GEORGE MUSANHU
versus
CHIPO MUNGUMA
and
YEUKAI CHAHWANDA
and
RUDO MAWEDZERA

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO 25 January and 13 April, 2022

Mr Gwezhira for the applicant
Respondent in person

Opposed Application

ZISENGWE J: This dispute is the latest instalment in a series of legal battles waged between the applicant and 1st respondent at whose heart lies the question of whether or not the 1st respondent is the legitimate surviving spouse of the late Aube Musanhu who died intestate in 2006.

The applicant is the brother of the late Aube Musanhu and his position is that the 1st respondent (*as with the 2nd and 3rd respondents*) is a masquerade as she was never married to Aube Musanhu. He avers that the 1st respondent was merely involved in an adulterous relationship with the late Aube during the currency of the latter's civil marriage to one Patricia Chifuro. The nub of his argument is therefore that the said marriage being monogamous rendered the relationship between Aube and the 1st respondent not only tainted with moral turpitude but also that it was downright unlawful out of which no rights could legally accrue. He therefore seeks a declaratur

wherein it is declared that the 1st respondent was not legally married to the late Aube Musanhu and that the latter was single at the time of his death.

The application stands sternly opposed by the 1st respondent who maintains that she was married to Aube Musanhu in terms of an unregistered customary law union. According to her, the applicant is merely driven by greed and is hell-bent on elbowing her out as the surviving spouse to pave the way for him to lay his hands on Aube Musanhus's estate.

It is this seemingly straight-forward dispute that spawned a litany of litigation between the applicant and the 1st respondent virtually spanning across Zimbabwe's entire legal system. It is pertinent to note that the 2nd and 3rd respondents did not file any opposing papers. That is not at all surprising given that the real protagonists to this dispute have always been the applicant and the 1st respondent.

The reasons for these pitched legal battles between the applicant and the 1st respondent are not too far to find, the late Aube left behind a sizeable estate, comprising among others a resettlement farm and a house in Masvingo. The triumphant party will assume the right to that estate either as administrator or beneficiary thereto or both.

The application is somewhat curiously headed. It is headed *"Court Application to cancel fake marriage*". The document which the applicant erroneously refers to as a "marriage" is simply a confirmation of the existence of a customary law union between Aube Musanhu and the 1st respondent. It is titled "Confirmation of Customary law marriage form" and is directed to the Director of (government) Pensions. All it purports to do is to confirm the existence of a customary law "Marriage" by the relatives of a deceased pension contributor or recipient. In this regard two persons namely, Simon Musanhu and Joseph Musanhu presented themselves before Provincial Magistrate J. Mzinyathi and identified themselves as the father and uncle of the late Aube Musanhu respectively before apparently confirming the existence of the said customary law union.

This form is no doubt intended for the disbursement of any pension benefits payable to a deceased's surviving spouse(s) should there be any. The main thrust of applicant's case is that this document was obtained through material misrepresentations which induced the magistrate who authored it to so confirm the existence of the impugned customary law union.

In a withering attack, the applicant brands that document as fake and implores the court to declare it as void and of no consequence. His main argument is that all the relevant documentation

relating to the registration of the estate of Aube Musanhu shows that as of the date of his death he was a widower having been so widowed in 2002 when his then wife Patricia died. Reliance in this regard was placed, among other documents, on the death notice compiled by Aube's relatives in the wake of his demise which described him as "widower'.

Applicant's position therefore is that the impugned document is the product of wily and fraudulent machinations on the part of the 1st applicant in a bid to circumvent the resistance she faced from Aube's relatives who thwarted her every move at falsely holding herself out as Aube's surviving spouse. He avers that the estate of the late Aube Musanhu was properly registered under DR 1179/10 and that frustrated by the late Aube Musanhu's relatives to give in her manoeuvres, 1st respondent with the assistance of the 2nd and 3rd respondents hatched a plan and embarked on a parallel process to similarly register Aube's estate. According to him in the course of doing so the 1st respondent made material misrepresentations to the Master of the High Court.

The applicant also makes reference to the apparent inconsistencies and contradictions in the documents filed by the 1st respondent in the registration of Aube's estate all of which according to him negate the very notion of 1st respondent being Aube's surviving spouse. He therefore seeks an order in the following terms:

> **"*WHEREUPON after reading documents filed of record and hearing counsel;***
> ***IT IS ORDERED THAT:***
> 1. *1ST respondent's proof of marriage witnessed by Simon Musanhu and Joseph C. Musanhu before Masvingo Provincial Magistrate be and is hereby cancelled.*
>
> 2. *The late Aube Musanhu be and is hereby declared to have been unmarried at the time of his death.*
>
> 3. *Respondents are hereby ordered to pay costs on a higher scale".*

As indicated earlier, the 1st respondent steadfastly maintains that she only entered into an unregistered customary law union in the wake of the demise of Aube's wife Patricia. She further avers that the present application, as with other similar applications, is actuated by malice, greed

and spite on applicant's part and is designed to unlawfully wrest the estate of her late husband Aube from her and that the applicant is only taking advantage of the fact that Aube's father Simon Musanhu who recognised her as Aube's surviving spouse has since passed away.

Regrettably, she also veers of tangential to the issues and recounted in her opposing affidavit how the applicant has striven to divest her of the late Aube's property (*notably a farm in Chiredzi and a house in Rujeko Township, Masvingo*).

Pertinently, she raised three points *in limine* which in her view are potentially dispositive of the matter in her favour. These points *in limine* are;

(a) That the applicant has failed to establish a cause of action upon which to nullify the document entitled "*confirmation of customary marriage*".

(b) That the issue at hand is in any case *res judicata,* a similar application having been dismissed by the Magistrates Court sitting at Masvingo in case number 2626/18 – and the appeal thereto in CIV 'A' 40/18 having been equally dismissed.

(c) That the current application is no more than an abuse of court process in light of applicant's failure to disclose similar ill-fated applications.

It is to those points *in limine* that I now turn:

The alleged absence of a legally cognisable cause of action

My understanding is that the applicant seeks the setting aside of the written confirmation of the purported customary law union between Aube Musanhu and 1st resopendent. The basis of the application being that the said confirmation was fraudulently obtained.

What is also clear is that in confirming that the 1st applicant was married to the late Aube Musanhu, the Magistrate in question performed what may loosely be termed as a quasi-judicial function and that he did so on the strength of information supplied to him by the two persons who appeared before him. The form in question was solely for purposes of the Director of Pensions intended for the disbursement of any pension benefits payable to the surviving spouse by a deceased pension contributor/recipient. It is however doubtful whether that form has any relevance (or has been used) outside the scope of the disbursement of pension emoluments payable to the surviving spouse of a deceased contributor or recipient. Interestingly that form can also be

completed by a district administrator or a chief. It is no more than a rudimentary attempt to establish the identity of person(s) who might have been customarily married to a deceased person.

Be that as it may, I believe the applicant in his founding affidavit provided a cognisable cause of action – namely the setting aside of a quasi-judicial decision allegedly obtained by fraud coupled with a declaration to the effect that the deceased person was not married at the time of his death. The latter is in essence a declaratory order as envisaged in section 14 of the High Court Act, [*Chapter 7:06*].

The first preliminary point can therefore not be sustained and is accordingly dismissed.

Whether the matter is *res judicata*

Here, the 1st respondent's contention is that the matter was conclusively adjudicated upon in the Magistrates Court sitting at Masvingo in case number 2626/18 wherein according to her such a claim was dismissed. She further avers that applicant's appeal against the Magistrate's ruling was dismissed by the High Court.

During oral submissions in court, the 1st respondent also referred to Harare High Court cases HC 8625/17 and 8626/17 in which she claims the issue at hand was equally placed before the court and adjudicated upon, the result of which was in her favour. Both contentions are disputed by the applicant. With regards to the defence of *res judicata* the remarks of GUBBAY JA (*as he then was*) in *Wolfenden* v *Jackson* 1985 (2) ZLR 313 (S) at 316 B – C are apposite, thus:

> *"The excepio rei judicata is based principally upon public interest that there must be an end to litigation and that the authority vested in judicial decisions be given effect to, even if erroneous. See Le Roux en n Ander is a form of estoppel and means that where a final and definitive judgment is delivered by a competent court, the parties to that judgment or their privies (or in the case of a judgment in rem, any other person) are not permitted to dispute its correctness".*

On the requirements to sustain a plea of *res judicata*, SANDURA JA in *Banda & Ors*. v *ZISCO* 1999 (1) ZLR 340 (S) had this to say at 341 H – 342 A.

> "*The requisites of the plea of res judicata have been set out in a number of previous cases. In Pretorius v Barkly East Divisional Council 1914 AD 407at 409, SEARLE J set them out as follows:*
>
> *'As to the first point, the requisites of a plea of res judicata have several times been laid down in this court.*

> *The three requisites of a plea of res judicata, said the CHIEF JUSTICE in Hiddingh v Denyssen & Ors (1885) 3 Mens 424, quoting voet (44.2.3), are that the action in respect of which judgment has been given must be between the same parties or their privies, concerning the same subject matter and founded upon the same cause of complaint as the action in which the defence is raised ....*
>
> *In order to determine the cause of complaint, the pleadings and not the evidence in the case must be looked at".*

Finally, in Herbstein & Van Winsen "*The Civil Practice of the High Courts and the Supreme Court of appeal of South Africa*" 5th ed, at 609 – 610, the defence of *res judicata* is summarised as follows;

> '*The requirements for successful reliance on the excepio rei judicata vel litis finitae (or lis finite) are*:
>
> *Idem actor, idem reus, eadem res and eadem causa patendi. This means that the exception can only be raised by a defendant in a later suit against a plaintiff who is 'demanding the same thing on the same ground' per STEYN CJ in Africa Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 5551 at 562 A); or which comes to the same thing, on the same cause for the same relief (per Van Winsen AJA in Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A) at 472 A – B, ...; or which comes to the same thing; or which also comes to the same thing; whether the same issue' had been adjudicated upon (see Horowitz v Brock 1988 (2) SA 160 (A) at 179 A – H). The fundamental question in the appeal is whether the same issue is involved in the questions, in other words, is the same thing demanded on the same ground, or which comes to the same relief claimed on the same cause, or to put it more succinctly, has the same issue now before the court been finally disposed of in the first action.*

I will apply the above principles to determine whether or not the proceedings in either of Masvingo Magistrates Court case No. 2626/18 or High Court cases HC 8625/17 and HC 8626/17 render the present matter *res judicata*. With regards to the former, what can be gathered from the contents of the papers filed of record in this regard is the following. Three applicants namely Noel Musanhu, George Musanhu (*the current applicant*) and Constantine Musanhu approached the Court seeking an order for the "cancellation of the marriage between the late Aube Musanhu and Chipo Munguma".

The basis for that application was essentially the same as in the present application, namely that Chipo Munguma was nothing more than an imposter who masqueraded as Aube Musanhu's surviving spouse. The Magistrate declined jurisdiction indicating as he did in his ruling that he

could not purport to arrogate to himself the power to review a fellow Magistrate's decision who had confirmed the existence of a customary law union between 1st respondent and Aube Musanhu.

Aggrieved by that decision the three applicants filed an appeal with the High Court under case number CIV "A" 40/18. However, that appeal was still born as it was withdrawn by the three Musanhu siblings on 4 November, 2020 (they erroneously referred to it as the "withdrawal of an application").

In contesting the 1st respondent's position that the proceedings and determination in 2626/18 is *res judicata*, the applicant relies on two positions namely that in that case, there were three applicants and the respondent yet in the present proceedings there is one applicant and three respondents. What the applicant is in fact suggesting is that the matter is not between the same parties.

This argument can hardly find traction. Should the rest of the requirements be satisfied, then the matter would be *res judicata* as between applicant and 1st respondents *in casu*. The fact that he may have joined two other persons (the 2nd and 3rd respondents) *in casu* or that in that earlier suit he acted together with two other persons (namely Noel and Constantine Musanhu) should not and cannot detract from the fact that issue would have been settled, and therefore *res judicata* as between them (i.e., applicant and 1st respondent) that is if the other requirements are satisfied.

The second ground for resisting the defence of *res judicata* is that the decision in 2626/18 was not decided on the merits as the Magistrate merely refused to entertain the application on the basis of want of jurisdiction. There is merit in that contention.

It is trite that for the defence of *res judicata* to succeed there must have been prior litigation or legal proceedings between the parties resulting in a final judgment, or a decision which has a final effect between the parties, based on the merits of the point in issue; see *Umhlebi* v *Estate Umhlebi* (1905) EDC 237; *African Wanderers Football Club (Pty) Ltd* v *Wanderers Football Club* 1977 (2) SA 38 (A) and *African Farms and Townships Ltd* v *Cape Town Municipality* (*supra*).

The presiding Magistrate in Case No. 2626/18 having thus declined to exercise jurisdiction over the matter, it can hardly be said that the matter was decided on the merits. Similarly, the appeal against the Magistrate's decision having been withdrawn before arguments were presented,

it can also not be said to have been decided on the merits to be qualify as a bar to the present application on the basis of the defence of *res judicata*.

I will now proceed to consider whether the proceedings in High Court cases HC 8625/17 and HC 8626/17 render the current application *res -judicata*. I have had occasion to peruse both HC 8625/17 and HC 8626/17 and I have observed that although there was indirect reference to the legitimacy of 1st respondent's claim to being married to Aube Musanhu, the question of the validity of the confirmation letter which forms the subject matter of the current proceedings was certainly not the issue for determination. Both cases dealt with an application for rescission of judgment in HC 2197/15 and HC 2195/15 and culminated in the judgment in HH 417/20. Both cases do not deal with the crisp question of the validity of the confirmation of the customary law union as captured in the document directed to the Director of Pensions referred to earlier. Consequently the 2nd point *in limine* relating to the plea of *res judicata* is also dismissed.

Both points *in limine* having thus fallen by the wayside, I will proceed to deal with the application on the merits.

The crux of the application is that the document in question came about as a result of material misrepresentations made to the then Magistrate Mr Mzinyathi. In short, the applicant avers that the proper consideration of the following observations negates the notion that respondents were married to the late Aube Musanhu.

(a) that the late Aube Musanhu was at the time of his death in August 2006 widowed, having last his wife Patricia Musanhu in 22nd October 2002

(b) that the death notice compiled by the relatives of the late Aube Musanhu and filed with the Master of the High Court, in DR 1179/10 correctly reflects his status as widower

(c) that the 1st and 2nd respondents fraudulently embarked on a parallel process for the registration of the estate of Aube Musanhu in the course of which they compile and submitted with the Master of the High Court a death notice indicating the late Aube Musanhu's status as married.

(d) that in respect of the death notice referred to in (c) above the 1st and 2nd applicants indicated that they got married to Aube Musanhu in October 1999 not August 1999 respectively and more significantly that the respondents could not have been married

to Aube at the stated time given that the latter was in a monogamous marriage with Patricia Musanhu

(e) that the death notice referred to "C" above was not supported by any of the late Aube Musanhu's relative

(f) that the insistence by the respondents that they were married to the late Aube Musanhu contradicts the sworn statements deposed to by 2nd respondent in 2003 in a Maintenance matter wherein she identified herself as an "unmarried woman" and wherein she indicated that 2nd respondent categorically stated she simply cohabited with the late Aube Musanhu and was never married to the same and that no lobola had been paid for her by Aube Musanhu

(g) that the respondents are inconsistent with regards to the late Aube Musanhu's father really was given that in the document currently under disputation he was identified as Simon Musanhu yet in the death notice referred to in "C" above, the late Aube Musanhu's father is identified as Artwell Musanhu

(h) that the confirmation of the customary law union was only done two years after the estate of the late Aube Musanhu had been registered – it being indicative of the fact that the respondents were not registered as surviving spouses at the time of registration of the late Aube Musanhu's estate

In her notice of opposition, the 1st respondent did precious little to rebut the assertions made by the applicants challenging the legitimacy of her claim to having been married to the late Aube Musanhu. Her main rallying point, however, was simply that the applicant is driven by greed and malice and is hell-bent on divesting her of the property of her late husband, Aube. She however indicated that she got married to Aube Musanhu in the wake of the death of Patricia Chifuro.

The fact that there were persons (one of whom identified himself to be the father of the late Aube Musanhu) who apparently came forward purportedly to confirm the existence of a customary law union between 1st respondent and Aube Musanhu coupled with 1st respondent's that she was indeed married to the late Aube Musanhu when juxtaposed against the applicant's averments to the contrary in my view constitute material disputes of fact regarding the legitimacy of 1st respondent's claim to having been married to late Aube Musanhu. This in turn has a direct bearing on the validity of the document in question.

That being the case what remains to be determined is what course of action to take. There are several options available to the court when seized with an application where it emerges that there are material disputes of fact. It can take a robust approach and decide the matter on affidavit evidence; see *Masukusa* v *National Foods Ltd and Anor* 1983 (1) ZLR 232, *Soffiantini* v *Mould* 1956 (4) SA 150, *Joosab & Ors*. v *Shah* 1972(4) SA 298, *Musevenzo* v *Benji & Anor*. HH 268/13; *Plascon Evans Paints Ltd* v *Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 H – 635 B.

Alternatively, the court can dismiss the application particularly in circumstances where applicant should have foreseen the inevitability of such material disputes of fact arising see *Masukusa* v *National Foods Ltd and Anor* (supra), *Mangurenje* v *Maposa* 2005 (2) ZLR 44 (H). As a further alternative the court can hear oral evidence on the specific issue in terms of Rule 58(2) of the High Court Rules.

As a fourth alternative, the court when confronted with material disputes of fact in application proceedings may refer the matter to trial in terms of Rule 46(10) (b);

> *"(10) Where in any application, including an application for provisional sentence or for the arrest of a person or the attachment of property, there is a conflict of evidence and the matter cannot be decided without the hearing of oral evidence, the court may—*
>
> *(a) order that such oral evidence as the parties may desire to produce be heard forthwith or on such date as the court may fix;*
>
> *(b) order that the matter should stand over for trial as if the proceedings had been commenced by summons, in which event the court may give directions as to—*
>
> *(i) dispensing with all pleadings or any particular pleading; or*
>
> *(ii) dispensing with the oral evidence of any person who has given or may give evidence upon affidavit;*
>
> (c) *make such other orders or give such other directions as the court considers are most conducive to the speedy and in expensive determination of the matters in issue*."

In the present matter, I find that it would not be equitable to dismiss the application on the basis of the *ratio* in *Masukusa* v *National Foods Ltd and Anor* (supra). Neither do I find it proper to attempt to decide the matter on the available affidavit evidence. The internecine legal battles

waged between the applicant on the one hand and the 1st respondent on the other which battles are strewn across literally the entire spectrum of Zimbabwe's Court system have one underlying common denominator, namely the legitimacy of 2nd respondent's claim to being the surviving spouse of the late Aube Musanhu. I hold the view that the matter should be referred to trial in terms of Rule 46 10)(b) of the High Court Rules, 2021.

Accordingly, it is hereby directed in terms of Rule 46(10)(b) of the High Court Rules, 2021 as follows:

(a) That the matter is hereby referred to trial only for the determination of whether or not the 1st respondent is the surviving spouse of the late Aube Musanhu who died on 7 August, 2006

(b) That pursuant to (a) above, the papers filed of record by the parties shall stand as the pleadings and no further pleadings shall be filed save as directed by the court.

(c) The Court to provide any such further directions with regards to (a) and (b) above as may be required by the parties

(d) Costs are in the cause.

Mbizo, Muchadehama & Makoni – applicant's legal practitioners