

REPORTABLE (58)

(1) GEORGE ZAWAIRA (2) ANNA ZAWAIRA (3) JOSEPH
ZAWAIRA (4) TENDAYI ZAWAIRA (5) ALEXANDER
ZAWAIRA (6) JULIUS ZAWAIRA (7) KUNDAI ZAWAIRA
v
(1) ROBERT THOMAS ZAWAIRA (2) W. NYAMUPFUKUDZA
(3) THE MASTER OF THE HIGH COURT

**SUPREME COURT OF ZIMBABWE
BEFORE: MALABA DCJ, GOWORA JA & HLATSHWAYO JA
HARARE, OCTOBER 14, 2014 & 12 OCTOBER, 2017**

P. Munangati-Manongwa, for the Appellant

H. Mukonoweshuro, for the Respondent

HLATSHWAYO JA: This is an appeal against the whole judgment of the High Court of Zimbabwe, the operative part of which consists of the following declaratory order:

- “1. The only lawful intestate beneficiaries of the Estate of the late Thomas Tavagwisa Zawaira are the children born of the late T.T. Zawaira’s union with the late Mrs F. J. Zawaira.
2. The costs of suit shall be borne by the estate of late T.T. Zawaira.”

Background

The facts giving rise to the appeal are uncontested and are set out below.

The appellants are children born to the late Thomas T. Zawaira (the deceased) who died intestate on 5 September 2003. The deceased had 16 children. Of the sixteen children, 10 were born out of wedlock and are the appellants *in casu*. The other 6 children, including the first respondent, were born in wedlock. At the time of his death, the deceased was married to one spouse, a Felistas Jimisayi Zawaira. The marriage was solemnised in August 1958 in terms of the Marriages Act [*Chapter 5:11*].

Having died intestate, the deceased's estate was duly registered under DR 988/07 with the second respondent being appointed as the executor dative to the estate. In executing her duties, the executrix lodged with the Master of the High Court a second and final Administration and Distribution Account in terms of which she distributed the estate equally to the surviving spouse and all the children of the late T.T Zawaira. After the account was duly advertised in terms of the law, the first respondent lodged an objection with the Master of the High Court. The nub of the objection was that the appellants being children born out of wedlock, could not lawfully succeed intestate their father or father's relatives in terms of the general law:

“The Final Distribution per second and final Administration and Distribution Account currently lying for inspection awards all the property to all the late T.T. Zawaira's children and surviving spouse in equal shares. I understand the legal position to be that succession of an African, who contracts a civil marriage like my father, is governed by the general laws as opposed to customary law. I also understand that under general law (Roman Dutch) out of wedlock children cannot succeed *ab intestato* to their father or the father's relatives. The estate is only obliged to provide maintenance in terms of the Deceased Persons Family Maintenance Act to those out of wedlock children who may need it. I believe that any Award to the 10 out of wedlock children that is not maintenance is incompetent and unlawful.”

However, the above objection was dismissed by The Master of the High Court ostensibly on the basis that the Deceased Succession Act [*Chapter 6:02*] and the Deceased Persons Family Maintenance Act [*Chapter 6:03*] removed the distinction between children

born out of wedlock and those born in wedlock and that, therefore, all children of the deceased had equal rights to inherit intestate.

Aggrieved by the dismissal of his objection, the first respondent approached the High Court seeking a declaratory order. The declaratory order sought was to the effect that the only lawful intestate beneficiaries of the estate of the deceased were his children born in wedlock. The application for a declaratory order was granted in terms already set out above. Dissatisfied with this declaratory order, the appellants noted this appeal on the following grounds:

1. That the court *a quo* erred in coming to the conclusion that the late Thomas T. Zawaira was not subject to customary law at the time of his death and so erred for the following reasons:
 - a) He had ten children born outside wedlock with different women,
 - b) The children were not born of ten mothers,
 - c) He gave all the children his name which name they were known by,
 - d) The children were all known in the family and their parentage was never an issue,
 - e) His conduct went therefore beyond mere adultery and was an indication of a clear connection with customary law principle and way of life.
2. The court *a quo* therefore erred under the circumstances in not coming to the conclusion that the presumption in favour of the applicability of general law had thus been rebutted and that the provisions of s 68 of the Administration of Estates Act accordingly applied with the result that appellants could inherit from the estate of their father *ab intestate*.

3. The court a *quo* further erred in failing to construe the applicable statutory provisions in a way that represented a departure from the old common law position and so erred in placing upon the provisions a construction which puts them at variance with ss 18 and 23 of the Constitution of Zimbabwe and renders them void.

From the appellants' grounds of appeal, two issues stick out, that is whether the estate of the late Thomas T. Zawaira was subject to customary law or general law and, secondly, whether on the basis of statutory interpretation or constitutional construction the general law outlawing intestate succession by out-of-wedlock children can be impugned.

Customary or general law?

The first respondent takes the point that since the deceased was married in terms of the Marriages Act [*Chapter 5:11*], the general law must apply. The backbone of this argument stems from s 68G of Administration of Estates Act [*Chapter 6:01*] which reads as follows:

“68G Determination of whether customary law applied to deceased person

- (1) Section 3 of the Customary Law and Local Courts Act [*Chapter 7:05*] shall apply in determining the question whether or not customary law applied to a deceased person for the purposes of this Part:
Provided that it shall be presumed, unless the contrary is shown, that—
 - (a) customary law applied to a person who, at the date of his death, was married in accordance with customary law; and
 - (b) the general law of Zimbabwe applied to a person who, at the date of his death, was married in accordance with the Marriage Act [*Chapter 5:11*] or the law of a foreign country, even if he was also married to the same person under customary law.
- (2) Where there is a dispute among the beneficiaries of an estate as to whether or not customary law applied to the deceased person for the purposes of this Part, the question shall be referred to the Master, who shall determine it in the speediest and least expensive manner consistent with real and substantial justice.” *my underlining*

Thus, s 68G (1)(b) of the Administration of Estates Act [*Chapter 6:01*] introduces a rebuttable presumption that the general law of Zimbabwe applies to a person who, at the date

of his death was married in accordance with the Marriage Act [*Chapter 5:11*]. According to the first respondent, therefore, it follows that the general law applies to the estate of his deceased father who was party to a marriage under the Marriage Act.

In terms of the general law, i.e., Roman Dutch law, of intestate succession, only children born in wedlock are entitled to inherit intestate. *Green v Fitzgerald* 1914 AD 88. See Meyrowitz, *The Law and Practice of Administration of Estates*, 5th ed, Juta & Company p.278 who states thus:

“No blood relationship for purposes of succession is recognized between a man and his illegitimate children who cannot, therefore, succeed to him *ab intestato*.”

See also, W Ncube, *Family Law in Zimbabwe*, Legal Resources Foundation, p.73, where the learned author states as follows:

“... illegitimate children cannot succeed *ab intestato* to their father or to their father’s relatives. Similarly, the father and his relatives cannot succeed *ab intestato* to the illegitimate children.”

Against this backdrop, the appellants argue that despite the deceased being party to a marriage in terms of the Marriage Act, customary law applies to the deceased. In other words, the appellants seek to rebut the statutory presumption under s 68G (1)(b) of the Administration of Estates Act. Section 68G (1) of the Administration of Estates Act makes reference to s 3 of the Customary Law and Local Courts Act [*Chapter 7:05*] which provides:

“3 Application of customary law

- (1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires—
 - (a) customary law shall apply in any civil case where—
 - (i) the parties have expressly agreed that it should apply; or
 - (ii) regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or
 - (iii) regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;
 - (b) the general law of Zimbabwe shall apply in all other cases.

- (2) For the purposes of paragraph (a) of subsection (1)—
“surrounding circumstances”, in relation to a case, shall, without limiting the expression, include—
- (a) the mode of life of the parties;
 - (b) the subject matter of the case;
 - (c) the understanding by the parties of the provisions of customary law or the general law of Zimbabwe, as the case may be, which apply to the case;
 - (d) the relative closeness of the case and the parties to the customary law or the general law of Zimbabwe, as the case may be.”

The import of this provision is clear. In determining whether customary law applies as argued by the appellants, regard must be had to the nature of the case and the surrounding circumstances if it appears just and proper that it should apply or if the parties are to be presumed to have agreed that it should apply. Section 3(2) of the Customary Law and Local Courts Act provides a non-exhaustive list of factors that help in determining whether customary law to apply to a party. The appellants aver that the fact that the deceased sired ten children outside marriage is one such factor or surrounding circumstance suggesting that customary law instead of the general law should apply to the deceased estate. Further, the appellants argue that each child born out of wedlock was given the deceased’s name. This, according to the appellants, suggests that customary law applies to the deceased.

Mrs *Munongwa-Munangati*, for the appellants submitted that the court *a quo* erred by placing excessive emphasis on the nature of the contracted marriage rather than assessing the applicable law and made reference to the following portions of the judgement:

“In *casu*, it is common cause the deceased was married in terms of the Marriage Act...No other marriage is alleged with any other woman...Apart from siring the children, the deceased did not marry the women in question It was not shown that he had expressly agreed that customary law should apply despite his marriage in terms of the Marriages Act. His mode of life was not shown to have been such as to infer that he was subject to customary law.”p.5

In my view, the submission and criticism, with respect, is justified. Too much emphasis is placed on the existence of the civil marriage and the absence of customary

marriages, which, of course, would have exposed the deceased to the crime of bigamy. The conclusion is then quickly drawn that in the light of the civil marriage and no other marriage, the applicable law should be general law. Furthermore, while it was the responsibility of the appellants to place before the court evidence of the surrounding circumstances which when considered together with the nature of the case would justify a departure from the presumption, the court below seems to have weighed whatever evidence there was in terms of whether it supported an express or implied agreement that customary law should apply. The court did not examine whether the nature of the case and the surrounding circumstances justified the application of customary law. In other words, the court *a quo* failed to consider the provisions of s 3(1) (a) (iii) of the Customary Law and Local Courts Act, which states:

“3 Application of customary law

- (1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires—
- (a) customary law shall apply in any civil case where—
 - (i) ...
 - (ii) ..., or
 - (iii) **regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;”**

This omission was a material misdirection justifying interference with the finding of the court below. It is also a matter which this Court itself is in as good a position to address as the court *a quo* and therefore need not remit the issue for such consideration.

As submitted by appellants’ counsel, by siring ten children out of wedlock, the deceased evinced an intention to procreate more than could be facilitated by the single wedded wife and the contracted marriage was not a true reflection of the system of law he would have intended to apply to his estate. However, this submission was, in my view, wrongly dismissed by the court *a quo* thus:

The respondents’ major point in this bid was the fact that the deceased sired ten out of wedlock children with different women. They contended that that showed that he was subject to

customary law. The respondents could not allude to any other factors. One may thus ask is the factor of siring children out of wedlock with various women peculiar to people subject to customary law? The answer, in my view, is no ...

In my view, the fact of having out of wedlock children, on its own, is inadequate to conclude that the deceased was subject to customary law at the time of his death. p.5

With respect, the court *a quo* fell into the error of viewing in isolation the act of siring ten out-of-wedlock children, without taking into account the totality of the surrounding circumstances. Mr *Mukonoweshuro*, for the respondents compounds this error when making the point that what the deceased had engaged in with the other women was adultery and that even “repeated adultery with the same person(s) remains adultery. Adultery is not peculiar to Zimbabwean custom. Even in Biblical times adultery was existent.” Mr *Mukonoweshuro* then concludes that the appellant’s submissions, if followed, would lead to many imponderables such as how far a party should have strayed from the civil marriage bed for such conduct to be adjudged as identification with customary law – a single instance or a dozen instances? Resulting in one, two or a dozen children? Instances of adultery are so numerous in the bourgeois marriage set-up that even the crime of adultery had to be abandoned through “desuetude”, that is, frequent non-prosecution! The criminal justice system was so overwhelmed it simply had to give up. Karl Marx and Frederick Engels in *The Communist Manifesto* observed in this regard, thus:

“Our bourgeois, not content with having the wives and daughters of their proletarians at their disposal, not to speak of common prostitutes, take the greatest pleasure in seducing each other’s wives.”p.50 *Karl Marx and Frederick Engels Selected Works*, Progress Publishers, Moscow, 1970.”

However, it is a misdirection to view in isolation aspects of the case such as the siring of many out-of-wedlock children or to mischaracterize the association with other women as “adultery or repeated adultery” *simpliciter*. When the case is looked at holistically, the out-of-wedlock children were children whom the deceased during his lifetime looked upon as being

on par with his in-wedlock children, entitled equally to the use of his surname, acknowledgement by the family and support. Had the deceased devolved his property through a will, he would have been entitled at law to treat all his children equally. The justice of this case supports the conclusion that customary law should apply as amply demonstrated by the nature of the case and the surrounding circumstances when viewed holistically.

What really is the nature of this case? It is not about the protection of the institution of civil marriage or the preservation and devolution of marital property on succession. There are civil remedies to protect the marriage available to a partner faced with a bed hopping spouse, such as suing for adultery damages and related remedies. The true nature of this case is about protection of children. Of the ten out of wedlock children, at the time of instituting proceedings, three were minors and one suffers from a mental disability and the rest are majors. All the in wedlock children are adults.

Now, since under both customary and general law, the father of an out of wedlock child is liable to maintain such child and the deceased was indeed supporting such children during his lifetime, the justice of this case cries out for such support to be maintained and that customary law should be deemed to apply to the distribution of the deceased's estate among the children.

The unfair treatment of out of wedlock children under general law cannot be gainsaid. Once upon a time, such law accepted the notion of children born out of wedlock being referred to as "bastards" or "misbegotten". The stigma associated with the name "bastard" moved a character in William Shakespeare's *King Lear* to observe thus:

*"Edmund...Why bastard? wherefore base?
When my dimensions are as well compact,*

My mind as generous, and my shape as true,
As honest madam's issue? Why brand they us
With base? with baseness? bastardy? base,
base?
Who, in the lusty stealth of nature, take
More composition and fierce quality
Than doth, within a dull, stale, tired bed,
Go to the creating a whole tribe of fops,
Got 'tween asleep and wake? Well, then,
Legitimate Edgar, I must have your land:
Our father's love is to the bastard Edmund
As to the legitimate: fine word, - legitimate!
Well, my legitimate, if this letter speed,
And my invention thrive, Edmund the base
Shall top the legitimate. I grow; I prosper:
Now, gods, stand up for bastards!" (Act I Scene II)

With the passage of time the term “bastard” was replaced with the word “illegitimate” child. This categorisation of children born of parents not married to each other into a bracket of the so called “illegitimate children” still had the sting of stigma that was sought to be gotten rid of. The introduction of the word “children born out of wedlock” is believed by the law giver to have taken away the stigma associated with the status of children born out of unmarried parents. In the South African jurisdiction, the blame has been shifted away from the children to the parents themselves as evident from the name, “children born of unmarried parents.”

This account of the journey of children born out of wedlock exhibits the dynamic of ideas and the society they emanate from. Societies by their very nature evolve with time. Laws that govern a particular society must also evolve to meet the needs of that particular dynamic society.

This Court has on a previous but slightly different occasion, pertaining to the interpretation of a constitutional provision, reiterated the need for the law to be dynamic and

accommodative of change. The law must not fail to respond to the needs of a dynamic society.

The learned former Chief Justice, GUBBAY CJ, had this to say in the case of *Smyth v Ushewokunze & Anor* 1997 (2) ZLR 544 (S):

“In arriving at the proper meaning and content of the right guaranteed by s 18 (2), it must not be overlooked that it is a right designed to secure a protection, and that the endeavour of the court should always be to expand the reach of a fundamental right rather than attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to the letter of the provision; one that takes full account of the changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges. The aim must be to move away from formalism and make human rights provisions a practical reality for the people.”

In the case of *ZIMNAT Insurance Company Pvt Ltd v Chawanda* 1990 (2) ZLR 145 (S) it was held that having regard to the notion of justice and the interests of the litigants balanced against the community as a whole it was desirable to extend the dependant’s action for damages for loss of support to a customary law wife in respect of whom the duty of support arises by virtue of legislation, and the following comment was made:

“What is offensive to one’s sense of justice is that upon the wrongful killing of a breadwinner the position of a widow, who had married under customary law, should differ adversely from that of another, who had married according to civil rites, albeit both suffer the same kind of loss. As our law accepts customary unions, it should endeavour to secure equality to the parties thereto and discard the intolerable affectation of superior virtue (to borrow a phrase) inherited from the colonial past. To continue to exhibit a vestige of condescension and conservatism towards customary law unions ill befits, and is repugnant to, the current and unyielding movement by the State to remove the legal disabilities suffered by African women.”pp. 152-153

In the above quotation, if reference to a ‘widow married under customary law’ were *mutatis mutandis* substituted with ‘child born out of wedlock’ these sentiments would apply with even greater force to the plight of out of wedlock children who would have lost a breadwinner in the form of their father when excluded from a share of his deceased estate. Thus, viewed holistically and in the light of the march of history and social sentiment, the

nature of this case demands that it would be just and proper that customary law should apply.

Gone are the days when such odious words as those of Emperor Justinian held sway, that:

“But those who are born of a union which is entirely odious to us, and therefore prohibited, shall not be called natural children and no indulgence whatever shall be extended to them. But this fact shall be punishment for the fathers that they know that children who are the issue of their sinful passion will inherit nothing.”

This is clearly so, because focus has inexorably moved away from punishment of the errant fathers to protection of all the children.

The “surrounding circumstances” which must be considered together with the nature of the case discussed above in order to decide whether it would be “just and proper” for customary law to apply include the mode of life of the parties, the subject matter of the case and the understanding and relative closeness of the parties to customary or general law. The mode of life of the parties includes the lifestyle, habits, cultural leanings and social norms. The conduct of the deceased which has already been set out above unequivocally places him in the category of an adherent of, and believer in, norms, values and tenets of the African traditional society. The subject matter of the case, i.e., dispute over succession, also clearly lends itself for resolution in terms of customary law and would be different from a dispute pertaining to a negotiable instrument, for example. Therefore, the preponderance of the surrounding circumstances, including the understanding and relative closeness of the parties to either system of law, all point to the applicability of customary law being just and proper in the circumstances.

Once it is found, as has been done here, that customary law is applicable, the provisions of the Administration of Estates Act, particularly s 68, automatically entitle all children, born in or out of wedlock, to be equal beneficiaries of the deceased person’s estate.

Constitutional Perspective

The constitutional arguments are being raised for the first time on appeal as being matters of law which the court *a quo* should have taken into account. The ground of appeal in this regard is that the court below should have placed a “purposive” construction on the relevant statutes discussed above and that such interpretation should have led to a departure from the common or general law position in order to afford the appellants protection of the law.

This ground of appeal, apart from being raised too late in the litigation, is so badly formulated that it is almost impossible to appreciate what is being challenged. Is the allegation that the court *a quo* adopted too narrow an approach in interpreting the relevant legislation? If so, how would a purposive interpretation have ‘progressively’ aligned the legislation to the constitution when regard is given to the fact that the s 18 protection of law stipulations in the former constitution were made subject to the provisions of the Constitution and that s 23 (2)(a) specifically excluded from the general anti-discrimination provision the following matters: “adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law”?

It was properly accepted by both counsel that the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 cannot be authority or the basis for disposing of this matter. The deceased died in 2003, close to a decade before the inception of Constitution of Zimbabwe Amendment (No. 20) Act, 2013. The facts of this case arose before the promulgation of the current supreme law. It being trite that the Constitution does not apply retrospectively, any reference to the 2013 Constitution as authority for this case would be misguided and incorrect. This matter is to be dealt with in terms of the laws that existed at the time when the dispute arose.

Because of the poor formulation of the purported constitutional challenge and given the conclusion already reached on the applicability of customary law to this case, it is unnecessary to grapple with the constitutional issues raised, such as they are. Happily though, the current Constitution has now addressed the issue of out of wedlock children through s 56 (3) which in very clear terms abolishes discrimination on the basis of, among other things, custom and whether one is born in or out of wedlock.

Disposition

The appellants maintained these proceedings largely on the basis of the opinion of the second respondent, who together with the third respondent chose not to oppose this appeal but to abide the Court's decision, that ss 3 and 3A of the Deceased Estates Succession Act and s 10 of the Deceased Persons Family Maintenance Act removed the distinction between children born in wedlock and those born out of wedlock. Although this view has been shown to be incorrect, the Court has found in appellants' favour on different grounds. Therefore, the cost of this appeal should not be visited on the appellants nor the respondents but is one to be properly born by the estate. See *Mpansi & Ors v Dube & Ors* 2015 (1) ZLR 587.

Accordingly, it is ordered as follows:

1. The appeal succeeds.
2. The Judgement of the Court *a quo* is set aside and substituted with the following:
“The application be and is hereby dismissed”.
3. The costs of this appeal and the costs of the application in the court below shall be borne by the estate of the late T.T. Zawaira.

MALABA CJ: I agree

GOWORA JA: I agree

Munangati & Associates, appellant's legal practitioners

Mukonoweshuro & Partners, respondent's legal practitioners