

MIRIAM MUPFURIRA  
versus  
MASTER OF THE HIGH COURT OF ZIMBABWE  
and  
ESTATE LATE JAMES CHIGWEDERE  
(Represented by Isaac Tichareva in his capacity as Executor Dative)  
and  
PRISCA TERESA CHIGWEDERE  
and  
PIUS CHIGWEDERE  
and  
ZIVANAI CHIGWEDERE  
and  
KUDZANAI CHIGWEDERE  
and  
TENDAYI FARAI CHIGWEDERE

HIGH COURT OF ZIMBABWE  
MUCHAWA J  
HARARE, 19 May and 30 May 2023

### **Opposed Matter**

Ms *DE Kawenda*, for the applicant  
Mr *L Madhuku*, for the second respondent  
No appearance for first, third, fourth, fifth, sixth and seventh respondents

**MUCHAWA J:** This is a court application for a declarator made in terms of s 14 of the High Court Act [*Chapter 7:06*]. The applicant seeks the following relief:

- a) That it be declared that the union that existed between applicant and the deceased being James Chigwedere was a putative marriage.
- b) That it be declared that the applicant is entitled to inherit a certain piece of land situate in the District of Salisbury being remainder of Stand Number 3042 Glen Lorne Township Salisbury District measuring 14326,55 square meters in her capacity as the putative spouse and such property shall not form part of the late James Chigwedere's estate registered with the first respondent as DR 2469/19.

**Alternatively:**

1. It is ordered that s 68(3) and (4) of the Administration of Deceased Estates Act is a direct violation of s 56(1) of the Constitution of Zimbabwe so far as it fails to recognise the circumstances of a putative spouse and is therefore deemed invalid.
2. It is ordered that the failure to consider the applicant as a spouse for purposes of s 3A of the Deceased Persons Succession Act is an unjustified limitation of the applicant's right to equal protection and benefit of the law as provided for in terms of s 56(1) of the Constitution of Zimbabwe.

The brief background to this matter is that the applicant claims that she was customarily married to the late James Chigwedere from around 2000 until his demise on 29 July 2019. Two children were born to them, who are both minors. It is further averred that the property, Stand Number 3042 Glen Lorne Township Salisbury District measuring 14326,55 square meters, was their matrimonial home. (Hereinafter called the Glen Lorne property). Though the property was already purchased at the time of the unregistered customary law union, the applicant claims to have made direct contributions towards the improvements of same amongst other contributions to the household.

The first respondent is cited in the capacity of the body mandated with the statutory obligation of registration and administration of deceased estates in terms of the Administration of Estates Act, [*Chapter 6:01*].

The second respondent is described as the "Estate late James Chigwedere (represented by Isaac Tichareva in his Executor Dative) a duly registered company in terms of the laws of Zimbabwe. It is cited herein in its capacity as which was appointed by the third respondent to wind up the estate of my late husband James Chigwedere."

The third respondent is the surviving spouse of the late James Chigwedere by virtue of civil marriage entered in terms of the then Marriage Act. The fourth respondent is the child born to the third respondent and the late James Chigwedere. The sixth and seventh respondents are also described as sons to the late James Chigwedere. Unfortunately, the founding affidavit does not state who the fifth respondent is, in relation to this matter. It is only in the heads of argument where it is stated that he too is a son to the late James Chigwedere, born to the same mother with sixth respondent.

It is the applicant's contention that she was not aware of the existence of the civil marriage between the deceased and third respondent and only learnt about this during the

estate administration meetings as the third respondent has been in the United Kingdom, all along.

The second respondent is alleged to have disposed of the Glen Lorne property upon being appointed executor and this is said to have been done without due regard that this was the applicant's matrimonial home nor a recognition of her putative marriage. This is what spurred the applicant into action to seek the order set out above.

The second respondent is opposed to the granting of the order sought. Two points *in limine* were raised and argued on the ground that a point of law can be raised at any time. I heard the parties and reserved my ruling. This is it.

### **Improper citation of the second respondent**

Mr *Madhuku* submitted that the second respondent is cited as "Estate Late James Chigwedere" but described as a duly registered company in terms of the laws of Zimbabwe. Such a description is said to be meaningless particularly as paragraph 4 of the founding affidavit is said to be riddled with typographic errors rendering it confusing. On the hand second respondent is said to be the Estate Late James Chigwedere represented by Isaac Tichareva as Executor Dative and on the other described as a duly registered company. This is said to be fatal as a deceased estate is not a legal persona rendering the entire proceedings void.

It was averred that the applicant ought to have sued the executor and not a non-existent person represented by an existing person. Reference was made to the cases of *CIR v Emory NO 1961 (2) SA 621 (A)* at 624-5, *Veritas v ZEC & 2 Ors SC 103/20*, amongst others. It was prayed that the matter should be struck off the roll with costs.

Ms *Kawenda* accepted that there was some tardiness in the way that the second respondent is described but argued that this cannot be considered a nullity but just a mis-citation or mis description. The intention was alleged to be to bring the executor of the estate before the court and such intention is said to be clearly laid out. Reliance was placed on the case of *Masuku v Delta Beverages 2012 (2) ZLR 112 (H)*, to argue that where an entity is not cited correctly but described with sufficient accuracy, it would be accepted. The court was urged to move from an overly formal approach and not find prejudice where there is none as per *Four Towers Investments (Pvt) Ltd v Andre Motors 2005 (3) SA 39*.

Furthermore, Ms *Kawenda* contended that since Isaac Tichareva had accepted service and deposed to an opposing affidavit, there was no prejudice to be suffered by the second respondent and no need to haggle over a mis-citation. It was also argued that even if the

second respondent is found not to be a legal persona, the rest of the other respondents would still be before the court and the matter cannot be struck off the roll as they have not opposed the application which would remain live.

To this, Mr *Madhuku* submitted that these proceedings are *sui generis* and cannot start without the executor. The result would therefore be a fatal misjoinder as it would be inconceivable to proceed without the executor of the estate. The acceptance of service was said not to bar the raising of a point *in limine* which can be raised at any point. In the end the second respondent's prayer was that this point be upheld with no order as to costs.

The issue on proper citation of a deceased estate has been settled in this jurisdiction. In the matter of *Estate Late Ngavaite Jack Chikuni aka Ngavaite Jack Chikuni & 2 Ors v James Chikuni & 5 Ors* HB 143/21 this issue was extensively dealt with as follows:

“At the commencement of the hearing, I enquired from Adv. *Nkomo*, counsel for the applicants, about the legal status of the 1<sup>st</sup> applicant, i.e. Estate Late Ngavaite Jack Chikuni A.K.A Ngavayite Jack Chikuni. Counsel conceded that there is no 1<sup>st</sup> applicant before court. The concession was well taken. This is so because the deceased estate cannot represent itself. In terms of Section 25 of the Administration of Estates Act [chapter 6:01] a deceased estate is represented by an executor or executrix duly appointed and issued with letters of administration by the Master. The executor/executrix must be cited by name in any suit where the estate is a party. Failure to cite the executor/executrix would be fatal to an action against the deceased's estate. See: *Nyandoro & Anor v Nyandoro & Ors* 2008 (2) ZLR 219(H); *Cosma Chiangwa v (1) David Katerere (2) Robert Adrian Campbell Logan (3) Israel Gumunyu (4) Registrar of Deeds (5) Edmond Chivhinge (6) Master of The High Court* SC 61/21. There is no legal entity at law answering to the name estate late Estate Late Ngavaite Jack Chikuni. Therefore, there are only two applicants before court, i.e. 2<sup>nd</sup> and 3<sup>rd</sup> applicants.”

In *Cosma Chiangwa v David Katerere & 5 Ors* SC 61/21, the Supreme Court cited the case of *Nyandoro v Nyandoro* HH 89/08, with approval, as follows:

“In *Nyandoro & Anor v Nyandoro & Ors* 2008 (2) ZLR 219(H) at 222H-223C KUDYA J aptly restated the legal position as follows:-

‘In *Clarke v Barnacle NO & Ors* 1958 R&N 358 (SR) at 349B -350A MORTON J stated the legal position that still obtains to this day in Zimbabwe. It is that “whether testate or intestate, an executor, either testamentary or dative, must be appointed.....so that the executor and he alone is looked upon as the person to represent the estate of the deceased person.” He left no doubt that towards the rest of the world the executor occupies the position of legal representative of the deceased with all the rights and obligations attaching to that position and that because a deceased's estate is vested in the executor, he is the only person who has *locus standi* to bring a vindicatory action relative to property alleged to form part of the estate.

Arising from the nature of a deceased estate as described in *Clarke v Barnacle, supra*, and *Mhlanga v Ndlovu, supra*, it must follow that the citation of a deceased estate as a party to litigation is wrong. The correct party to cite in *lieu* of the deceased estate is the executor by name. The citation of the second plaintiff and second defendant *in casu* was therefore improper and incurable. It makes their presence before me a nullity.”

What emerges from these authorities is that the citation of a deceased estate as a party to litigation is wrong. It is the executor who must be cited by name. Failure to cite the executor/executrix would be fatal to an action against the deceased's estate. It does not matter that there are others remaining in the suit, if the suit is aimed against the deceased estate, failure to cite the executor is fatal. In terms of s 25 of the Administration of Estates Act [Chapter 6:01] a deceased estate is represented by an executor or executrix duly appointed and issued with letters of administration by the Master. The case of *Estate Late Ngavaite Jack Chikuni (supra)* was saved by the fact that the executor was the second applicant. In *casu*, the executor has not been cited by name. This is not just a mis citation. It is fatal to the application.

It does not matter that Isaac Tichareva filed an opposing affidavit. He was not properly cited, and a point of law can be raised at any time. See *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) @157 A-B.

There is therefore nothing left for me to do except to strike this matter off the roll with no order as to costs as prayed for at the end.

**Whether it is competent to make a constitutional application under s 85(1)(a) of the Constitution of Zimbabwe as an alternative**

Mr *Madhuku* impugned the approach taken by the applicant wherein as an alternative to the declaratory order in respect of s 3A of the Deceased Estates Succession Act [Chapter 6:02], the applicant purports to be making a constitutional application under s 85(1) (a) of the Constitution of Zimbabwe. This was based on the case of *CABS v Penelope Douglas Stone & Ors* SC 15/21 wherein the following observation was made:

“The manner in which the respondents presented and argued their case before the court *a quo* left a lot to be desired. It is clear that due care and diligence were not exercised, nor was proper consideration given to the relevant procedural and substantive law. As correctly stated by Mr *Madhuku* for the Minister, an application under s 85 of the Constitution should not be raised as an alternative cause of action. In addition to that, the propriety of combining an ordinary application with a s 85 (1) constitutional application on the basis of the same founding papers may also be open to question. Section 85 (1) is a fundamental provision of the Constitution and an application under it, being *sui generis*, should ideally be made specifically and separately as such.”

It was prayed that the entire portion of the application raising constitutional issues should fall away.

Ms *Kawenda* conceded that the issue has been settled on this point and the point *in limine* was accordingly upheld.

**In the result, I order as follows:**

1. Both points *in limine* be and are hereby upheld.
2. The matter is struck off the roll with no order as to costs.

*Tendai Biti Law*, applicant's legal practitioners  
*Chatsanga & Partners*, second respondent's legal practitioners