LAWRENCE MUTESWA
versus
OLIVER MASOMERA N.O
and
APOLONIA MUTESWA
and
LOYCE MUTESWA
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 22 June 2016 and 8 February 2017

Unopposed Matter

B Bopoto, for the applicant

FOROMA J: This is a matter in which the applicant's application was enrolled as an unopposed application on the unopposed roll on 22 June 2016. On perusal of the court application I observed that although none of the four respondents who were duly served had opposed the application, the relief that the applicant sought did not appear to be legally competent on the facts pleaded in the founding affidavit. At the hearing of the unopposed application the applicant's counsel was not able to satisfy the court that the relief he was moving the court to grant could properly be granted against the second and third respondents even though they were in default. I accordingly requested the applicant's legal practitioner to file heads of argument to canvass fully the availability of the order sought namely a declaratur that the second and third respondents are not surving spouses of the late Langton Muteswa.

On the applicant's filing of heads of argument I was still not satisfied with the applicant's argument and considered that I needed an *amicus curiae* to assist the court. The court is most indebted to Advocate *Thabani Mpofu* who prepared a well-researched argument which assisted the court ventilate more clearly its judgment.

The relevant background to the applicant's application is as summarised below.

The applicant is the son of the late Langton Muteswa by the applicant's late mother Violet Muteswa to whom the late Langton Muteswa was married by Christian rites on 14 August 1959. The applicant's parents' marriage was accordingly monogamous.

During the subsistence of the marriage of the applicant's parents' the applicant's father contracted two customary unions with the second and third respondents in respect of each of whom he paid lobola at different times. Langton Muteswa lived with the second and third respondents at the matrimonial homestead where he also lived with his wife i.e the applicant's mother and her children who included the applicant. In his founding affidavit the applicant did not disclose whether the second and third respondent had any surviving children by Langton Muteswa (herein after referred to as 'the deceased).'

The applicant's mother pre-deceased the deceased. On the demise of the applicant's mother in 1980 the deceased solemnized his customary union with both the second and third respondent whom he continued to live with at what the applicant called our 'homesteads' (*sic*). The applicant deposed in his founding affidavit that his late parents jointly acquired a number of movable and immovable properties for their joint benefit. The applicant does not suggest that neither the second not the third respondents made any direct or indirect contributions to any of these assets. In fact he considers that they contributed nothing.

The applicant is convinced that his mother died as a result of stress related conditions. He expresses his conviction in the following terms in the founding affidavit – 6.1.3.

> "My mother Violet Muteswa passed away on 8 March 1980. The death certificate attached hereto and marked annexure B is quite illuminating. I have a great conviction that my mother's demise can be ascribed to the failure to bear living with the second and third respondents notwithstanding that she was in a monogamous marriage. In addition she could not bear the fact that my father had the boldness to pay lobola for both the second and third respondents regardless of their marriage which was monogamous and worse still having to share the properties that she had built and purchased with the two respondents not involved in even an Iorta of the transactions leading to the purchase of any one of the properties."

The deceased solemnized his customary unions with the second, third respondent in 1983 and lived with both until his death. The date of death of the late Langton Muteswa was not indicated but the DR reference bearing No. 2075/14 suggests that he may have died about 2014.

The applicant has approached this court seeking a declararoty order that the second and third respondent are not surviving spouses of the late Muteswa by reason of the legal advice that

he obtained to the effect that any marriage contracted during the subsistence of a monogamous marriage is void *ab initio.* He thus argues that the fact that the deceased customarily married (paid lobola) both the second and third respondents makes such marriages void *ab initio* the same having been contracted during the subsistence of his mother's monogamous marriage. He goes on to aver that the subsequent solemnization of the customary unions after the death of his mother does not purge the illegality of the two respondents marriage to his late father. The applicant has been ill-advised.

When the applicant was asked by the court to substantiate its claim by filing heads of argument the applicant disclosed in the heads of argument that the second respondent had nine children by the deceased and the third respondent had three children by the deceased.

It is significant to note that none of the 12 children born to the second and third respondents were joined as interested parties and yet the implied suggestion that they were born of bigamous unions results in their bastardisation. This misjoinder is of such important significance on the status of the 12 children of the Late Langton Muteswa. The court was inclined to stay the conclusion of the application pending joinder of these children but for the fact that he applicant's application was doomed to fail for other reasons.

New evidence was sought to be introduced in the applicant's heads of argument which is totally impermissible - see *Cargill Zimbabwe* v *Culvenhan Trading (Pvt) Ltd* 2006 (1) ZLR 381 H. Such new evidence may be ignored see *Austerlands (Pvt) Ltd* v *Trade Investment Bank Ltd & Ors* SC 92-05, *Karimatsenga* v *Tsvangirai* HH 369-12, *Muchini* v *Adams* SC 47-13 and *Manguiza* v *Zimbe* 2000 (2) ZLR 489.

The applicant cited no authority for the proposition he made i.e that payment of lobola for another woman and proceeding to live with her during the subsistence of a monogamous marriage renders the union with such other woman bigamous and that any subsequent solemnisation of the union after the termination by death of the monogamous union does not validate the "bigamous" union. Such premise is faulty. See *Matanhira* v *BP Shell Marketing Services (Pvt) Ltd* 2005 (1) ZLR 140 at 147 F-G.

Section 3 (1) of the Customary Marriages Act provides as follows – Subject to this section no marriage contracted according to customary law including the case where a man takes to wife the widow or widows of a deceased relative shall be regarded as a valid marriage unless:

(a) such marriage is solemnised in terms of this Act or

(b) such marriage was registered under the Native Marriages Act [*Chapter 79*] of 1939 before 1 January 1957 or

(c) such marriage was contracted before 1 February 1918 or

(d) being a marriage contracted outside Zimbabwe such marriage is recognised as a valid marriage in the country in which it was contracted.

It is clear from the provisions quoted above that Langton Muteswa's relationships with second and third respondents were not solemnised during the subsistence of Violet Muteswa's marriage to Langton Muteswa. The applicant acknowledges this expressly as he says in para 6.1.4 of his founding affidavit:

> "Sometime after 1983 my father went out to solemnise his polygamous marriages with the second and third respondents and was issued with marriages certificate."

Langton Muteswa could therefore not have been monogamous and polygamous at the same time – *Makwiramiti* v *Fidelity Life Assurance of Zimbabwe (Pvt) Ltd and Anor* 1998 (2) ZLR 471. The marriages to the respondents only came to life when they were solemnised in 1983 and 1984 in respect of second and third respondent respectively.

It is true that a customary marriage can only be solemnised after payment or agreement of the marriage consideration see ss 4 (2) (a) 6 (1) 7 (1) (a) 12 (4) and 12 (4) (b). That however is irrelevant for the purpose of the present matter as clearly the second and third respondents unions with Langton Muteswa were only solemnised after the legal impediment had ceased to exist through the death of the applicant's mother. The issue of *locus standi* on the part of the applicant arises. The applicant has approached the court seeking a declaratur. He does not tell the court why he wants it. He has thus not met the requirements of an application of this nature See *Johnsen* v *AFC* 1995 (1) ZLR 65 (H) @ 72 E-F.

The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an interested person 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. The interest must cover an existing, future or contingent right. The court will not decide abstract academic or hypothetical questions unrelated thereto but

the presence of an actual dispute or controversy between the parties interested is not a pre-requisite to the exercise of jurisdiction – *Ex parte* Chief Migration Officer 1983 (1) ZLR 122 (S) at 129 F-G 1994 (1) SA 370 at 376 G.

Munn Publishing (Pvt) Ltd v *ZBC* 1994 (1) ZLR 337 (S).

The applicant has not shown the court that he is an interested person in the declaratur sought and the court cannot surmise on his behalf. On this score the application can also not succeed. The fact that the application is not opposed is of no moment considering that the applicant is not at law entitled to the relief he seeks.

In the circumstances the applicant's application is accordingly dismissed.

Maeresera & Partners, applicant's legal practitioners