

Judgment No. HB 27/15
Case No. HC 150/11
Xref No. HC 912/12; 1580/10 & 1653/10

MONICA DHLIWAYO
versus
BONGANI NDLOVU (in his official capacity
as the Executor Dative of the estate
Late Jubane James Jack)
and
ESTATE LATE JUBANE JAMES JACK
and
CLEMENTINE JACK
and
DEPUTY MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 20-21 JANUARY AND 19 FEBRUARY 2015

Civil Trial

Mr S S Mazibisa for the plaintiff
Mr R Ndlovu for the defendant

MAKONESE J: The plaintiff initiated proceedings by way of an Urgent Chamber Application under case number HC 1580/10 seeking an order interdicting first and second defendants or any beneficiaries of second defendant's Estate from disposing of the property known as Lot 1 A of Gumtree held under Deed of Transfer number 1793/82 and Lot 3 of Gumtree held under Deed of Transfer number 1326/82C hereinafter referred to as "the property"). An interim order was granted in this Honourable Court but its confirmation was opposed by the defendants. A separate court Application was launched by the plaintiff under case number HC 1653/10 wherein she sought to be declared the sole surviving spouse of the

second defendant's estate. That court application was also opposed and eventually by court order granted on 6 June 2012 it was ordered as follows:

1. The two applications pending before this Honourable court under cover of case number HC 1580/10 and HC 1653/10 consolidated under cover of case number HC 150/11 be and are hereby converted into action proceedings.
2. The papers filed of record by the parties stand as pleadings in this matter.
3. The parties file their discovery affidavits, pre-trial conference minutes and summaries of evidence within 7 days of this order.
4. In the event of any party failing as directed in paragraph (3) above, the party having complied be and is hereby granted leave to set the matter down without giving notice, on the unopposed roll.
5. Third respondent pay costs only if she opposed this application.

The parties consolidated the two applications in terms of the aforesaid order and proceeded to set down the matter for trial. A joint pre-trial conference memorandum of issues filed by the parties reflects the issue for determination as follows:

1. Whether or not plaintiff bought the immovable properties namely Lot 1A Gumtree held under Deed of Transfer number 1793/81 and Lot 3 Gumtree and is therefore entitled to them.
2. Whether the third defendant is the surviving spouse and therefore the lawful heir to the estate of the late Jubane James Jack.

It was resolved and agreed at the pre-trial conference that the onus on the first issue was on the plaintiff and the onus on the second issue was on the third defendant.

Plaintiff's case

The plaintiff gave evidence in support of her case. She testified that she is ordinarily resident at 61 Queensbrooks, Slough in the United Kingdom. She is a State Registered Nurse and also qualified as a Mental Health Nurse. She was customarily married to the Late Jubane James Jack who died on 21 February 2006 in the United Kingdom. Her evidence was that the deceased and herself commenced living together around December 1980 and formalized the union a year later in 1981 when her husband was customarily accepted as a son-in-law by her family. At the same

occasion she was accepted as a daughter in law by members of the late Jubane James Jack's family. The plaintiff stated that at the time of their marriage the deceased was working for National Railways of Zimbabwe and then based at Hwange. The deceased disclosed to the plaintiff that he was once married to the third defendant and that the marriage had broken down and he was in the process of legally divorcing third defendant with whom he was married in terms of the then Marriage Act, [*Chapter 37*]. She was also informed that the third defendant had one child with the deceased by the name Violet Jack. At the time plaintiff met the deceased the third defendant was not living with him. They were on separation. The plaintiff stated that in or around 1981 she was looking for a property to buy. She was advised that there was a plot for sale just outside the city of Bulawayo. She said that she negotiated for the purchase of the property, being Lot 1 A Gumtree and Lot 3 Gumtree, situate in the District of Umguza. The property was registered in the names of the late Jubane James Jack because she did not have a payslip and there was need to have a Bond registered against the title deed for the payment of the balance. She paid an initial deposit of \$3000 and the balance was paid in monthly instalments of \$250. Payments were made at the offices of *Messrs Ben Baron and Partners*. She indicated that on certain occasions the late Jubane James Jack would pay the instalments. The total purchase price for the property was \$15000. The second property being Lot 3 of Gumtree was sold for \$10 000. A second bond was registered over the property. Plaintiff testified that she received part of the deposit for the purchase of the second property from a Mr Joshua Malinga. After the purchase of the two properties plaintiff said she left for the United Kingdom in or around February 1999. The deceased and the plaintiff had three children, namely Neville Thamsanqa Jack (born on 26 October 1981, Brian Bekithemba Jack (born on 3 October 1985) and Denise Thembeke Jack (born on 18 January 1990). The deceased and the children relocated to the United Kingdom in December 1999 where they remained until the demise of the deceased in 2006.

It was the plaintiff's evidence that problems started in June 2010 when she received a message on facebook from Violet Jack (her husband's only child out of his marriage with third defendant), advising her that she and her mother were going to be the beneficiaries in the estate of the late Jubane James Jack. In July 2010 the plaintiff travelled to Zimbabwe to attend the

funeral of her sister, Faith Mazaiwana. Whilst at the funeral she was alerted that the property at Gumtree had been put up for sale. The plaintiff filed an urgent Chamber Application for an order interdicting the Executor of the Estate of late Jubane James Jack and third defendant from disposing of the immovable properties being Lot 1A of Gumtree and Lot 3 of Gumtree, in the District of Umguza. The Registrar of Deeds and the Master of the High Court were cited in those proceedings as nominal respondents. Upon the granting of the Provisional Order the confirmation of such order was resisted by third defendant. A subsequent Court Application under case number HC 1653/10 was filed by the plaintiff. Both applications have now been consolidated.

The plaintiff abandoned her claim that she be declared the sole surviving spouse in the Estate Late Jubane James Jack when it became apparent that third defendant was still legally married to deceased at the time of his death. In summary the plaintiff avers that the property in dispute belongs to her for these reasons:

- (a) She bought the property using her own funds. She saved the money whilst she was working in the United Kingdom and she was responsible for the repayments on the mortgage bonds.
- (b) The deceased did not contribute anything towards the purchase of these properties.
- (c) The third defendant never set a foot on these properties and never contributed towards their purchase, directly or indirectly.
- (d) The property never belonged to the Estate Late Jubane James Jack in spite of the property being registered in the names of the deceased.

The plaintiff's evidence is difficult to accept. The plaintiff was unable to adequately explain why the property was registered in the names of Jubane James Jack and not in their joint names if indeed they had acquired the property together. It is inconceivable that the deceased who was then employed by the National Railways of Zimbabwe would have contributed nothing whatsoever towards the purchase of the property. At the time plaintiff commenced living with the deceased she was well aware third defendant was still legally married to him. She was aware that divorce proceedings had not been instituted. Plaintiff would not have invested all her entire life savings in a property registered in the names of a man married to another woman. The

plaintiff claims that all her documents proving the purchase of the property were lost or destroyed. The court must therefore, according to the plaintiff believe her version of events on her mere say so. Under cross examination, when a direct question was put to her as to why the property was registered in the names of the deceased, plaintiff's response was that she was heavily pregnant at the time and she did not possess a payslip. She could not say for certain who signed the agreement of sale. However, she could not deny that the agreement of sale was signed by the deceased who eventually had his names on the title deed. Plaintiff conceded that at the time of the death of the deceased the legal owner of the property was reflected on the title deed as Jubane James Jack, although she insisted that she was the financier.

It is my view that the evidence of the plaintiff was not convincing. She did not strike as a credible witness. She failed to produce a single document to prove that the funds used to pay for the property were raised from her savings. Her initial attempt to claim to be the sole surviving spouse of the late Jubane James Jack puts her in very bad light. There can be no other conclusion except that her intention was to mislead the court.

The second and only witness for the plaintiff was Flora Dhliwayo a sister to the plaintiff. Her evidence was largely unhelpful to the court. She repeated that the plaintiff had through her own endeavours purchased the property in dispute. She averred that she had gone to view the property with her sister before its purchase. She however played no further part in the transaction. She did not witness the signing of the agreement of sale between the seller and the purchaser. She informed the court that the reason the property was registered in the names of the deceased was because the plaintiff was pregnant at the time and further plaintiff was not employed at the time. The plaintiff's witness did not assist the plaintiff's case in any meaningful way.

The Defendant's case

The defendant gave evidence and did not call any witnesses in support of her case. She testified that on 22 September 1972 she was married to the late Jubane James Jack in terms of the Marriage Act [*Chapter 37*] (as it was called then). The defendant said that when they were married they moved into a house belonging to the National Railways in Thorngroove. Between

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1974 and 1980 they were living at West Sommerton, Bulawayo. She stated that her husband was posted to various places of work around the country and outside Zimbabwe. The late Jubane James Jack fathered eight children from different mothers. She had one child with the deceased, Violet Jack (born in 1978).

Defendant's evidence was essentially that the property in Gumtree were purchased by the late Jubane James Jack. He raised the funds to acquire the property through a loan raised through his employer. The balance was secured by a mortgage bond registered over the property. She said by virtue of their marriage and as his legal wife she was a beneficiary in the estate of her husband as a surviving spouse. She firmly advised the court that she was always aware of the illicit relationship between her husband and the plaintiff. Her version was that the plaintiff stole her husband and persuaded him to move over to the United Kingdom with him. The deceased never went through the divorce proceedings because he was aware that they would have to share the property at Gumtree. Defendant further stated that when her late husband indicated that he wished to divorce her he reminded him of their type of their marriage and that they would have to sell the immovable property and share the proceeds. The defendant informed the court that the deceased never commenced the divorce proceedings until he met his death. Defendant said she registered the Estate of the late Jubane James Jack under DRB 773/06. A First and Final Liquidation and Distribution Account was filed with the Master of the High Court as follows:

"FIRST AND FINAL LIQUIDATION AND DISTRIBUTION ACCOUNT IN THE ESTATE OF THE LATE JUBANE JACK WHO DIED AT JOHN RADCLIFFE, OXFORD RADCLIFFE HOSPITAL, UNITED KINGDOM ON THE 21ST FEBRUARY 2006

DRB 773/06

LIQUIDATION ACCOUNT

ASSETS

\$US

IMMOVABLE PROPERTY

1. Certain piece of land being lot 1A Gumtree
 Situate in the District of Bulawayo measuring
 2,7323 hectares \$ 50 000-00
2. Certain piece of land being Umguza 100 Acre Lot
 3 situate in the District of Bulawayo measuring

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40, 4684 hectares	\$25 000-00
<u>MOVABLE PROPERTY</u>	
1. Household goods and effects	\$ 1 000-00
2. Five (5) herd of cattle	\$ 500-00
3. Grinding Mill	<u>\$ 100-00</u>
TOTAL ASSETS	<u>\$ 76 600-00</u>
<u>ADMINISTRATION EXPENSES</u>	
<u>12. ADVERTISING DEBTORS AND CREDITORS</u>	
(a) Chronicle	see attachment
(b) Government	see attachment
<u>ADVERTISING THIS ACCOUNT</u>	
a) Chronicle	\$10.00
b) Government gazette	\$ 5.00
<u>13. MASTER'S FEES</u>	
4% on \$76 600-00	\$ 3 064-00
Edict fees	see attached statement
<u>TOTAL LIABILITIES</u>	
Balance to Distribution	\$ 6 372.80
	<u>\$70 227.20</u>
	<u>\$76 600-00</u>
<u>DISTRIBUTION ACCOUNT</u>	
Balance brought down to Distribution Account	\$70 227.20

Assets awarded in terms of Deceased Succession Act Chapter 6:02 Section 3A

TO CLEMENTINE JACK

1. 1/9 share of certain piece of land being lot 1A Gumtree Situat in the District of Bulawayo measuring 2,7323 hectares	\$ 5 555.56
2. 1/9 share of certain piece of land being Umguza 100 Acre Lot 3 situat in the District of Bulawayo measuring 40,4684 Hectares	\$ 2 777.78
3. Five (5) herd of cattle	\$ 55.56
4. Grinding mill	\$ 11.11

TO DANISO JACK

1. 1/9 share of certain piece of land being lot 1A Gumtree Situat in the District of Bulawayo measuring 2,7323 hectares	\$ 5 555.56
2. 1/9 share of certain piece of land being Umguza 100 Acre	

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Lot 3 situate in the District of Bulawayo measuring 40,4684 Hectares	\$ 2 777.78
3. Five (5) herd of cattle	\$ 55.56
4. Grinding mill	\$ 11.11

TO CHIPO JACK

1. 1/9 share of certain piece of land being lot 1A Gumtree Situata in the District of Bulawayo measuring 2,7323 hectares	\$ 5 555.56
2. 1/9 share of certain piece of land being Umguza 100 Acre Lot 3 situate in the District of Bulawayo measuring 40,4684 Hectares	\$ 2 777.78
3. Five (5) herd of cattle	\$ 55.56
4. Grinding mill	\$ 11.11

TO VUYISILE PATRICK JACK

1. 1/9 share of certain piece of land being lot 1A Gumtree Situata in the District of Bulawayo measuring 2,7323 hectares	\$ 5 555.56
2. 1/9 share of certain piece of land being Umguza 100 Acre Lot 3 situate in the District of Bulawayo measuring 40,4684 Hectares	\$ 2 777.78
3. Five (5) herd of cattle	\$ 55.56
4. Grinding mill	\$ 11.11

TO VIOLATE JACK

1. 1/9 share of certain piece of land being lot 1A Gumtree Situata in the District of Bulawayo measuring 2,7323 hectares	\$ 5 555.56
2. 1/9 share of certain piece of land being Umguza 100 Acre Lot 3 situate in the District of Bulawayo measuring 40,4684 Hectares	\$ 2 777.78
3. Five (5) herd of cattle	\$ 55.56
4. Grinding mill	\$ 11.11

TO THAMSANQA JACK

1. 1/9 share of certain piece of land being lot 1A Gumtree Situata in the District of Bulawayo measuring 2,7323 hectares	\$ 5 555.56
2. 1/9 share of certain piece of land being Umguza 100 Acre Lot 3 situate in the District of Bulawayo measuring 40,4684 Hectares	\$ 2 777.78
3. Five (5) herd of cattle	\$ 55.56
4. Grinding mill	\$ 11.11

TO BRIAN JACK

1. 1/9 share of certain piece of land being lot 1A Gumtree	
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Situate in the District of Bulawayo measuring 2,7323 hectares	\$ 5 555.56
2. 1/9 share of certain piece of land being Umguza 100 Acre Lot 3 situate in the District of Bulawayo measuring 40,4684 Hectares	\$ 2 777.78
3. Five (5) herd of cattle	\$ 55.56
4. Grinding mill	\$ 11.11

TO GUGU JACK

1. 1/9 share of certain piece of land being lot 1A Gumtree Situate in the District of Bulawayo measuring 2,7323 hectares	\$ 5 555.56
2. 1/9 share of certain piece of land being Umguza 100 Acre Lot 3 situate in the District of Bulawayo measuring 40,4684 Hectares	\$ 2 777.78
3. Five (5) herd of cattle	\$ 55.56
4. Grinding mill	\$ 11.11

TO DENNIS JACK

1. 1/9 share of certain piece of land being lot 1A Gumtree Situate in the District of Bulawayo measuring 2,7323 hectares	\$ 5 555.56
2. 1/9 share of certain piece of land being Umguza 100 Acre Lot 3 situate in the District of Bulawayo measuring 40,4684 Hectares	\$ 2 777.78
3. Five (5) herd of cattle	\$ 55.56
4. Grinding mill	\$ 11.11
	\$70 227.00
Cash contribution to avoid sale of assets	\$ 6 372.00
	\$76 600-00

EXECUTORS CERTIFICATE

I, Bongani Ndlovu, hereby certify to the best of my knowledge and belief that the foregoing accounts are true and correct, that there are no further assets and that no liability exists in respect of income tax.

Dated at Bulawayo this day 28th day of January 2010.

FOR ESTATE LATE JAMES JUBANE
JACK AKA JUBANE JAMES JACK

EXECUTOR DATIVE”

What can be gleaned from a perusal of the Distribution account is that the defendant took into account all of the deceased's children, including the plaintiff's children. The totality of the defendant's evidence was that she was married to the late Jubane James Jack, such marriage being monogamous. She established that at the time the late Jubane James Jack died, she was the surviving spouse at law. She asserted that she was entitled to inherit from the deceased estate. She contended that in spite of their separation the property was acquired by the parties during the marriage. Her evidence was that her late husband secured a loan from the National Railways of Zimbabwe. She stuck to her evidence that the plaintiff could not inherit the property in dispute because she was not the surviving spouse and in any event she could not prove that she used her own funds to purchase the property. From the defendant's testimony her version remained uncontroverted. It cannot be denied that if she was the lawful surviving spouse of the deceased she would ordinarily be entitled to inherit the immovable property in dispute. The defendant went further to show that the property was shared amongst all the children of the deceased including herself. It is my view that her attitude clearly shows that she did not seek to deprive all the lawful beneficiaries to the estate. She did not seek to allocate the property to herself to the exclusion of the children of the deceased.

The legal position

I have already set out the disputed and undisputed facts of the matter. I must now examine the law on the subject. I have shown that the plaintiff failed to prove that she purchased the property in question. If she did contribute directly towards the purchase of the property, she failed on a balance of probabilities to show that she made any financial contributions. Nothing was placed before the court by way of evidence to show that plaintiff purchased the property except her mere say so.

In the case of *Sibanda v Sibanda and Another* 2002 (1) ZLR 622 (H), SMITH J, stated at page 626 as follows:

“since I have found that Josephine was not aware, in March 1994, that Joseph was a married man, that means that their “marriage” is in fact a putative marriage.”

The judge held in that case that the plaintiff was only entitled to what was a fair share in the matrimonial estate. She was not entitled to a half share. The matter went on appeal to the Supreme Court and in *Sibanda and Another v Sibanda* 2005 (1) ZLR 97(S), the appeal court upheld the decision of the High Court. The Supreme Court agreed with the lower court that where a man enters into a marriage with another woman whilst a previous monogamous marriage subsisted, the second marriage is a nullity. The court, however acknowledged that it was the correct approach to take into consideration the contribution of the “wife” in order to determine what amounts to an equitable distribution of matrimonial property.

See also *Makovah v Makovah* 1998 (2) ZLR 82 (S).

In *casu*, however, the court is not being called upon to determine what is an equitable distribution of matrimonial property. The court is also not called to consider the direct or financial contributions of the plaintiff, in the second “marriage,” which was undoubtedly a nullity.

The plaintiff in this action is claiming Lot 1A and Lot 3 Gumtree, alleging that she purchased the said property using her own funds. I have already concluded that the plaintiff’s evidence shows falls short of proving that she purchased the property. If anything the totality of the evidence shows that the late Jubane James Jack had a substantial part to play in the acquisition of the said property. In my view the said property remained matrimonial property up to the time of the deceased’s death. The property therefore quite clearly fell for distribution in the estate of the deceased. I am satisfied that on the evidence led the third defendant managed to prove that she is the surviving spouse of the estate of the late Jubane James Jack and therefore the lawful heir to his estate. I must observe that where a party cohabits with a married man or woman with full knowledge of the existence of a prior marriage, he or she takes a calculated risk when they acquire property together. In the event of either party’s death the property automatically falls into the estate of the deceased. The beneficiaries of such estate have valid and lawful claims against the deceased estate. A surviving spouse who produces proof of marriage with the deceased will have a *prima facie* claim as a beneficiary in the estate.

In the result, I am not satisfied that plaintiff succeeded in proving her case on a balance of probabilities.

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It is accordingly ordered as follows:

The plaintiff's claim is hereby dismissed with costs.

Dube-Banda, Nzarayapenga and partners, plaintiff's legal practitioners
Zimbabwe Women Lawyers Association, defendant's legal practitioners