

SIBUSISIWE NCUBE

And

PRINCE NCUBE

Versus

KHOPOLO NCUBE

And

ESTATE LATE THEMBINKOSI LUNGISANI NCUBE

And

DEPUTY MASTER OF THE HIGH COURT N.O.

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 8 NOVEMBER 2017 & 8 FEBRUARY 2018

Opposed Application

Ms Q. Chimbo for the applicants

Mrs D. Phulu for the respondents

MAKONESE J: The applicant filed a court application with this court on the 10th of May 2017 seeking the following relief:

“It is ordered that:

1. The registration of the estate of the late Thembinkosi Ncube under CRB 440/200 be and is hereby set aside.
2. It is hereby ordered that the marriage of the 1st respondent Khopolo Ncube to the late Thembinkosi Lungisani Ncube solemnized in terms of Chapter 37 is hereby declared null and void.
3. It is hereby ordered that the divorce granted in default under CC 41/96 be and is hereby set aside.

4. The appointment of the 1st respondent Khopolo Ncube as the surviving spouse of the late Thembinkosi Lungisani Ncube and subsequently her appointment as Executor and sole beneficiary in the estate of the late Thembinkosi Lungisani Ncube be and is hereby set aside.
5. It is hereby ordered that the estate of the late Thembinkosi Lungisani Ncube be re-registered and a neutral Executor be appointed.
6. 1st respondent to bear the costs of suit on an attorney and client scale.”

This application is opposed by the 1st respondent who contends, *inter alia*, that the relief sought by the applicant is incompetent. 1st respondent argues that this court cannot re-marry the 1st respondent with a deceased person. 1st respondent was divorced by the late Thembinkosi Lungisani Ncube (hereinafter referred to as the late Ncube) way back in 1996 under case number CC 41/96, in default. Further, the 1st respondent contends that at the time of the deceased's death, she had been married to the deceased, who had complied with all the customary requirements. They were married as such on the 28th April 1995. As regards the legal position, 1st respondent avers that in terms of section 68 (4) of the Administration of Estates Act (Chapter 6:01), her marriage to the late Thembinkosi Lungisani Ncube was valid for the purposes of inheritance.

Factual Background

1st respondent and the late Ncube were married in terms of then Marriages Act (Chapter 37). 1st respondent and her late husband shared their matrimonial home, No. 8 Dube Township, Plumtree. This property was registered in the name of the deceased until the winding-up of the estate of the late Ncube, when it was then transferred into the names of 1st respondent under Deed of Transfer number 679/04. It is common cause that applicant was married to the deceased in terms of the African Marriages Act (Chapter 236), on 14th May 1984. Sometime in 1983 applicant left Zimbabwe to settle in South Africa, and in search of greener pastures. In 1996 applicant was divorced by the late Ncube, in default under case number CC 41/96. In the meantime, 1st respondent continued to reside with the late Ncube until his death on 28 December 1999. The applicant remained in South Africa only to resurface in Zimbabwe sometime in 2015 when she purported to register the estate of the late Ncube. Applicant was informed that the estate of the late Ncube had long been registered and wound up. The estate was registered under DRB 440/2000. On 10th May 2017 the applicant who is a former spouse of the late Ncube filed a court

application with this court seeking amongst other things an order setting aside the divorce order granted in 1996, the nullification of 1st respondent's marriage to the late Ncube and the re-registration of the estate of the late Ncube. 1st respondent opposed this application and asserted that the process of the registration of the estate of the late Ncube, and the transfer of property from the deceased's estate was done lawfully by the Master of the High Court. Further, the marriage between 1st respondent and the late Ncube was valid and enforceable for the purposes of the administration of the estate. 1st respondent avers that this application is ill-conceived and is devoid of merit.

Issues for determination

The following may be summarised as the issues for determination by this court:

1. Whether or not 1st respondent was the surviving spouse of the late Thembinkosi Lungisani Ncube for the purposes of the administration of the estate.
2. Whether or not the applicant's divorce to the late Thembinkosi Lungisani Ncube should be rescinded by this court.
3. Whether or not the wound up Estate of the Late Thembinkosi Lungisani Ncube should be re-registered.

In addressing the issue of whether or not 1st respondent's marriage was valid for the purposes of the administration of the deceased's estate, 1st respondent relies on the provisions under section 68 (4) of the Administration of Estate Act (Chapter 6:01) which provides as follows:

“A marriage contracted according to the Marriage Act (Chapter 5:11) or the law of foreign country under which persons are not permitted to have more than one spouse shall be regarded as a valid marriage for the purposes of this Part even if, when it was contracted, either of the parties was married to someone else in accordance with customary law, whether or not that customary law marriage was solemnized in terms of the Customary Marriages Act (Chapter 5:07).”

On the facts of this matter, it matters not that the civil marriage between 1st respondent and the late Ncube was entered into before the divorce of the applicant and the deceased was finalised.

An application of section 68 (4) of the Administration of Estates Act, places 1st respondent's marriage on the same pedestal as other marriages despite the circumstances. 1st respondent's marriage to the late Ncube is considered valid and enforceable for the purposes of the administration of the deceased's estate. Even if the applicant had remained married to the deceased, the Master would have been guided by section 68F of the Administration of Estates Act which provides as follows:-

“ ...

- (c) where the deceased person was a man and is survived by two or more wives, whether or not there are any surviving children, the wives should receive the following property in addition to anything they are entitled to anything they are entitled to under paragraph (b) –
 - (i) Where they live in separate houses, each wife should get ownership of or if that is impracticable, a usufruct over the house she lived in at the time of the deceased person's death, together with all the household goods in that house.”

In casu, in terms of section 68F of the Administration of Estates Act, 1st respondent and applicant would have been treated as co-wives with each inheriting the house they were living in. 1st respondent would have inherited the matrimonial home where she was residing with the deceased at the time of his death and all the household goods therein.

In the case of *Ndlovu v Ndlovu & Ors* HB-10-11, the learned Judge remarked as follows:-

“...the time has come to declare in no uncertain terms that parties cannot invest marriage only to surface after the death of the other person they would long have abandoned to commence new life. It is unacceptable and an extremely habit which should be discouraged. If the marriage has failed it should be terminated to release the parties to start afresh.”

In the present case, applicant left for South Africa in 1993, some 24 years ago. The applicant was divorced in 1996. The applicant cannot approach this court and wave a marriage certificate that was revoked by a court, lawfully 21 years ago just so that she may seek to benefit from an estate. This is not fair to the estate of the deceased and to the 1st respondent who has not only improved and added value to the matrimonial property but transferred the property into her

names 14 years ago. This court must adopt the stance that an estate that has been wound up may not be unwound and re-registered randomly. There must exist special circumstances for the unwinding of an estate. Such special circumstances will include acts of fraud or misrepresentation. In the instant case there are no allegations of fraud and no special circumstances exist for the unwinding of the estate.

Disposition

1st respondent's marriage to the deceased was valid and enforceable for the purposes of the administration of the estate. The divorce order granted by the Magistrate's Court in 1996 against the applicant was lawfully entered. For over 21 years, the applicant never took steps to seek a rescission of that judgment. The applicant could not remain legally married by virtue of "a paper marriage". The applicant cannot therefore seek to be re-married to the deceased after his death. There is no evidence that a real marriage existed between applicant and the late Ncube prior to his death. In any event, it is not competent for this court to seek to re-marry the applicant and a deceased person. I am not satisfied that this application is *bona fide*. This court cannot allow the applicant to be unduly enriched from an estate that she lost claim to when she abandoned the deceased 24 years ago to settle in South Africa. In my view this application is frivolous and vexatious. The court should show its displeasure by awarding costs on a punitive scale.

In the result, the application is dismissed with costs on an attorney and client scale.

Messrs T. Hara & Partners, applicants' legal practitioners
Vundhla-Phulu & Partners, respondents' legal practitioners