaintiff's action was prescribed more so as it is based on the executrix's final distribution plan in which she did not recognize plaintiff's child as a beneficiary.

2. **Whether or not Tanaka Thokozani Dhliwayo is the late Joseph Hlupani Dhliwayo's child with plaintiff**

The plaintiff's evidence on this issue was to the effect that she fell in love with the late Joseph Hlupani Dhliwayo and stayed with him from 1997 to 2002. During that period they lived as husband and wife though not formally married. In the process of cohabiting a child was born to the couple on 20 November 2000.

Though by the time of Joseph's death no birth certificate for the child had been obtained, she tendered into evidence hospital/clinic cards to show that Joseph Dhliwayo was the father of the child. In the plaintiff's bundle of documents she referred to a City of Harare Ambulance bill dated 12 November 2000. The name of the patient is stated as Spiwe Dhliwayo of 8 Mason Avenue Mabelreign and her next of kin was stated as Joseph Dhliwayo of 8 Mason Avenue Mabelreign. The document shows that the patient was conveyed to Warren Park Clinic. The plaintiff argued that she is the Spiwe Dhliwayo referred to therein. She was conveyed from 8 Mason Avenue to the clinic in question at Joseph Dhliwayo's

expense as the two were staying together as husband and wife and Joseph was responsible for the pregnancy.

The other document she referred to was the Child Health Card with the child's name as Thokozana, the mother as Spiwe and the late Joseph Dhliwayo as the father. The card was given to the plaintiff at Warren Park Maternity Clinic. One of the dates on which the child was immunized is 21 November 2000. Though the Child Health card is hardly legible, the above information is what I could clearly make out of the other entries reflected therein.

The information, on both the City of Harare Ambulance bill and the Child Health Card, point to the fact that during the period in question the plaintiff resided at or, at the very least, used the same residential address as the late Joseph Dhliwayo. In the documents the late Joseph Dhliwayo was consistently reflected as the plaintiff's next of kin and father of the child.

The plaintiff also referred to a medical invoice from Suburban Medical Center. She argued that though that invoice is in the name of Maritawana. The medical attention was in respect of her child. The late Joseph Dhliwayo used Maritawana's Medical Aid Card as her child had not yet been enrolled on the deceased's Medical Aid Scheme. The veracity or otherwise of the above assertion was neither here nor there as clearly only the plaintiff and the late Joseph could shed light on this.

In her *viva-voce* evidence the plaintiff stated that at no time in his lifetime did the late Joseph Dhliwayo deny paternity of their child. The plaintiff maintained her stance under cross examination. Her evidence on her relationship with the late Joseph and that as a result of that a child was born seemed credible.

Wuziya Marechera gave evidence next. He was a friend to the late Joseph Dhliwayo. His evidence was to the effect that he knew the plaintiff as the late Joseph Dhliwayo's girlfriend. The plaintiff and Joseph stayed together at Joseph's residence and he would visit them and they would also visit him. To his knowledge the late Joseph Dhliwayo never denied or disputed paternity of the child in question.

The next witness was the plaintiff's brother one, Tonnie Kapfudza. His evidence was to the effect that the plaintiff went to stay with the late Joseph Dhliwayo as husband and wife in 1997 till Joseph Dhliwayo's death. When the child in question was born to his knowledge Joseph never denied paternity. According to Tonnie it is in fact the late Joseph who gave a name to the child when it was born.

The evidence of both Wuziya and Tonnie on the fact that the plaintiff lived with the late Joseph as husband and wife was not seriously challenged under cross examination. All the three witnesses for the plaintiff categorically stated that the child in question was born when the plaintiff was staying with the late Joseph Dhliwayo. That in my view was not rebutted in cross-examination.

The first defendant's evidence on the issue of paternity was rather shaky. The first defendant stated that she had never met the plaintiff during Joseph's lifetime though she had heard about her. It was her evidence that she overheard her late brother telling her husband that there was this lady who was claiming that she was pregnant by him but he was denying responsibility. I did not hear her to suggest that her late brother ever denied having had sexual intercourse with the said woman.

Under cross examination the first defendant was at pains to admit that she really had no basis to claim that the child was not fathered by the late Joseph Dhliwayo. For instance, when asked on what basis she denied paternity she said it was firstly because her brother denied paternity.

Due to her incoherent and inconsistent answers she was further asked –

> "So you deny because your brother hinted to you that he denied paternity?"
> To which she said "yes".

She was later asked as to what evidence she had to deny paternity on behalf of her late brother her response was to the effect that -

> "I am not saying that I deny paternity but I have no evidence that it is his child."

She was further asked –

> "Would I be correct to say you are not denying paternity but you are just not sure...?"
> To which she replied "yes".

Clearly from the above exchange the first defendant has no defence to the claim. In her so-called denial of paternity by her late brother I did not hear her to say that her late brother denied having had sexual intercourse with the plaintiff or even staying with the plaintiff at his residence as lovers during the relevant period leading to the plaintiff's pregnancy. Naturally, therefore the plaintiff's assertion that she had sexual intercourse with the late Joseph Dhliwayo as a result of which she fell pregnant and the child in question was born was virtually unchallenged.

The basic legal position is that if it is shown or proved that a man and a woman had sexual intercourse, the onus on paternity shifts to the man to prove that he cannot possibly be the father to the child.

In *casu* the first defendant lamentably failed to show that her late brother could not possibly be the father to the child in question.

The testimony by the other defence witnesses was inadequate in this regard as well. For instance the first defendant's husband, Stanford Mwadani Mushiri, confirmed that he knew the plaintiff as someone who came to public places with her brother. He however could not say he knew of any love affair between the plaintiff and late Joseph Dhliwayo. He testified that he was surprised to hear that the plaintiff was saying her child was fathered by the late Joseph Dhliwayo. This was contrary to his wife's evidence who had said that she overheard her brother Joseph telling him about a woman who was claiming that he had made her pregnant.

The third witness, Joan Mutukwa, is the mother to Maritawana Dhliwayo. Her evidence was not of much value. For instance she could not categorically say that the late Joseph never had sexual intercourse with the plaintiff or that the two never had a love relationship as clearly she was not always with him. In her evidence she indicated that during the period of the alleged relationship she was no longer staying with the late Joseph. She would occasionally visit him as someone she had two children with and on those visits she did not see the plaintiff. Her failure to see the plaintiff on the occasions she visited Joseph is not evidence enough to show that Joseph could not possibly be the father of the child in question.

In the circumstances I am of the view that it has not been shown that the late Joseph could not possibly have fathered the child in question. The evidence adduced shows that the late Joseph is the father of the child in question.

3. **Whether or not Tanaka Thokozani Dhliwayo should be a beneficiary in respect of the estate**

Having found that the child was fathered by Joseph the next question is as an out of wedlock child is she not entitled to any benefit from Joseph's estate?

In terms of s 2 of the Deceased Persons Family Maintenance Act *Chapter 6*:*03*, a child, in relation to a deceased, includes an adopted and an illegitimate child of the deceased and a dependant in relation to a deceased, means-

(a) …
(b) …

(c) a minor child,
(f) any other person who-
(i) was being maintained by the deceased at the time of his death; or
(ii) was entitled to the payment of maintenance by the deceased at the time of his death.

Section 3 of the said Act gives the dependant the right to apply for maintenance from the net estate of the deceased. The child in question as late Joseph's child is thus a dependant and is entitled to apply for maintenance from the net estate of the deceased.

Section 8 of the Act describes the form and substance of the award that court may make. Section 8 (1) provides that in making an award the appropriate court may, subject to this Act, determine that the award shall take such form as it thinks fit. Some of the forms outlined in subs 2 include:

8 (2) (d) the transfer to the applicant of such property comprised in the net estate of the deceased as may be specified by the court;

(e) the conferring upon any person of a usufruct in any asset of the net estate of the deceased;

(i) the variation of the disposition of the deceased's estate effected by will or the law relating to intestacy in such manner as the court thinks fair and reasonable".

From the above it is clear that maintenance is not limited to monetary payments; it may include a share in the estate or use of an asset of the estate.

The plaintiff's hurdle in claiming maintenance at this stage is that she has to comply with s 3 of the Act. The application should have been made within three months of the date of grant of Letters of Administration to the executrix of the estate. Where as in this case there has been a delay the proviso to s 3 states that the Master may on good cause shown, grant an extension of the relevant period within which to apply for maintenance. In this case the applicant does not seem to have applied to the Master for maintenance and neither did she apply for the extension of the period within which to apply for maintenance. The application for maintenance is thus not properly before this court.

The matter does not end there. As already alluded to the plaintiff's main claim was for the recognition of her child as a child of the late Joseph Dhliwayo and as such entitled to benefit from his estate. Section 68 (1) (a) of the Administration of Estates Act [*Cap 6:02*]

defines a beneficiary as, "in relation to a deceased person's estate, means a surviving spouse or child of the deceased person;"

By virtue of this definition there should be no doubt that the child, as a child of the late Joseph Hlupani Dhliwayo is a beneficiary to the estate. The failure by the executrix to consider the child as a beneficiary was thus wrong and cannot stand.

In his closing submissions counsel for the first defendant contended that an out of wedlock child cannot inherit deceased's estate. Such an argument was misplaced in that the plaintiff was not seeking that her child be declared the heir to her father's estate, all she was seeking was to be recognized as a beneficiary and so as to benefit from the estate in terms of the law. I am of the view that the plaintiff's child should be included on the list of beneficiaries to the estate.

The plaintiff prayed for an equal share in the estate between the two surviving children of the late Joseph Hlupani Dhliwayo. There was no justification to the contrary. Both children were born out of wedlock as their mothers were never married to the late Joseph.

Issues 3 and 5 in the light of the above conclusions it is my view that issues 3 and 5 have been answered as well in the discussions leading to those conclusions.

The plaintiff's prayer for the re-administration of the estate did not carry much weight. The first defendant's major error of awarding herself joint ownership of the immovable property has since been rectified. The other aspect of the movable property was ably explained and documents shown to confirm how she acquired the item in a bid to serve the immovable property from being foreclosed by a finance house. All that needs to be done is to ensure that the plaintiff's child is made an equal beneficiary to the immovable property.

Accordingly therefore it is hereby ordered that:

1. That Tanaka Thokozani Dhliwayo born on 20 November 2000 be and is hereby declared to be a child of the late Joseph Hlupani Dhliwayo and as such she is a beneficiary in the estate late Joseph Hlupani Dhliwayo.

2. The two surviving children of the late Joseph Hlupani Dhliwayo be and are hereby declared as the beneficiaries in equal shares of the estate late Joseph Hlupani Dhliwayo.

3. The executrix, Ruth Bongani Mushiri be and is hereby directed to take all necessary steps to ensure that the immovable property namely Stand 2919 Mabelreign Township Harare, is registered in the names of the two beneficiaries in equal shares.

4. Should the first defendant refuse or fail to comply with clause 3 above within thirty days of the date of this order the Deputy Sheriff Harare be and is hereby authorized to act in her stead.

5. The costs of transfer shall be met from the estate.

Kamusasa & Musendo, plaintiff's legal practitioners
J Mambara & partners, first defendant's legal practitioners