COTILDA DZAPATA
versus
HILARY TAFIREYI
and
HILDA TAFIREYI
and
LOVENESS TAFIREYI
and
KNOWLEDGE TAFIREYI
and
TONGAYI MANZIEGUDHU
and
OLIVER MASOMERA N.O.
(in his capacity as the Executor Dative in the Estate Late Emmanuel Tafireyi Drc 29/24)
and
MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE; 2 May 2025 & 4 June 2025

Court Application – Declaratory Order

T.A Mandizvidza, for the applicant
N Mazula, for the 1st – 5th respondents
No appearance for 6th and 7th respondents

MAXWELL J:

Applicant approached the court seeking the following order;

"IT IS ORDERED THAT:

1. Cotilda Dzapata be and is hereby declared the spouse of the late Emmanuel Tafireyi for purposes of the Administration of Estates Act [*Chapter 6:01*].
2. Costs of suit be borne by the estate of the late Emmanuel Tafireyi."

In the founding affidavit, applicant stated the following. She commenced living with the late Emmanuel Tafireyi (the deceased) as husband and wife in 2014. In 2018 the deceased married

her customarily as he paid lobola for her. Their union was blessed with three minor children. The death of her husband was a source of misery for her and the minor children caused by the deceased's relatives. The deceased's relatives clandestinely registered the estate of the deceased in Chiredzi after obtaining a death certificate which falsely recorded that the deceased was a widower. Through the assistance of her legal practitioners she applied for the estate registered in Chiredzi under CHD DE 05/24 to be referred to Harare and this was done. She indicated that first to the fifth respondents acknowledged that the minor children are beneficiaries in the estate after coercing her to have DNA tests to prove paternity. Around the 17th of April 2024 a meeting of the relatives was held. The relatives initially disputed that she was the surviving spouse but later conceded. An edict meeting was held on or around 9/5/24 were second respondent (the deceased's child) was nominated co – executor with herself in her capacity as the surviving spouse. However the seventh respondent refused the appointment of co – executors on the basis that co – executors usually end up disagreeing resulting in stalling the progress of administration of the estate. He recommended that a neutral person be appointed as executor and sixth respondent was appointed.

She was surprised when a meeting was held at sixth respondent's offices and the deceased's relatives including second respondent disputed that she was the surviving spouse. Thereafter she approached the court in the present proceedings. She further stated that before the death of her husband, and at the time of his death and after his death she has been residing with the minor children at the matrimonial home being number 6033 Bloomingdale Tynwald, Harare. According to her it is unwarranted for the deceased's relatives to deny her the surviving spouse status as they are motivated by malice. She attached documents showing that deceased regarded her as his wife. These documents included a ZIMRA Personal Information Form, BancABC Loan Application Form, a letter from Premier Service Medical Aid Society dated 27/1/2015, letter from ZIMRA dated 9/2/24, letter from ZIMRA to Nyaradzo Funeral Assurance and a First Mutual Health Confirmation of membership. She stated that after presenting these documents to sixth respondent, he confirmed her as the surviving spouse.

Applicant averred that she has been subjected to inhuman treatment by the deceased's relatives. Further that her well-being is tied to that of her children and that the best interests of the minor children should be considered.

First to fifth respondents opposed the application. The opposing affidavit was deposed to by first respondent. She stated that there are material disputes of facts which cannot be resolved on the papers. She disputed that applicant was married to the deceased customarily or otherwise. According to her, the relationship between applicant and deceased was just a concubinage association which never gravitated towards a customary marriage. She stated that the deceased had not lived with the applicant for more than two years prior to his death.

On the merits she stated that the deceased never hinted or mentioned any desire to marry or perform any customary marriage rites for the applicant. She confirmed that the estate had been registered in Chiredzi as deceased's farm and residence were in Chiredzi. She asserted that the deceased never remarried after the death of her mother in 2007 hence the widower status on the death certificate. According to her, applicant had been proposed as a co – executor as a guardian of the minor children, not as a surviving spouse. She pointed out that the Letters of Administration issued to her by the Assistant Master at Chiredzi were never revoked and remain extant. First respondent submitted that applicant does not know how long the deceased was admitted in hospital and who was residing with him, were he was residing prior to his death and when he died. She disputed the applicant's entitlement to a declaratory order.

In answer applicant stated that there are no material disputes of fact. She stated that from 2014 in all the paperwork that required marital status the deceased would indicate that he was married to her. Further that there was no question on the paternity of the minor children and the deceased was registered as the father of all the minor children therefore it came as a shock that the first to fifth respondents requested paternity tests on the minor children. She insisted that there was a customary marriage witnessed by some of the relatives who were now denying it for their selfish ends. She disputed that the Letters of Administration issued in Chiredzi were sill extant as sixth respondent had been appointed after the removal of the first respondent as he was based in the United Kingdom.

In heads of argument, applicant submitted that it is not necessary to lead oral evidence on whether or not she was married to the deceased as sufficient evidence exist for the court to make a decision. She referred to the case of *Douglas Muzanenhamo* v *Officer in Charge CID Law & Order & Others* CCZ 3/13 where the Constitutional Court held that;

> "As a general rule in motion proceedings the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party…"

Applicant argued that the deceased's relatives confirmed at a meeting held before seventh respondent that she is the surviving spouse therefore their change from that position is just an afterthought which should not be entertained by this court. She referred to s 12(1)(a) of the Civil Evidence Act [*Chapter 8:01*] and asserted that what seventh respondent stated in a letter was an accurate record that the deceased's relatives confirmed that she was the surviving spouse. She argued that as stated in *S* v *Marutsi* 1990 (2) ZLR 370 a litigant cannot be allowed to approbate and reprobate a step taken in proceedings. She stated that first to fifth respondents took a step of confirming that she is the surviving spouse and therefore as a matter of law they cannot resile from that earlier position accepted and adopted. She prayed for the granting of the order sought.

The first to fifth respondents insisted in their heads of argument that the case the applicant placed before the court cannot be resolved on the papers which are filed of record. They submitted that applicant had the onus to adduce clear and unambiguous evidence which points to the veracity of her claims. They pointed out that the lobola list she relies upon is not signed nor does it purport to mention the names of the parties who attended. On the basis of *Sibanda* v *Mwonzora & Ors* HH 713/20 they submitted that applicant ought to have filed affidavits from relatives from either side to confirm the customary marriage. They also relied on *Thulani Dube* v *Lindiwe Dlamini & 3 Ors* HB 271/16 in which it was stated that in a concubinage arrangement there is no spouse in accordance with the law therefore no inheritance follows. They also referred to *Moyo* v *Chidumo* HB 42/13 wherein it is stressed that even if money exchanges hands from the would – be groom to representatives of the would – be bride secretively, such a union would not qualify to be termed a customary law marriage. Further that as stated in *Hosho* v *Hasisi* 2015 (1) ZLR 772 the process of paying lobola and the ceremony itself involves key representatives from both families as well as other people who can attest to the process having taken place. They further stated that the lobola list is dated 29/9/2018 yet the ancillary documents applicant attached alleged that she was married in 2014. The contradiction they submitted must be held against the applicant and the application be dismissed with costs on a legal practitioners and client scale.

At the hearing of the matter the parties agreed to abandon the preliminary point. This judgment does not cover that point.

Section 14 of the High Court Act [*Chapter 7:06*] gives this court power to enquire and determine at the instance of any interested person any existing, future or contingent right or obligation notwithstanding that such a person cannot claim any relief consequent to such a determination. In *Munn Publishing (Pvt) Ltd* v *Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 the remedy in terms of section 14 of the High Court Act [*Chapter 7:06*] the court held that;

> "The condition precedent to the grant of a declaratory order is that the applicant must be an interested party, 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. See *United Watch & Diamond Company (Pty) Ltd and Others* v *Disa Hotels Ltd and Another* 1972 (4) SA 409 (c) at 415; *Milani and Another* v *South African Medical and Dental Council and Another* 1990 (1) SA 899 (T) at 902 G-H. The interest may relate to an existing future or contingent right. The court will not decide the abstract, academic or hypothetical questions unrelated to such interest. See *Anglo – Transvaal Collieries Ltd* v *SA Mutual Life Assurance* SOC 1977 (3) SA 631 (T) at 635 G-H. But the existence of an actual dispute between persons interested is not a statutory requirement to the exercise by the court of jurisdiction. See *Ex Porte Nell* 1963 (1) SA 754 (A) at 759 – 760A. Nor does the availability of another remedy render the grant of a declaratory order incompetent. See *Grelcon Investments (Pvt) Ltd* v *Adair Properties (Pvt) Ltd* 969 (2) RLR 120 (G) at 128 A – B; 1969 (3) SA 142 (R) at 144 D – F;
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> > "This then is the first stage of the determination by the court.
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> At the second stage of the enquiry, it is incumbent upon the court to decide whether or not the case in question is a proper one for the exercise of its discretion under s 14. What constitutes a proper case was considered by WILLIAMSON J in *Adbro Investments Co Ltd* v *Minister of the Interior & Ors* 1961 (3) SA 283 (T) at 285 B – C, to be the one which generally speaking showed that;
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> "……..despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet nevertheless justice or convenience demands that a declaration be made, for instance as to the existence of or as to the nature of a legal right claimed by the applicant or of a legal obligation claimed to be due by a respondent. I think that a proper case for a purely declaratory order is not made out if the result is merely a decision of mere academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant's position with reference to an existing future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought."

The determining question is whether cultural practices were observed to confirm a customary law marriage. In *Chivise* v *Dimbwi* 2004 (1) ZLR 12 it was held that the validity or otherwise of a customary marriage is not tested by how long it had endured but by whether certain formalities and rituals at customary law have been performed. In *Hosho* v *Hasisi* HH 449/15 those

cultural practices were said to involve the payment of Lobola and that the process of paying lobola and the ceremony itself involves key representatives from both families as well as other people who can attest to the process having taken place.

Applicant stated in her founding affidavit that she was married customarily by the deceased Emmanuel Tafireyi in 2018 as he paid lobola for her. She attached a lobola list as proof. She also attached documents from ZIMRA, BancABC, PSMAS and First Mutual Health as overwhelming proof that the deceased considered her as his wife. In response first respondent stated that the deceased never hinted or mentioned any desire to marry or perform any customary marriage rites for the applicant. Further that the deceased never at any point in time approached the applicant's guardian or family for her hand in marriage. First respondent stated that the lobola list attached by the applicant is unknown to the entire Tafireyi family and it is a fake. On the attached documents, first respondent stated that they are a high sounding nothing and do not establish applicant's status as a surviving spouse.

In answer to the opposition, applicant simply stated that the Tafireyi family is well aware of the lobola day and that some of them though then denying for selfish ends, attended the lobola ceremony. She does not go further to state who from the Tafireyi family attended the ceremony. She does not state who the go – between (munyai) was. Neither does she state exactly where the ceremony took place. Applicant is silent on how many members of the Tafireyi family she alleges attended the ceremony. She does not state the author or custodian of the lobola list she produced before the court. It is not customary for the married woman to be the custodian of such a list. Its appearance before the court through her statement is therefore inadequate for purposes of confirming its authenticity.

Without being a handwriting expert, the authors of the document before the court are clearly different. The paper on page 14 of 94 of the record is different from that on page 15 of 94. The differences have not been explained. There are a lot of erasures which also were not explained. No one explained why some text is faint while the other is bold. No one explained why some text appears to have been added in. Page 14 of 94 is not dated. It is not clear if it was prepared at the same time with page 15 of 94 which is dated 29/9/18. To top it all, there is no "munyai" to confirm that the list is what was prepared for the alleged ceremony. I find that the evidence presented is

insufficient to confirm the authenticity of the roora list. Furthermore no evidence was presented to confirm the lobola ceremony.

The annexures attached as proof that the deceased considered the applicant his wife do not help the applicant's case. What they prove is that the deceased and the applicant presented themselves as married, mentioning themselves as spouses for the world, without actually getting married. The first attachment is labelled Annexure G1. Staff Confidential Loss Control Division. The residential address given therein is different from the applicant's address. There is no explanation of why that is so. It was signed on 25/03/2015. Annexure G2 does not take the matter any further as it is simply a confirmation of what is in the ZIMRA Staff records. No one from ZIMRA explained whether there is a verification process on the status of the employee. My guess is that the information in the staff records will be supplied by the staff member and the employer usually does not verify its veracity. Annexure G3 is a personal loan application form on which the deceased again stated an address which is different from the applicant's. That form was signed on 3/09/2014. Annexure G4 is a confirmation that deceased made applicant a beneficiary to the Premier Service Medical Aid Society with effect from 1/5/2015. Annexure G5 confirms deceased's membership to First Mutual Health and the applicant is listed as a wife having joined the scheme on 1/7/2018. Annexure G6 confirms that ZIMRA provided services to the deceased during the funeral of the applicant's father. Again that letter does not take the matter any further as according to deceased's information supplied to ZIMRA, he was married to the applicant. Put in other words, deceased held out to ZIMRA that he was married to the applicant. ZIMRA cannot confirm whether or not the customary and cultural practices were observed in order to confirm the existence of a customary law marriage.

In addition all the annexures were signed before lobola was paid. According to the applicant, lobola was paid on 29/9/18. Annexure G1 was signed on 25/3/2015, G3 on 3/09/2014, G4 on 27/1/2015 and G5 joining date 1/7/2018. By the 29/9/18 when lobola was allegedly paid, all the documents that show that deceased considered the applicant his wife were already in existence. In other words he presented her as his wife even though he had not paid lobola. Applicant cannot therefore use the payment of lobola in conjunction with the documents she attached. The documents do not confirm a status conferred by the payment of lobola, as the lobola had not yet been paid when the deceased declared her to be his wife.

In addition there are some very specific averments made by the first respondent which did not attract a response from the applicant. In paragraph 2 of the Opposing Affidavit, first respondent specifically stated that applicant had not lived with the deceased for more than 2 years prior to his death. In para 17 he stated that applicant doesn't even know how long deceased was admitted in hospital, who was residing with him, where he was residing prior to his death or even where he died. Nowhere in her answer did the applicant dispute these specific averments. She did not contradict what the first respondent stated. It is trite that what is not disputed is taken as admitted. See *Fawcett Operations P/L* v *Director of Customs and Excise & Others* 1993 (2) ZLR 12. The silence on the applicant's part to such averments may be the reason why she was not involved initially when the estate was registered in Chiredzi. In her founding affidavit she stated that she was residing at the matrimonial home with the minor children. She did not say she was residing with the deceased.

Applicant also seeks to rely on two letters that confirmed her as the surviving spouse. The first is from the sixth respondent in which he stated;

> "Given the submissions that were made before the Master of High Court and the attachments in the above mentioned letter, the position is that Ms Cotilda Dzapata is a surviving spouse to this estate."

The second is from the seventh respondent in which it is stated that;

> "according to the information on record Ms Cotilda Dzapata 59 – 082719 W 24 is recognised as the deceased's surviving spouse as confirmed by the deceased's relatives who attended the meeting held at our offices on 9 May 2024."

I have already dealt with the attachments referred to by the sixth respondent above. They do not confirm that applicant had customary rites and cultural practices performed to confirm her marriage. I took the liberty of requesting for the record from the seventh respondent's office. It has a number of meetings in which the attendees were applicant's relatives and legal practitioners. On the 9th of May 2024 the deceased's relatives were outnumbered by the applicant's. On 9/6/24 a letter from the legal practitioners on behalf of first and second respondents stated;

> "Our instructions are that, at no point in time did the parties ever agree the fact that Ms Cotilda Dzapata is the surviving spouse, as alleged. Without casting aspersions, our clients insist that the above is a false reflection of the deliberations at the special meeting, and an attempt to recognise Ms Cotilda Dzapata as the surviving spouse through the back door.

> The circumstances under which such a finding or conclusion was made and captured in the minutes remains a mystery to our clients and the Tafireyi family members who attended the meeting. The position of the Tafireyi family regarding the status of Ms Cotilda Dzapata has been clear from the onset, as captured in their letter addressed to yourselves and filed of record."

The letters applicant seeks to rely on were written after a protest was placed on record. The one by sixth respondent was written on 30 July 2024 whilst that by seventh respondent was written on 27/8/24. There is no indication that the issues raised in the protest letter of 9/6/24 were resolved. Furthermore the record from the seventh respondent is not helpful as there is no specific person or persons from deceased's relatives to whom the acknowledgement of applicant as the surviving spouse is ascribed. As that information was disputed applicant cannot rely on it.

In the final analysis, the authenticity of the lobola list that was attached by the applicant is questionable. The customary and cultural rites process confirming a customary law marriage has not been established. There is not even an affidavit from any of the applicant or deceased's relatives to confirm the lobola process. The documents and letters applicant sought to rely on are much ado about nothing. The deceased's employer, bank, medical aid society, the Master of the High Court or the executor cannot confirm the occurrence of the lobola process which is the determining factor in this case.

For the above reasons I cannot declare that the applicant is a surviving spouse of the late Emmanuel Tafireyi for the purposes of the Administration of Estates Act [*Chapter 6:01*].

The relief sought by the applicant is not justified.

The application is therefore dismissed with costs.

MAXWELL J: …….

Masiya – Sheshe & Associates, applicant's legal practitioners
Madzima & Company Law Chambers, first to fifth respondents' legal practitioners