DORCAS DORIS MHLANGA

And

BENJAMIN PHAKATSHANE

IN THE HIGH COURT OF ZIMBABWE
MUTEMA & MOYO JJ
BULAWAYO 2 AND 12 FEBRUARY 2015

I.R. Mafirakureva for the appellant
N. Nyathi for the respondent

Civil Appeal

MUTEMA J: The late Addison Mhlanga was of Malawian extraction who came and naturalized himself in Zimbabwe. He married one Dinah Ndlovu but did not have children. The two then adopted Esther Ncube (nee Nkala) as their child. Dinah Ndlovu pre-deceased Addison Mhlanga. Addison Mhlanga died intestate on 22 September 2003 at age 85 years. He owned stand number 49257 otherwise known as Block 26/919 Mpopoma Township, Bulawayo. The adopted child Esther died on 19 November, 2012 leaving three children, *viz* Sibonile Ncube, Zanele Ncube and Sikhangele Ncube.

At an edict meeting before the Additional Assistant Master on 19 March, 2013 Esther's relatives agreed that the respondent be appointed executor dative to administer the estate of the late Addison Mhlanga. Apparently the respondent is related to the late Addison Mhlanga's late wife Dinah Ndlovu, the latter having been respondent's maternal aunt. Ordinarily, the sole asset of Addison Mhlanga's deceased estate, *viz* the Mpopoma house alluded to *supra* was set to devolve upon Esther's estate which in turn was set to be inherited by Esther's three daughters mentioned above.

Following an advertisement in the Chronicle Newspaper and the Government Gazette of Addison Mhlanga's estate by respondent, the appellant out of the blue and having changed the surname on her birth certificate from Nkhulambe to read Mhlanga on 7 May 2013, lodged an

application on 10 May 2013 in the magistrates' court Bulawayo to have an edict meeting for the appointment of herself as heir to Addison Mhlanga's estate claiming to be the sole surviving daughter to Addison Mhlanga.

The application was dismissed and dissatisfied with the outcome the appellant lodged the current appeal before this court. Two main grounds of appeal were raised and they are these:

"1. The learned magistrate erred at law in dismissing appellant's claim when -
   1.1 There was evidence to the effect that the deceased Addison Mhlanga disclosed, during his lifetime, that appellant was his daughter.
   1.2 The appellant had a birth certificate showing that the deceased Addison Mhlanga's father (*sic*).
   1.3 The deceased, at the time of his death, had allowed the appellant to reside at his house and she continues to do so now.
   1.4 The now deceased Esther Nkala did not reside at the said house – 26/919 Mpopoma, Bulawayo after the death of Addison Mhlanga.
   1.5 Appellant's lobola was paid to the deceased Addison Mhlanga during his lifetime.
2. The learned magistrate also erred at law, in accepting that the later Esther Nkala's children were entitled to inherit from the late Addison Mhlanga's estate because Esther Nkala was his adopted daughter when no document was produced to prove that she was and had been adopted."

Appellant's prayer is that she be declared the late Addison Mhlanga's daughter and that the late Esther Nkala's children are not entitled to inherit from the late Addison Mhlanga's estate.

I will deal with the grounds of appeal hereunder seriatum.

THAT THERE WAS EVIDENCE TO THE EFFECT THAT ADDISON MHLANGA DISCLOSED THAT APPELLANT WAS HIS DAUGHTER

The means which the parties must produce and on which the court can base its decision is what is called evidence (*facta probantia*) while what has to be proved in any given issue (*facta probanda*) is the domain of substantive law. *In casu* what had to be proved (*factum probandum)*

was that Addison Mhlanga, during his lifetime disclosed that appellant was his biological daughter. Was there such evidence as contended for by the appellant?

What is not in dispute here is this:

Simanga Moyo who is appellant's mother was Kenneth Nkhulambe's customary law wife. Nkhulambe, like Addison Mhlanga, was also of Malawian extraction. As people who find each other in foreign lands are wont to do, the two would address each other as "brothers". Appellant was born on 24 January 1978 as Doris Dorcas Nkhulambe. Her birth certificate reflected so. After Nkhulambe "divorced" appellant's mother Addison Mhlanga took appellant and her siblings into his household as he thought that a stepmother (Nkhulambe's new wife) would not take good care of the children. In 1986-1987 the children were taken to Gwanda where Addison had a rural homestead. Then appellant was in grade 4. In 1992 appellant returned to Bulawayo and stayed at Block 83 with Nkhulambe and her step mother until she got married in 2000.

What is in dispute is that appellant is an adulterine progeny of Simanga Moyo and Addison Mhlanga. Appellant averred that this issue of adultery and paternity only came to light in the year 2000 when a meeting was held at which Addison Mhlanga disclosed that appellant was his biological daughter. Appellant was not forthcoming on whether she attended this meeting or was merely told later. She said the meeting was attended by the two men, Esther Ncube, Shilling Phiri, Fatima and Dorcas Phiri. However, pertinent to note here is that Fatima herself initially said she sat in the meeting (see pages 48 of the record) but under cross-examination on page 50 of the record she said; "The elders held their meeting and we were then told [of the illicit affair of Simanga and Addison Mhlanga] later after the meeting." Since appellant was not an elder, it is therefore safe to infer that she is incorporated in the "we" referred to by Fatima that they were only told later. In the event what appellant is alleging is purely hearsay, which, as evidence, is inadmissible.

Appellant's witness Addison Phiri did not ameliorate matters. He said the meeting alluded to was held in 1997, it having been prompted by appellant's illness. He said it was a

secret between Addison Mhlanga and himself that appellant was Mhlanga's daughter sired by him and Nkhulambe's wife. However, under cross-examination the alleged secret evaporated into thin air when this witness said present when Mhlanga told him were "Shilling, Esnat and myself, those were the only people who were there." However, on further probing he added that Nkhulambe and Edna (Mhlanga's wife) were also present. His year of 1997 contradicts the year 2000 stated by appellant and Fatima. Also, the people he named as being present when he was let into the secret exclude appellant and Fatima which buttresses the above finding that appellant's and Fatima's evidence was purely hearsay and inadmissible.

Further, it is improbable that Nkhulambe would maintain his cool and silence on being told that the daughter whom, for 22 years, he had believed to be his was a progeny of adultery between his wife and a man he regarded as a brother. Things which are inconsistent with ordinary human experience are properly rated improbable. It is also pertinent to note that Simanga Moyo – appellant's mother was not called to corroborate the alleged adultery inspite of the fact that she is still alive. No explanation for not calling her as a witness was proffered. It is often opined that it is only the mother who knows the father of her child.

In the result, there is no evidence at all that the late Addison Mhlanga disclosed that appellant was his daughter. Accordingly that ground of appeal must fail.

THAT APPELLANT HAD A BIRTH CERTIFICATE SHOWING ADDISON MHLANGA AS HER FATHER

This ground of appeal seemed to be the main thrust of her argument. Reliance was placed upon the provisions of section 7 of the Births and Deaths Registration Act [Chapter 5:02] which state that:

> "7. Evidence of certified copy of entry in register
>
> A document purporting to be a copy of any entry in any register certified under the hand of the Registrar-General or a registrar to be a true copy shall, on its production by any person for the purpose of any law, be *prima facie* evidence in all courts of the dates and facts therein stated."

The contention here was advanced that the provision quoted above is peremptory and non-compliance with it amounted to a mis-direction. Reliance for the proposition was the case of *Schierhot* v *Minister of Justice* 1926 AD 99 at 109 where INNES CJ spelt out the general principle governing non-compliance with statutory provisions in these words:

> "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no force or effect. And the disregard of a peremptory provision in a statute is fatal to the validity of the proceedings affected."

With respect, I consider Mr *Mafirakureva's* interpretation of the phrase *prima facie* evidence too simplistic. The phrase *prima facie* is Latin for "at first sight" or "sufficient to establish a fact or raise a presumption unless disproved or rebutted" or "on first appearance but subject to further evidence or information." This therefore means that evidence which is *prima facie* is not absolute as contended for by Mr *Mafirakureva*.

In the instant case there is an abundance of evidence rebutting the prima facie evidence of the appellant's birth certificate.

It is common cause that from her birth appellant, up until she attained 23 years of age, had her birth certificate bearing the surname of Nkhulambe. She said she changed the surname to Mhlanga in 2001. That would be after her marriage in 2000 and a year after the alleged knowledge of her paternity. She does not tell how this change of surname was effected. She also said because she was sharing the letters BHD with another person, this prompted her to acquire a new birth certificate on 7 May 2013 – three days prior to her filing an application in the magistrates' court for an edict meeting to have her declared heir to Addison Mhlanga's estate on the basis that she was the sole surviving daughter. BHD relates to birth entry number.

Section 18 of the Births and Deaths Registration Act deals with change of name.

Section 18 (3) provides:

"18 Change of name in register

(3) where the birth of a person has been registered for births and the surname of the person is changed, otherwise than by adoption, the person concerned … may apply to the Registrar-General for the registration of the surname and the Registrar-General shall, on payment of the prescribed fee and on being satisfied that –
  (a) a notarial deed, as defined in the Deeds Registries Act [Chapter 20:05], setting forth the change of surname has been registered in the Deeds Registry; and
  (b) the change of surname has been advertised in the Gazette;
  register the change of surname in the appropriate register for births but without deleting the original surname.

(4) notwithstanding subsection (3) the Registrar-General may register a change of surname in the appropriate register for births but without deleting the original surname even where a notarial deed has not been registered, if he is satisfied –
  (a) that the change of surname is for a lawful purpose; and
  (b) that the change of surname is not being effected for purposes of fraud or misrepresentation; and
  (c) …

(5) After the registration of a change of name under this Act every certified copy of the entry concerned shall omit the original surname unless otherwise requested by the applicant."

What can be gleamed from section 18 above as appertaining to the instant case in material respects are the following:

1. There is no evidence adduced or furnished that the appellant ever applied to the Registrar-General for change of surname. This could have been shown by a copy of such application and or receipt for payment of the appropriate fee;
2. Even though the Registrar-General is empowered to register a change of surname where a notarial deed has not been registered, such notarial deed ought to exist to show that the same was in fact effected by a notary public. *In casu* it has not been alluded to, let alone furnished. I did ask Mr *Mafirakureva* whether a notarial deed was ever executed and he said he did not know. If the appellant through her legal practitioner does not know the fact then who should?

3. It raises eye brows for appellant not to have requested that her original Nkhulambe surname which she had used till after marriage, be included in every certified copy of her birth certificate.

Over and above the foregoing there is no proof that appellant first changed her Nkhulambe surname in 2001 to Mhlanga except for her *ipsissima verba*. This should not have been impossible to prove. Even if that were so it would be stretching coincidence to absurdity to hold that appellant discovered that her birth certificate shared the same BHD with another person which then necessitated acquisition of the current birth certificate some three days prior to her filing the application in the magistrates' court for the convening of the edict meeting for her to be declared sole surviving daughter of the late Addison Mhlanga hence the sole heiress to his estate, a decade after Mhlanga's death, one year after Esther's death and several years knowing that there existed this dispute pertaining to the estate.

The *prima facie* evidence of the birth certificate sought to be relied upon as proof that appellant is the late Addison Mhlanga's biological daughter was sufficiently rebutted to hold no water.

Another insurmountable hurdle besetting the appellant's case is the legal position that a child conceived by or born of a wife during the course of her customary marriage, whether legitimate or as a result of adultery belongs to her husband: *Shumba* v *Shumba* HB-25-05. This is in conformity with the presumption against bastardisation of a child born as a result of adultery – see *Kulumo* v *Diyana & Ors* 1944 SRN 35; *Hlale* v *Dziyake* 1938 SRN 34; *Ndoro* v *Mapfumo* 1942 SRN 166 and *Elizabeth & Mzeze* v *Gwandibva* 1941 SRN 121. Appellant cannot therefore bastardise herself.

THAT ADDISON MHLANGA AT THE TIME OF DEATH HAD ALLOWED APPELLANT TO RESIDE AT HIS HOUSE AND SHE CONTINUES TO SO DO

This ground of appeal should not detain us for it is devoid of merit whether standing alone or in conjunction with any other ground. It was common cause that the late Mhlanga

regarded appellant's father Nkhulambe as a brother and when the latter divorced and remarried, Mhlanga, out of pity for the appellant, took it upon himself to take appellant and her siblings in. He even moved them to Gwanda. One cannot, with success, abuse pity by equating it to proof of paternity. Appellant herself stated that Esther told her that she only took a few pots from Mhlanga's estate because she did not want to have the house and allowed appellant to continue staying there. This, however, cannot mean that such a scenario amounts to an indication of proof of paternity!

THAT THE LATE ESTHER NKALA DID NOT RESIDE AT THE MPOPOMA HOUSE AFTER THE DEATH OF ADDISON MHLANGA

That either standing alone or read in conjunction with any other ground of appeal proves nothing pertaining to the paternity being sought by the appellant. Over and above the finding in the preceding ground, it is not disputed that there were tenants at the house and that Esther was married, staying at her husband's place.

THAT APPELLANT'S LOBOLA WAS PAID TO ADDISON MHLANGA

This contention was contrived to prove that if Mhlanga received and "ate" appellant's lobola then it would go to prove that he indeed was her father. There is no shred of evidence proving this averment. As early as generations before 2000 lobola payments in Zimbabwe were recorded in writing showing how much was charged for who, for what, by who, what was paid, the balance and when such balance would be paid. Appellant was asked in cross-examination as to who married her off and her answer was this:

> "A. Both of them, actually Mhlanga" (page 47 of the record). By "both of them" she meant Kenneth Nkhulambe and Addison Mhlanga. It does not require a traditionalist to know that in African custom, both the putative father and the paramour cannot marry off a bride. How come the bride herself was unsure as regards who married her off!

It is accordingly not difficult to infer and conclude that appellant was lying when she alleged that both Nkhulambe and Mhlanga married her off. Her father Nkhulambe was the one who did.

THAT THE LATE ESTHER NKALA WAS NOT MHLANGA'S ADOPTED DAUGHTER FOR WANT OF DOCUMENTARY PROOF TO THAT EFFECT HENCE HER CHILDREN ARE NOT ENTITLED TO INHERIT FROM MHLANGA'S DECEASED ESTATE

Now this we consider to be a red herring and should be dismissed as mere attempt at sophistry. Pages 58 and 59 of the record record admissions by the appellant on 5 September, 2013 pertaining to this ground of appeal in the following words:

"To both parties by the court

Q Do you both acknowledge that Esther was an adopted child of the late Addison Mhlanga?
A Applicant - Yes
Respondent - Yes
Q Esther has children?
A Yes
Q How many children does she have?
A 3 children – names, Sibonisiwe, Zanele, Sikhange Ncube
Q Do you both acknowledge that she is the sole heir or as yet to be established one of the heirs to the estate of the late?
A Applicant - Yes
Respondent - Yes
Q Now that Esther is not there who should get her share?
A Applicant - her children
Respondent - her children
Q It would appear that the dispute is whether or not the applicant should have a share as well?
A Applicant - Yes
Respondent - Yes"

With the above admissions having been made, the turn around by the appellant can only be explained away on the basis of greed. In any event, having found as we have done above that appellant is not Addison Mhlanga's daughter, she cannot benefit from his estate and she has no

locus standi to raise the issue encapsulated in the last ground of appeal. Even if she has she is estopped from raising it.

In the event, on the totality of the foregoing findings which are clearly incontrovertible against the appellant, we are constrained to find the appeal totally devoid of merit and we hereby dismiss it in its entirety with costs.

Moyo J …… I agree

Messrs Moyo & Nyoni, appellant's legal practitioners
Legal Resources Foundation – Bulawayo, respondent's legal practitioners