

FELISTUS VURAYAYI  
versus  
LETISIA NGWENYA  
and  
THE REGISTRAR OF MARRIAGES N.O.  
and  
POLKA EXECUTOR SERVICES (PRIVATE) LIMITED  
and  
THE MASTER OF THE HIGH COURT  
and  
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
MAXWELL J  
HARARE, 22 May & 27 September 2023

### **Opposed Matter-Special Plea**

*H Marava*, for the plaintiff  
*J Dondo*, for 1<sup>st</sup> and 3<sup>rd</sup> defendants

**MAXWELL J**

### **BACKGROUND**

On 22 November 2022 plaintiff issued out summons claiming the following,

“ An order declaring the marriage Certificate No,113/1992 between the late Flaviano Vitalis Mahangate and the 1<sup>st</sup> Defendant solemnized on 22<sup>nd</sup> of July 1992 null and void as it was solemnized through fraud in that the late Flaviano Vitalis Mahangate and 1<sup>st</sup> Defendant misrepresented to the 2<sup>nd</sup> Defendant to the effect that the late Flaviano Vitalis Mahangate was 33 years old when in fact he was 37 years on the date of marriage and that the late Flaviano Vitalis Mahangate was a bachelor when in fact the late Flaviano Vitalis Mahangate was customarily married [ to ] the Plaintiff with 6 children.

- a) An order declaring that the late Flaviano Vitalis Mahangate was a polygamist who was customarily married to the Plaintiff and the 1<sup>st</sup> Defendant.
- b) An order declaring the approval of a distribution plan under DR 2117/98 which exclude the Plaintiff by the 3<sup>rd</sup> Defendant null and void.
- c) An order setting aside the transfer of Stand Number 2472, 32<sup>nd</sup> Close, Glenview and Stand ME93 Section 2 Mbizo, Kwekwe to the 1<sup>st</sup> Defendant.
- d) Costs of suit”

In her declaration, plaintiff stated that she was customarily married to the late Flaviano Vitalis Mahangate who duly paid lobola to her parents. The customary law union was blessed with six children. Around 1988 the late Flaviano Vitalis Mahangate customarily married the first defendant who gave birth to a son in 1989. In 1992 the late Flaviano Vitalis Mahangate and the first defendant decided to solemnize their marriage under the then Marriage Act [*Chapter 37*]. They misrepresented the following facts to the Marriage Officer for him to solemnize their marriage,

1. That the late Flaviano Vitalis Mahangate had no other marriage when in fact both the late Flaviano Vitalis Mahangate and the first defendant were very aware that by that time the said marriage was solemnized the late Flaviano Vitalis Mahangate was customarily married to the plaintiff with five children.
2. That the late Flaviano Vitalis Mahangate was thirty-three (33) years old on the date when the marriage was solemnized when in actual fact, the late Flaviano Vitalis Mahangate was 37 years old.
3. That the late Flaviano Vitalis Mahangate was a bachelor at the time when the marriage was solemnized when in fact the late Flaviano Vitalis Mahangate was customarily married to the plaintiff with five children at the material time.

As a result, of the misrepresentation, on 22 July 1992, the marriage was solemnized, and marriage certificate number 113/1992 was issued. The late Flaviano Vitalis Mahangate met his death on 8 May 1998. First defendant obtained a death certificate and registered the estate with the fourth defendant. The third defendant was appointed the executor in the estate under DR 2117/98. The third and fourth defendants approved a distribution plan solely relying on the marriage certificate which was presented to them by the first defendant. Sometime in 2010 the matrimonial property, Stand number 2472 32<sup>nd</sup> Close, Glenview 1 Harare was transferred to first defendant despite a court order in HC 9357/2002 which prohibited the transfer of the property. Plaintiff submitted that her rights and interest in the late Flaviano Vitalis Mahangate's properties based upon her customary law union with the late Flaviano Vitalis Mahangate were thrown away by the first, third and fourth defendants. She therefore seeks a declaration of her legal status and the first defendant's marriage status which not only affects her property rights but also her inheritance rights. She sought costs of suit on an attorney and client scale.

The first and third defendants gave notice of appearance to defend on 30 November 2022. On 16 December 2022 they filed a special plea that all of plaintiff's claims had prescribed and expired by effluxion of time. On 30 December 2022, second defendant gave notice that he is not opposed to the relief sought in the matter.

### **SUBMISSIONS BY THE PARTIES**

First and third defendants submitted that plaintiff's claims relate to events which occurred between 1992 and 2010. Summons were issued out on 22 November 2022, a period in excess of between twelve years and twenty-four years depending on the individual claims. They referred to ss 15(d) and 16(1) of the Prescription Act [*Chapter 8:11*] (the Act). They pointed out that the cause of action in the first claim arose in July 1992 and Plaintiff became aware of the solemnization of the marriage at latest in the year 2000 when she instituted proceedings in case number HC 7710/2000. Further that the cause of action for the second claim arose in 1998 when the estate of the late Flaviano Vitalis Mahangate was registered with the fourth defendant and plaintiff knew that fourth defendant had only recognized first defendant as the sole surviving spouse of the deceased and that she had been excluded despite her claims that she also had been customarily married to the deceased. They stated that plaintiff instituted proceedings after a period in excess of twenty-four years from the date the cause of action arose. First and third defendants pointed out that plaintiff knew of the Distribution Plan approved by the fourth defendant under DR 2117/98 latest by July 2000 when she instituted proceedings in HC 7710/2000. She did not institute proceedings to challenge the Distribution Plan and cannot do so now after a period in excess of twenty-two years. Lastly, plaintiff sued for the setting aside of the Deed of Transfer 000930/2010 which transferred the property in dispute to first defendant on 12 March 2010. First and third defendants pointed out that in June 2000 Plaintiff was aware that rights, title, and interests within the property in dispute were ceded and/or transferred by City of Harare to first defendant and she did not take any legal action to have the cession set aside.

First and third defendants referred to *Ndlovu v Post & TeleCommunications Corporation* 1998 (2) ZLR 334 in which circumstances when a debt becomes due are illustrated. These include when it is "owing and payable", or "immediately claimable", or "immediately extinguishable at the will of the creditor". See *Escom v Stewarts & Lloyds SA (Pty) Ltd* 1979 (4) SA 905, *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 and *Benson & Anor v Walters & Ors* 1984 (1)

SA 73. They also referred to cases in which “cause of action” in relation to a claim was defined as “the entire set of fact which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a Plaintiff to succeed in his claim” or “every fact which it would be necessary for the Plaintiff to prove if traversed, in order to support his right to the judgment of the Court.” It is also “the combination of facts that are material for the Plaintiff to prove in order to succeed in his action. See *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626, *Patel v Controller of Customs and Excise* 1982 (2) ZLR 82, *Controller of Customs v Guiffre* 1971 (1) RLR 91, *Read v Brown* (1888) 22 QBD 131, *Dube v Banana* 1998 (2) ZLR 92, *Peebles v Dairyboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 and *Mukahlera v Clerk of Parliament & Others* 2005 (2) ZLR 365. First and third defendants prayed for the upholding of the Special Plea with costs on an attorney and client scale.

Plaintiff in her heads of argument reiterated that she is calling upon this court to issue a declaratur on the basis that defendants cannot obtain rights out of an illegality. She pointed out that this is a matter which involves an estate where the Attorney General was not opposed to the granting of the declaratur. She submitted that the clause Defendants rely on relates to debts and not a claim of this nature.

### ANALYSIS

Where declaratory relief is sought, the court stated in *Johnsen v Agricultural Finance Corporation* 1995 (1) ZLR 65 (S) at 72 that:

“The condition precedent of the grant of a declaratory order under s14 of the *High court of Zimbabwe Act 1981* is that the applicant must be an ‘interested person’, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future, or contingent right. The court will not decide abstract, academic, or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a prerequisite to the exercise of jurisdiction. See *Ex p Chief Immigration Officer* 1993 (1) ZLR 122 (S) @ 129F-g, *Munn Publishing (Pvt) Ltd v ZBC* 1994 (1) ZLR 337 (S)”

It is trite that the grant of declaratory relief is discretionary. The courts will use the power to issue a declaratur sparingly, and with utmost caution. It is a power that will only be exercised when there is a good reason for doing so in suitable circumstances. See *Ex parte Chief Immigration Officer* 1993 (1) ZLR 122. Some litigants file applications that appear as seeking declaratory relief when in fact review proceedings would be appropriate in the circumstances. To deal with that, the Supreme Court pointed out in *Geddes v Tawonezvi* 2002 (1) ZLR 479 that:

“In deciding whether an application is for a declaration or review, the court has to look at the grounds of the application and the evidence produced in support of them. The fact that an application seeks a declaratory relief is not in itself proof that the application is not for review. The court should look at the grounds on which the application is based rather than the order sought...”

A consideration of the grounds on which the application is based leads to the inevitable conclusion that this is a review disguised as an application for a declarator. This is evident from the submissions by the plaintiff. In para 13 of the Founding affidavit she stated that; -

“The 3<sup>rd</sup> Defendant and the 4<sup>th</sup> Defendant approved a distribution plan solely relying on the Marriage Certificate which was presented to them by the 1<sup>st</sup> Defendant despite the fact that the same marriage certificate was obtained through fraudulent means by the late Flaviano Vitalis Mahangate and the 1<sup>st</sup> Defendant”

She also stated in para 15 that; -

“The Plaintiff’s rights and interest on the Late Flaviano Vitalis Mahangate’s properties based upon her customary law union with the Late Flaviano Vitalis Mahangate were thrown away by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant (sic).”

Clearly she is complaining of an irregularity in the manner the estate of the Late Flaviano Vitalis Mahangate was handled by the Executor and the Master. Irregularity in the proceedings or decision is one of the grounds for review in terms of s 27(1)(c) of the High Court Act [*Chapter 7:06*]. In any event Plaintiff ought to have proceeded in terms of the Administration of Estates Act [*Chapter 6:01*]. She could have either objected when the estate’s account lay for inspection or if the issue related to the final distribution account, she was obliged to approach the court through motion proceedings for an order setting aside the Master’s direction within 30 days thereof. Both actions are time specific, and Plaintiff did not act within any of the prescribed times. In my view the plaintiff deliberately disguised the application as a declaratur to evade the consequences of having failed to comply with the provisions of s 52(8), (9) and s 68F (1) of the Administration of Estates Act [*Chapter 6:01*].

Plaintiff’s argument that the clause relied on by first and third defendants does not relate to claims of this nature was not supported by any authorities. Neither were there any authorities cited giving a position contrary to the authorities cited by first and third defendants. That the Attorney General has not opposed the matter is neither here nor there as the Attorney General represents an official who has no interest in the matter.

For the above reasons, I find favour with the position taken by first and third defendants that the Plaintiff’s claim prescribed

## **COSTS**

First and third defendants prayed for costs on a legal practitioner and client scale on the basis that the claims amount to a clear abuse of Court process. The prayer was made in their plea in abatement dated 15 December 2022 as well as in their heads of argument dated 19 December 2022. On 22 May 2023 heads of argument for the plaintiff were filed. Only one paragraph is an elaboration of the plaintiff's position. That paragraph has no single authority cited, and is not responsive to what the first and third defendants submitted. Clearly, plaintiff had nothing meaningful in response to the submissions by first and third defendants. Rather than concede and save time and costs, Plaintiff chose to persist and have the matter argued. Such conduct amounts to an abuse of court process and deserves censure. In *Mudzimu v Municipality of Chinhoyi & Another* 1986 (1) ZLR 12, it was held that the basis of an award of costs on a legal practitioner and client scale is that the litigant's conduct has amounted to an abuse of the Court process and his actions have thereby brought about additional and unwarranted expense to the other party. Plaintiff's conduct falls justifies such an award.

## **DISPOSITION**

1. The Special Plea taken by the first and third defendants of Prescription be and is hereby upheld.
2. The plaintiff's claim is dismissed with costs on an attorney and client scale.

*Rosi Chavi Law Office*, plaintiff's legal practitioners.  
*Dondo & Partners*, first and third defendants' legal practitioners  
*Civil Division of the Attorney General's Office*, second defendant's legal practitioners.

