REPORTABLE (174)

GERALD CHIGWADA

v

(1) PENELOPE CHIGWADA

(2) SHEPHERD KUSADA N.O.

(3) MASTER OF THE HIGH COURT

SUPREME COURT OF ZIMBABWE
MALABA CJ, GARWE JA, MAKARAU JA, GOWORA JA & BERE JA
HARARE, SEPTEMBER, 24, 2018 & DECEMBER 28, 2020

S Hashiti, for the appellant

C Damiso, for the first respondent

F Mahere, *Amicus Curiae*

L Uriri, *Amicus Curiae*

No appearance for the second respondent

No appearance for the third respondent

MALABA CJ: This is an appeal against the whole judgment of the High Court. The question for determination is whether the law governing the property rights of married persons, or the law of testamentary disposition of estates, binds a testator to bequeath his or her right in an estate to the husband or wife.

The Court holds as follows. The law governing the property rights of married persons in Zimbabwe is the Married Persons Property Act [*Chapter 5:12*], which provides that since 1929 marriages in Zimbabwe are out of community of property. Parties to a marriage out of community of property are legally entitled to own and dispose of property in their individual capacities. The law of testamentary disposition in Zimbabwe recognises the doctrine of freedom of testation and does not oblige a testator to bequeath his or her property to the surviving spouse.

The law of testamentary disposition, which is based on the universal principle of equality of men and women, gives a right to a person married out of community of property to dispose of his or her estate by will to whomsoever he or she chooses. Decisions of the High Court to the effect that a testator is, in the circumstances, bound to leave his or her property to the husband or wife and declaring testamentary disposition to the contrary to be void are inconsistent with the law. They should no longer be followed. The reasons for the decision of the Court now follow.

FACTUAL BACKGROUND

The facts are common cause. The first respondent was married to the late Aaron Chigwada ("the deceased") in 1971 in terms of customary law. In 1975 the parties had the union solemnised in terms of the Marriage Act [*Chapter 5:11*]. Before marrying the first respondent, the deceased had been married to the appellant's mother. They had divorced. The

deceased had six children with his first wife, the appellant being the fifth child and the youngest son.

During the subsistence of their marriage, the first respondent and the deceased acquired a house, Stand No. 28181 Harare Township of Salisbury Township Lands, also known as No. 85 Vito Street ("the immovable property"). The immovable property, which became the matrimonial house, was registered in the joint names of the husband and wife. Each spouse owned half of the beneficial interest in the house.

On 20 September 2007 the deceased made a will, in terms of which he bequeathed his half share of the beneficial interest in the immovable property to his son, the appellant. He appointed the second respondent as the executor to give effect to the testamentary disposition. The deceased died on 19 July 2011.

The will surfaced after the deceased's death. The first respondent, who is the surviving spouse, approached the High Court (the court *a quo*) challenging the right of the appellant to succeed to the half share of the beneficial interest in the immovable property left to him by the deceased in terms of the will. The first respondent believed, from teachings at her church, that the surviving spouse had a right to inherit the estate of the deceased husband or wife regardless of the existence of a will disposing of the property to a person other than the surviving spouse. Motivated by the belief she held, she thought that had it been the testator's intention to bequeath the property to his child, he ought to have bequeathed it to all the children that survived him.

During the proceedings in the court *a quo*, the only issue that remained for determination was whether the will was valid under the Wills Act [*Chapter 6:06*]. The other grounds for disputing the will were abandoned. Initially, the first respondent sought an order declaring the will void on the allegation that the deceased lacked mental capacity to execute

the will. She had also alleged fraud and undue influence. The first respondent eventually settled on the allegation that the will was invalid because the disposition did not leave the testator's estate to her as the surviving spouse. The contention addressed the question of the essential validity of the will by making the allegation that the law of testamentary disposition binds a spouse to leave his or her entire estate to the husband or wife.

THE QUESTION FOR DETERMINATION IN THE COURT *A QUO*

The question for determination was whether there was a law which binds a spouse desirous of disposing of his or her estate by will to leave the property to the surviving spouse. If the correct finding by the court *a quo* was that there was such a law, the disposition by the deceased of his estate by will to the appellant would be void on account of failure to comply with an essential requirement of validity.

The question for determination by the court *a quo* was not one of construction of any of the provisions of the Wills Act. The learned Judge identified what she believed to be the law binding a spouse intending to make a disposition of his or her property by will to leave the estate to the surviving spouse as s 3A of the Deceased Estates Succession Act [*Chapter 6:02*]. The law in question addressed matters of succession to an intestate estate and had nothing to do with the question of the right of a testator to dispose of his or her property to whomsoever he or she chooses.

The learned Judge, nonetheless, found that s 3A of the Deceased Estates Succession Act was the law referred to in s 5(3)(a) of the Wills Act as the "law governing the property rights of married persons", to which the validity of the disposition of property by will is made to be subject.

In what can only be described as an unusual process of reasoning, the learned Judge concluded that s 3A of the Deceased Estates Succession Act binds a married person to dispose of his or her estate by a will to his wife or her husband. She held that the deceased's will was void for contravening s 3A of the Deceased Estates Succession Act, because it gave effect to a disposition of his estate to a person other than the surviving spouse. The court *a quo* set aside the deceased's will, leaving the estate to be disposable in terms of the law of intestate succession. The appellant was aggrieved by the court *a quo's* decision, against which he appealed to the Court.

The interpretation and application of s 5(3)(a) of the Wills Act has given rise to conflicting judgments in the High Court. The conflicting decisions of the High Court on the question whether a person married out of community of property in Zimbabwe enjoys freedom of testation or is bound to dispose of his or her estate by will to the surviving spouse have caused confusion and created uncertainty in the minds of members of the public as to the correct legal position. A five-member Bench of the Court had to be constituted to answer the divisive question once and for all.

CONFLICTING DECISIONS OF THE HIGH COURT

It is prudent to set out the cases which support the two different schools of thought in order to appreciate the nature and source of the conflicting decisions rendered by different Judges of the High Court on the matter.

In *Estate Late Wakapila v Matongo & Ors* 2008 (2) ZLR 43 (H) at 47E-H ("the *Wakapila* decision") KUDYA J had this to say:

> "The argument advanced by Mr *Matimba* that the surviving spouse is vested with rights in a deceased estate, in which a testamentary disposition has been made, at the time of death is fallacious for three reasons. The first is that the divested property, subject to

> acceptance by the beneficiary, no longer belongs to the testator. The second being that giving such a meaning to the provision in issue would result in so radical an alteration of the common law power of a spouse to dispose of his or her property to whomsoever he or she wishes. If the lawmaker intended such a radical departure from the common law it would have said so in clear language. It would be absurd to allow the spouse to dispose of his or her property during his or her lifetime but take away that power from him or her to dispose of it by will. The third being that a wife married under customary law can only inherit from her husband's estate if he dies intestate. Where he has disposed of his estate by a will, she does not inherit and thus has no rights in any property belonging to his estate."

In *Roche* v *Middleton* HH 198-16 CHITAKUNYE J held that the *Wakapila* decision was based on the correct interpretation and application of s 5(3)(a) of the Wills Act. The court intimated that it would be absurd to hold that a person who could dispose of his or her property without the other spouse's consent would lose the right to dispose of it by will to whomsoever he or she chooses. The court further held that if the Legislature intended such a radical departure from the common law, it would have enacted express provisions to that effect.

The reasoning championed by the *Wakapila* decision was to be rejected in later decisions of the High Court where the position adopted was that a will which does not bequeath the matrimonial house to the surviving spouse is void. The departure from the *Wakapila* decision was registered in *Chimbari N O v Madzima and Ors* HH 325-13, where the court held that s 5(3)(a) of the Wills Act prohibits a testator from disinheriting a surviving spouse. The court in that case held that the provisions of s 5(3)(a) were put in place to safeguard the rights that accrue to a surviving spouse at the death of the testator.

In *Chiminya* v *Estate Late Chiminya and Ors* 2015 (1) ZLR 450 (H) ("the *Chiminya* decision") the court expressed the view that the purpose of s 5(3)(a) of the Wills Act was to cure the mischief by testators who wanted to disinherit their surviving spouses. The reasoning of the court was based on the assumption that the surviving spouse has a "right of inheritance" which is protected by s 5(3)(a) of the Wills Act. The court relied on s 3A of the Deceased

Estates Succession Act which it said prescribed inheritance principles regarding surviving spouses. The court adopted the reasoning, notwithstanding the fact that s 3A of the Deceased Estates Succession Act applies where the deceased died intestate whilst s 5(3)(a) of the Wills Act addresses requirements for the validity of disposition of estates of married persons by will.

The reason given by the court for relying on s 3A of the Deceased Estates Succession Act was that the provision was in conformity with s 56 of the Constitution, which prohibits discrimination based on marital status and promotes equality before the law. The reasoning, with respect, is not logical, as there was an admission of the fact that s 3A of the Deceased Estates Succession Act was irrelevant to the matter under discussion. The attempt to draw similarities between the purpose of s 5(3)(a) of the Wills Act and that of s 3A of the Deceased Estates Succession Act was unnecessary. The court had this to say at 453E-G:

> "I am alive to the fact that the Deceased Estates Succession Act [*Chapter 6:02*] deals with intestate succession. Suffice to mention at this stage that I have alluded to it in so far as it is in conformity with the Constitution and in so far as it recognises the surviving spouse's right to inheritance. In the same manner the Wills Act [*Chapter 6:06*] recognises the surviving spouse's rights by having provisions such as s 5(3)(a) which recognise rights of a surviving spouse and seek to protect inheritance right of a surviving spouse even where the other spouse dies testate."

The approach adopted in the *Chiminya* decision was followed in *Majuru* v *Majuru* HH 404-16, where the court held that a will that disinherited a surviving spouse was in contravention of s 26 of the Constitution which recognises equality of spouses during marriage and at dissolution either through death or divorce. The court held that disinheriting a spouse was contrary to public policy and prejudiced the surviving spouse's right to inherit the deceased's estate. This is also a judgment based on the wrong premise that s 5(1) of the Wills Act, which gives every person, possessed of the capacity to do so, a right to dispose of his or her estate by will to whomsoever he or she pleases, is not based on the principle of equality of men and women.

The reasoning in the *Chiminya* decision was also adopted in *Nyamushanya and Ors v Nyamushanya and Ors* HH 693-17. The court held that a will which disinherited a surviving spouse was void for the reason that it contravened s 5(3)(a) of the Wills Act and s 3A of the Deceased Estates Succession Act. The court further held that the surviving spouse's right to inherit the deceased spouse's estate was guaranteed by the statutory provisions and that the will ran foul of the law by bequeathing the matrimonial house to a person other than the surviving spouse. Needless to say, the decision was also based on the erroneous proposition that there is a correlation between the provisions of s 5(3(a) of the Wills Act and those of s 3A of the Deceased Estates Succession Act.

The departure from the *Wakapila* decision to the *Chiminya* decision is predicated on the presumed applicability of s 3A of the Deceased Estates Succession Act in the interpretation of s 5(3)(a) of the Wills Act. The *Wakapila* decision is to the effect that the rights of the surviving spouse protected by s 5(3)(a) of the Wills Act are those that the surviving spouse holds at the time that the will is executed. In other words, the rights must flow from a law which governed the rights of the deceased spouse and the surviving spouse while they were both alive. On the other hand, the *Chiminya* decision holds that s 5(3)(a) of the Wills Act protects the rights that a surviving spouse holds under s 3A of the Deceased Estates Succession Act.

The *Chiminya* decision suggests that the rights which flow from s 3A of the Deceased Estates Succession Act entitle a surviving spouse to inherit the matrimonial house. This is a departure from the *Wakapila* decision.

REASONING OF THE COURT *A QUO*

The court *a quo* adopted the reasoning in the *Chiminya* decision. It held that the testator's will which bequeathed his half share of the beneficial interest in the matrimonial house to the son was invalid because it had prejudiced the surviving spouse's right to inherit the whole beneficial interest.

The court *a quo* stated that s 3A of the Deceased Estates Succession Act is the law governing the property rights of married persons. It held that if the deceased had died intestate, the surviving spouse would have been entitled to inherit the matrimonial house in terms of s 3A of the Deceased Estates Succession Act. The view of the court *a quo* was that she could not be prejudiced merely because the deceased had executed a will. The court *a quo* further held that the fact that s 3A of the Deceased Estates Succession Act applied to spouses who died wholly or partly intestate was indicative of the intention of the Legislature to protect surviving spouses even in situations where there was a will. The effect of the judgment was that the overriding factor was that the person affected was a surviving spouse. The learned judge had this to say at p 3 of the cyclostyled judgment:

> "The fact that s 3A above includes situations where part of the estate is covered by a will as evidenced by the use of the phrase 'dies wholly or partly intestate' is an indication that the intention of the Legislature was to protect such spouses even in situations where there is a will. Section 3A of the Deceased Estates Succession Act [*Chapter 6:02*] is part of the law referred to in s 5(3) of the Wills Act which would have made the plaintiff obtain 50% of the house from the testator's estate if the bequest to the first defendant had not been made by the testator in his will.
>
> This means that the bequest of 50% of the matrimonial home to the first defendant in the will by the late Aaron Chigwada is the obstacle which is now prejudicing the plaintiff from the enjoyment of the only home she has ever known since she got married. In my view, this is the mischief which the legislature intended to cure when it enacted s 5(3) of the Wills Act [*Chapter 6:06*]. The intention was to intervene in situations where surviving spouses would be rendered homeless by the wills of their deceased partners in situations where the will bequeathed the spouses' home, or part of it, to a third party as in the present situation." (the underlining is for emphasis)

The view of the court *a quo* cannot be the correct interpretation of the provisions of s 5(3)(a) of the Wills Act. The effect of the approach adopted by the court *a quo* in interpreting s 5(3)(a) of the Wills Act is one which abrogates the right of testation, given under s 5(1)(a) of the Wills Act. The words "wholly or partly intestate" do not refer to property disposed of by a will. They refer to property not covered by a testamentary disposition. At law property is disposed of by a will or it is not.

RELEVANT STATUTORY PROVISIONS GOVERNING THE DISPOSITION OF DECEASED ESTATES

It is necessary to set out the statutory provisions at the centre of the divergent opinions of the High Court.

Section 5 of the Wills Act

> "5 **Power to make dispositions by will**
>
> (1) Subject to this Act and any other enactment, any person who has capacity in terms of section four to make a will may in his will -
>
> (a) make provision for the transfer, disposal or disposition of the whole or any part of his estate.
>
> ...
>
> (2) Subject to this Act and any other enactment, a will shall not be invalid solely because the testator has disinherited or omitted to mention any parent, child, descendant or other relative or because he has not assigned any reason for such disinheritance or omission.
>
> (3) No provision, disposition or direction made by a testator in his will shall operate so as to vary or prejudice the rights of—
>
> (a) any person to whom the deceased was married to a share in the deceased's estate or in the spouses' joint estate in terms of any law governing the property rights of married persons." (the underlining is for emphasis).

Section 3A of the Deceased Estates Succession Act

"3A The surviving spouse of every person who on or after the first of November 1997, dies wholly or partly intestate shall be entitled to receive from the free residue of the estate:

(a) The house or other domestic premises in which the spouses or surviving spouse, as the case may be, lived immediately before the person's death; and

(b) The household goods and effects which immediately before the person's death were used in relation to the house or domestic premises referred to in paragraph (a);

where such house, premises, goods and effects form part of the deceased's estate."

SUBMISSIONS ON APPEAL

The appellant's submissions

The submissions by *Mr Hashiti* were largely based on the *Wakapila* decision and the reasoning therein. He argued that the first respondent had not been prejudiced in relation to any of her rights in the property. His argument was that the deceased owned a half share of the beneficial interest in the house and the first respondent owned the other half. The deceased did not bequeath any part of the first respondent's half share. Realising that he owned half of the beneficial interest in the immovable property, the deceased bequeathed the estate that belonged to him. As a result, the first respondent's property rights were not varied or prejudiced, as she remained the sole owner of her half share of the beneficial interest in the matrimonial house.

Mr Hashiti submitted that the property rights referred to in s 5(3)(a) of the Wills Act are rights which exist at the time that the will is executed. The appellant's argument was that had the deceased bequeathed the first respondent's half share of the beneficial interest in the matrimonial house the bequest would have been void on account of the operation of s 5(3)(a) unless she would have consented to the variation of her rights.

He further submitted that to give to s 5(3)(a) of the Wills Act the meaning given by the court *a quo* would result in a radical alteration of the common law. The argument was that if Parliament intended to make such a radical departure from the common law principle of freedom of testation it would have done so through express provisions.

The first respondent's submissions

Ms Damiso submitted that the first respondent was entitled to receive the deceased's half share of the beneficial interest in the matrimonial house because she is the surviving spouse. She contended that the will that had been executed by the deceased prejudiced the surviving spouse's right to inherit his estate. She argued that the right to inherit the deceased's estate was based on s 3A of the Deceased Estates Succession Act. Her argument was predicated on two legal assumptions. The first assumption was that a surviving spouse has a right to inherit the deceased's estate. The second assumption was that the law governing property rights of married persons referred to in s 5(3)(a) of the Wills Act is s 3A of the Deceased Estates Succession Act.

Counsel went further and submitted that the fact that most of the challengers of wills in cases of this nature are women betrays the reality of gender issues in Zimbabwe. She argued that a decision that allowed a testator to disinherit the surviving spouse of the matrimonial house, whilst gender neutral on the face of it, has adverse effects on women. She further contended that due to gender inequality men are the property holders. According to counsel, the decision in favour of the appellant would lead to the perception of discrimination against women on the ground of gender.

Ms Damiso submitted that the Court should take cognisance of the fact that the *Wakapila* decision was made in 2008 before the current Constitution came into effect. The

contention was that the *Wakapila* decision is inconsistent with the provisions of the Constitution which place emphasis on respect for gender equality, protection of vulnerable members of society and promotion of family values.

Counsel further submitted that the rules of constitutional interpretation include a presumption that Zimbabwe does not intend to abrogate its obligations under international law. The point made was that Zimbabwe is party to several international conventions that prohibit discrimination against women. To buttress the point, counsel made reference to the Convention on the Elimination of all forms of Discrimination Against Women (1979) ("CEDAW") and General Recommendation 29, which speak of property rights of spouses. Reference was also made to Article 21 of the Protocol To The African Charter On Human And Peoples Rights On The Rights Of Women In Africa ("the Maputo Protocol"). She further submitted that, in terms of s 326 of the Constitution, the Court should adopt an interpretation that honours Zimbabwe's obligations under international law.

The first *amicus curiae*'s submissions

Ms Mahere argued that the court *a quo* erred in awarding the property in question to the first respondent contrary to the express intention of the testator. For this proposition she made reference to s 5(1)(a) of the Wills Act, which underscores the doctrine of freedom of testation. She said that the testator was at large to dispose of his property by will to whomsoever he chose. She quoted from De Waal and Malan "*Law of Succession*" (4 ed, Juta & Co Ltd, Cape Town 2008) in which the learned authors state at p 4 that, although strict formalities attach to the execution of a will, its contents are left to the discretion of the testator. *Ms Mahere* also made reference to an article by Edrick Roux titled "*Freedom of testation - Can a person disinherit a spouse?*" DR, November 2013:48 [2013] DEREBUS 225. The writer states that

freedom of testation goes beyond the testator distributing his or her assets to his or her surviving family members. He emphasises that the assets can be distributed to whomsoever the testator chooses.

Ms *Mahere* further argued that the doctrine of freedom of testation is entrenched by s 71(2) of the Constitution, which provides that:

> "(2) Subject to section 72, every person has the right, in any part of Zimbabwe, to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others." (the underlining is for emphasis)

She submitted that the right to private property guaranteed under the Constitution includes the right to decide how one's property is disposed of during one's lifetime and after death. De Waal and Malan *op. cit.* The learned authors postulate that the constitutional protection of the right to freely determine how one's estate is to be distributed after death protects the principle of freedom of testation that supports it. *Ms Mahere* argued that the right to property enshrined in s 71(2) of the Constitution, and by extension the right of testation, is a fundamental right. She further quoted from De Waal and Malan *op. cit* where at p 6 the learned authors say:

> "Nobody has a right to inherit. Leaving someone out of a will as a beneficiary therefore does not amount to an encroachment upon or taking away of an existing right. A potential beneficiary has at most a so-called *spes* or hope."

The contention by *Ms Mahere* was that a court's prerogative is not to write a will for the deceased but to give effect to the testator's intention. She submitted that s 5(3)(a) of the Wills Act places a limitation on the exercise of the right of testation. The limitation is that the testator must not vary or prejudice the property rights of the person to whom he or she is married. She submitted that the first respondent had to illustrate that a right that she held in the

property had been prejudiced by the testator's disposition of his own half share of the beneficial interest in the matrimonial house.

Ms Mahere emphasised the point that the property rights that are protected from possible prejudice flowing from a disposition by the deceased are the rights which the surviving spouse holds at the time the will is executed and not future or contingent rights. She argued that the marriage to the deceased did not endow the first respondent with any proprietary rights in the deceased's half share of the beneficial interest in the immovable property. The contention was that the proprietary rights the first respondent had in the immovable property accrued to her as a result of the registration of her own half share in the beneficial interest as a joint owner of the matrimonial house. The deceased continued to exercise dominion over his share of the matrimonial house. Consequently, the contention that the first respondent's rights were prejudiced by the disposition by the deceased of his own property rights by will was not supported by the facts.

Ms Mahere further argued that the court *a quo* was wrong to rely on s 3A of the Deceased Estates Succession Act. It conflated instances where one died testate with instances where one died intestate. The contention was that what determined the applicable law was the answer to the question whether the deceased died intestate or testate. The determinant factor was not the marital status of the deceased. Her argument was that the court *a quo* failed to take into account the fact that marriages in Zimbabwe are out of community of property. As a result, there has to be a clear law prohibiting testamentary disposition of a matrimonial house before a court can hold that the surviving spouse's rights or interests have been prejudiced or interfered with by a disposition by the deceased of his or her estate in the matrimonial house by will to a person other than the surviving spouse.

On the argument by counsel for the first respondent that women ought to be protected as vulnerable members of society, *Ms Mahere* made the observation that the first respondent was a property holder who owned a half share in the property in question. She owned the property in her personal capacity in terms of the law governing the property rights of married persons. Consequently, the first respondent could not be deemed to be economically disadvantaged.

The second *amicus curiae*'s submissions

The submissions made by Mr *Uriri* were in support of the *Wakapila* decision. Mr *Uriri* submitted that s 5(3)(a) of the Wills Act does not create proprietary rights. It relates to existing rights. These rights must be provided for in terms of a law governing the property rights of married persons. He submitted that the law governing the property rights of married persons in Zimbabwe is the Married Persons Property Act [*Chapter 5:12*], which provides that all marriages in Zimbabwe are out of community of property. The contention was that the import of the provision of the Married Persons Property Act is that spouses are equal partners, each with the capacity and freedom to hold and dispose of property independent of the other.

Mr Uriri argued that s 5(1)(a) of the Wills Act embodies the principle of freedom of testation. He argued that the wording of s 5(3)(a) of the Wills Act is clear and requires no interpretation. He said that, in its literal sense, s 5(3)(a) of the Wills Act proscribes prejudice to the surviving spouse's rights held in terms of the law governing the property rights of married persons.

Mr Uriri contended that the purpose of s 5(3)(a) of the Wills Act is to safeguard the respective spouses' rights acquired under the Married Persons Property Act, the object of which was to abolish the matrimonial power of the husband under the community of property legal

regime. Having chosen to be married under a specific matrimonial regime, neither party requires protection from the known legal consequences of their own choice. The known consequence of marriage out of community of property is the existence of separate and divisible estates between the spouses. The contention was that property acquired by a spouse in his or her own right belongs to that spouse. The parties jointly own property by agreement.

ANALYSIS OF THE ISSUES

The first respondent based her case on the premise that the disposition by the deceased of his half share of the beneficial interest in the matrimonial house ran foul of s 5(3)(a) of the Wills Act, in that it allegedly contravened s 3A of the Deceased Estates Succession Act which entitles the surviving spouse to inherit the matrimonial house and goods in it. A reading of s 3A of the Deceased Estates Succession Act reveals that it is not any spouse who is entitled to inherit the matrimonial house and the chattels in it. It is the spouse of a person who died wholly or partly intestate. The first respondent is a surviving spouse of a person who died testate. She is not eligible to the benefits of entitlements that flow from s 3A of the Deceased Estates Succession Act because there was a valid will executed by the deceased. It should follow that where there is a valid will, s 5(3)(a) of the Wills Act cannot be said to have been contravened by the disposal of a matrimonial house and the chattels therein.

The purpose of s 5(3)(a) of the Wills Act is to provide protection for the property or estate belonging to the other spouse from being disposed of by the testator by will as if it is part of his or her own estate. The effect of s 5(3)(a) of the Wills Act is that, if the property belongs to the other spouse in terms of the law governing the property rights of married persons, the execution of the will disposing of that property is a nullity.

For the first respondent to benefit from the provisions of s 5(3)(a) of the Wills Act, she had to allege and prove that the deceased made a will by which he sought to dispose of her property. She, however, accepted that the half share of the beneficial interest in the immovable property the deceased disposed of by the will belonged to him. She claimed a right to the immovable property on the sole ground that she was the surviving spouse. Section 5(3)(a) of the Wills Act could not be invoked to assist her cause. Subject to the condition that a disposition of an estate by will must not have the effect of varying or prejudicing the property rights of a spouse under a law governing property rights of married persons, s 5(3)(a) of the Wills Act does not subtract from the right of testation provided for in s 5(1). Section 5(2) is important in that it provides that a will shall not be invalid solely because the testator has disinherited or omitted to mention any relative or because he or she has not assigned any reason for such disinheritance or omission.

The subject matter of s 5 of the Wills Act as a whole is the provision, disposition or direction made by a testator in his or her will. The testamentary power given to a testator under s 5(1) of the Wills Act relates to these subject matters.

The effect of s 5(3)(a) of the Wills Act is that the testator must not include in the disposition by will property belonging to the other spouse except with his or her consent. He or she must include in the disposition by will assets consisting of his or her own estate. Including in the disposition of the estate by will assets belonging to the other person to whom the testator is married without his or her consent would render the will void. Such a disposition by will would inevitably have the effect of varying or prejudicing the property rights of the other spouse, contrary to s 5(3)(a) of the Wills Act.

Section 5(3)(a) of the Wills Act cannot be understood to mean that a testator has no right to dispose of his or her estate to whomsoever he or she chooses. Such a view of s 5(3)(a)

of the Wills Act would ignore the provisions of subsection (1) of s 5, which is the root to the provisions of the other subsections. The only qualification to the right of testation provided for in subsection (1) by s 5(3)(a) is that the testator must ensure that the assets he or she intends to have disposed of by will to whomsoever he or she chooses belong to him or her. Section 5(3)(a) of the Wills Act is not concerned with the status of the person to whom the testator intends to have his or her estate disposed upon his or her death.

The issue is not that the person to whom the testator was married is disinherited. A surviving spouse can be a subject of disinheritance by a will complying with the formalities of a valid will as well as with the requirements for essential validity such as are prescribed under s 5(3)(a) of the Wills Act. Once a will complies with all the requirements of validity, its terms and conditions determine the question of succession to the deceased's estate. Section 5(3)(a) of the Wills Act should not be read to mean that a husband or wife cannot disinherit the surviving spouse by a will. The requirements for the essential validity of the will are not to the effect that the testator must leave his or her estate to the surviving spouse.

The reference to s 3A of the Deceased Estates Succession Act in the interpretation of s 5(3)(a) of the Wills Act was an attempt at finding justification for a decision to set aside an otherwise valid will. The purpose was to imbue a surviving spouse in a testate succession with the same benefits that accrue to a surviving spouse under intestate succession. There is no legal basis for the adoption of such an approach.

The question that arises is whether section 3A of the Deceased Estates Succession Act is a law that governs the property rights of married persons referred to in s 5(3)(a) of the Wills Act. The Deceased Estates Succession Act gives rights to surviving spouses, which accrue upon dissolution of a marriage through the death of the intestate husband or wife. The rights do not accrue during the subsistence of the marriage but after one of the spouses has died

intestate. Consequently, the Deceased Estates Succession Act cannot be a law governing the property rights of married persons. It is a law that governs property rights of a surviving spouse once the other spouse has died without leaving a valid will.

Succession to an intestate estate is determined by the operation of the provisions of s 3A of the Deceased Estates Succession Act. In that event, there would be no question of the deceased having had any influence on the manner of the disposition of his or her estate before his or her death. The deceased is taken to have had no influence on such matters as to who should succeed him or her in the estate upon dissolution of the marriage through his or her death. These matters are settled by the operation of the law at the time the need for succession to the intestate estate arises. The question of the application of s 3A of the Deceased Estates Succession Act would not arise in the circumstances at any time before the dissolution of the marriage through the death.

The law of testamentary disposition proceeds on the principle that because of freedom of testation the matter relating to succession to the deceased's estate shall be as determined by the testator in his or her will. The only factor common to the law of intestate succession and the law of testamentary succession is that both laws apply to a situation arising from dissolution of a marriage through the death of the spouse whose estate is to be distributed. The provisions of s 3A of the Deceased Estates Succession Act underscore the importance of having property disposed of by a will. Wills silence family disputes relating to the inheritance of the deceased spouse's estate. They embody the actual wishes of the deceased concerning the disposition of his or her property. They should not be lightly interfered with.

The law that governs the property rights of married persons referred to in s 5(3)(a) of the Wills Act is the Married Persons Property Act, which states that since 1929 marriages in Zimbabwe are out of community of property. Spouses in a marriage out of community of

property are legally entitled to own and dispose of property in their individual capacities. The import of having marriages out of community of property is that a spouse is allowed to own, in his or her personal capacity, movable and immovable property and any other rights or interests of value. If a spouse has immovable property registered in his or her name, be it the house used as the matrimonial home, he or she has the right to dispose of it by will to whomsoever he or she chooses. The right of a property owner to dispose of his or her estate by will to whomsoever he or she chooses is one of the rights constituting ownership of property. In *Marckx* v *Belgium* 13 June 1979 Series A No. 31, the European Court of Human Rights observed that "the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property".

Such are the factual and legal implications of marriages out of community of property. It is not correct to assert that a spouse, by virtue of a marriage, is entitled to own property that is owned and registered in the name of the other spouse. Marriage does not afford such rights. The case would be different if marriages in Zimbabwe were in community of property, as property would be owned as common property by virtue of the type of marriage entered into by the parties.

In the *Chiminya* decision the court interpreted s 5(3)(a) of the Wills Act to mean that a surviving spouse is entitled to a share in the deceased's estate. This approach is contrary to the proper construction of the relevant provisions. Subsections (1) and (2) of s 5 of the Wills Act provide for freedom of testation and give full authority to a testator to transfer, dispose of or bequeath his or her assets freely to whomsoever he or she chooses. Section 5(3)(a) of the Wills Act sets the parameters that a testator must follow in the exercise of his or her right of testation.

A will, as a legal document, derives its validity from compliance with the provisions of the statute prescribing the requirements of a valid will. A will which complies with all the

requirements of validity cannot be set aside on the basis of extraneous matters, such as that its execution has the effect of disinheriting the surviving spouse. The law of wills imposes an obligation on all who deal with the deceased's property, including the surviving spouse, to give effect to the intention of the deceased regarding the disposition of his or her property as expressed in a valid will.

A court is bound to act in terms of the law. It cannot set aside a valid will because it thinks that the testator ought to have bequeathed his or her property to the surviving spouse. Section 5(3)(a) of the Wills Act does not require a husband or wife to bequeath his or her property to the surviving spouse.

Different statutory provisions are enacted to deal with different, although sometimes related, subject-matters. Provisions of different statutes are never interpreted to contradict each other. It was improper on the part of the court *a quo* to use the provisions of s 3A of the Deceased Estates Succession Act regulating intestate succession to invalidate a will expressly spelling out in terms of the relevant statute how the deceased's property was to be disposed of after his death.

It is difficult to understand how the court *a quo* found s 3A of the Deceased Estates Succession Act to be relevant in the interpretation and application of s 5(3)(a) of the Wills Act. The disposition of property of a spouse who dies without having written a will is not regulated by a "law governing the property rights of married persons". Section 3A of the Deceased Estates Succession Act governs the disposition of property after dissolution of marriage of spouses through death.

The court *a quo* made two erroneous assumptions. The first was that there is a right of inheritance guaranteed to a spouse, married out of community of property, to inherit the other

spouse's estate. The second assumption was that the surviving spouse is protected against the deceased spouse. These assumptions appear to have influenced the decisions that follow the reasoning in the *Chiminya* decision. The court *a quo* and the first respondent were unable to point at a specific provision that confers a right upon a spouse, married out of community of property, to inherit the other spouse's property. Section 5(3)(a) of the Wills Act does not confer such a right. It only refers to rights that are found elsewhere.

On the question whether one spouse is entitled to succeed to the other partner's estate after his or her death, it must be recognised that two autonomous individuals are involved in a marriage. This basic realm of freedom of both partners encompasses the right to decide what to do with one's own estate.

Counsel for the first respondent argued that, in interpreting s 5(3)(a) of the Wills Act, a court must be alive to the provisions of s 326 of the Constitution. The section provides that customary international law is part of the law of Zimbabwe unless it is inconsistent with the Constitution or an act of Parliament and that every court must always have regard to customary international law in interpreting the law. To this end, she argued that the court ought to adopt an interpretation of s 5(3)(a) of the Wills Act which is consistent with the principle of gender equality.

The right of every person to freely dispose of his or her property binds all governmental institutions, including the courts, because it is a fundamental right enshrined s 71(2) of the Constitution. The Constitution guarantees this fundamental right to every person in Zimbabwe, regardless of gender. A woman or a man, as the case may be, is guaranteed the right to equal protection of the law to dispose of his or her property in the manner he or she chooses.

The fundamental principle of equality of men and women, which forms the basis of the guarantee of property rights under s 71(2) of the Constitution, is given effect to by the provisions of s 5(1) of the Wills Act. Section 71(2) of the Constitution gives effect to similarly worded provisions of international human rights instruments.

Article 17(1) of the Universal Declaration of Human Rights (1948) ("UDHR") declares that everyone has the right to own property alone as well as in association with others. On the basis of the universal principle of equality of men and women, a spouse has equal rights, regardless of gender or marital status, to acquire, own and dispose of his or her property.

Article 2(a) of the CEDAW requires States Parties to embody the principle of equality of men and women in their national constitutions or other appropriate legislation. States Parties are required to ensure both formal and substantive gender equality by putting in place legislative measures aimed at the elimination of gender norms and gender roles that feed cultural and traditional gender stereotypes that deny women access to property rights.

Article 16(1)(h) of the CEDAW provides that on the basis of equality of men and women States Parties must ensure "the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration". The right to own, manage, enjoy and freely dispose of property is central to a woman's right to enjoy financial independence. The right is gender neutral.

Article 6 of the Maputo Protocol imposes an obligation on States Parties to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. States Parties are required under Article 6(j) to enact appropriate national legislative measures to

guarantee that "during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely".

Zimbabwe is a party to the applicable international human rights instruments. Ensuring, in accordance with the provisions of s 71(2) of the Constitution and s 5(1) of the Wills Act, that a person married out of community of property has, on the basis of equality of men and women, the right to dispose of the property he or she owns by will to whomsoever he or she chooses is consistent with the obligations imposed on the State by the relevant international human rights instruments.

The first respondent also sought to rely on s 26 of the Constitution, which provides as follows:

> **"26 Marriage**
>
> The State must take appropriate measures to ensure that —
>
> (*a*) – (*b*) ... ;
>
> (*c*) there is equality of rights and obligations of spouses during marriage and at its dissolution; and
>
> (*d*) in the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses."

In the *Majuru* case *supra*, MWAYERA J said the following:

> "Further the Constitution makes it clear that in the spirit of protection of marriages and family the spouses have equal rights and obligations during marriage upon divorce and at death.
>
> Section 26 (c) and (d) of the Constitution of Zimbabwe Amendment (No 20) Act 2013 is instructive ... .
>
> To then turn around and sanction a will which disinherits and dispossesses the surviving spouse of not only assets but the matrimonial home would in my opinion not only be contrary to public policy but *ultra vires* the Constitution and thus invalid.

> It is common cause the applicant is the surviving spouse of the late Caroline Majuru. It is also not in dispute that as a surviving spouse the applicant qualifies as a beneficiary to the late Caroline Majuru's estate. Further from evidence it is apparent property distributed by way of will included that to which the applicant has rights. The dispossession of the applicant in the circumstances is contrary to public policy and unlawful rendering the will invalid."

If, as found in the *Majuru* case *supra*, the applicant had established as a fact that property belonging to him had been included in the assets disposed of by will by the deceased as her estate, the disposition would have been void in light of the provisions of s 5(3) of the Wills Act. In that case the learned Judge reached a correct conclusion on wrong reasons. In terms of s 5(1) of the Wills Act, one can only dispose of what one has acquired and owns as his or her property.

The decisions of the High Court that followed a different line of reasoning from the *Wakapila* decision have had the effect of denying persons married out of community of property the enjoyment of the right to dispose of their property by will as long as they do not dispose of the property to the surviving spouse. The erroneous view of the law of testamentary succession as applied to a surviving spouse in the event of dissolution of a marriage through death is founded on the belief that s 26(d) of the Constitution prohibits disinheritance of a spouse by the deceased.

The judgments concerned are invariably couched in language directed at finding fault with the will made by the late husband or wife. The will is then set aside to create a situation in which the deceased's estate devolves to the surviving spouse as an intestate estate in terms of s 3A of the Deceased Estates Succession Act. What is presented as judicial protection of the surviving spouse is in fact evidence of failure to appreciate the purpose and effect of s 26(d) of the Constitution.

A reading of s 26(d) of the Constitution in its proper context reveals that it is not a legislative provision for direct enforcement by the courts. It does not confer rights on individuals. It is found in *Chapter 2* of the Constitution in which national objectives are set out. In that context, s 26(d) of the Constitution contains an important objective intended to guide the State in the formulation and implementation of laws relating to the specific area of dissolution of marriage through death.

The Constitution identifies the protection of a surviving spouse in the event of dissolution of a marriage through death as a legitimate objective, which the State must secure by appropriate measures it must take. By those appropriate measures the State must ensure that provision is made for the necessary protection of surviving spouses regardless of gender. Section 26(d) of the Constitution imposes a constitutional duty on the State to take appropriate measures for the provision of the necessary protection of surviving spouses in the event of dissolution of a marriage through death.

The State must take the appropriate measures to provide for the necessary protection of a surviving spouse in the event of dissolution of a marriage through death by the exercise of the constitutional power created for the purpose. This is a power, the proper exercise of which would ensure that the measures adopted are appropriate in the sense of being reasonable in the circumstances of dissolution of a marriage through death and are proportional to the objective of providing necessary protection to a surviving spouse.

The appropriate measures adopted by the State to provide the necessary protection of the surviving spouse in the event of dissolution of a marriage through death must constitute objective standards applicable to surviving spouses in similar circumstances. Appropriate

measures for the provision of the necessary protection of a surviving spouse must, for example, take into account the fact of dissolution of a marriage through death of an intestate spouse or a testator. Measures taken by the State for providing the necessary protection of a surviving spouse in the event of dissolution of a marriage through death of an intestate spouse would be different from those for the necessary protection of a surviving spouse in the event of dissolution of a marriage through the death of a testator.

The rights and obligations arising from the law of succession in the event of dissolution of a marriage through death of a testator would be taken into account by the State in the formulation of appropriate measures for the provision of the necessary protection of a surviving spouse in the circumstances of testamentary succession. The purpose of the appropriate measures taken by the State in the circumstances, in terms of s 26(d) of the Constitution, would not be the reversal of the exercise by the deceased of the right to dispose of his or her estate by will to whomsoever he or she chooses. The intended purpose and effect of the measures taken by the State would be the provision of the necessary protection of the surviving spouse from the negative effects on his or her interests of the testamentary disposition without undermining its validity.

The use of the words "appropriate measures" and "necessary protection" in s 26(d) of the Constitution prescribes a standard that the organ of the State under the constitutional obligation to take the necessary measures has to meet. In the absence of appropriate measures taken by the organ of the State with the power to do so under the Constitution, a court may not apply the provisions of s 26(d) of the Constitution as if it contained the appropriate measures for the provision of the necessary protection of a surviving spouse in the event of dissolution of a marriage through death.

The question for determination by the court *a quo* was not what the obligations of the State were and whether the State had fulfilled them. The determination of the question would have necessitated the interpretation and application of s 26(d) of the Constitution. The question for determination was whether the deceased had made a valid will. The provisions of s 26(d) of the Constitution do not prohibit a spouse from disposing of his or her property by will to a person other than the surviving spouse.

The provisions of s 26(d) of the Constitution had no bearing on the determination of the question before the court *a quo*. There was no need to have regard to the provisions of s 26(d) of the Constitution in interpreting the provisions of s 5(3)(a) of the Wills Act.

The legal position is that a spouse in a marriage out of community of property has no right to inherit the other spouse's property until he or she has by will disposed of the property to him or her. Where a spouse dies without leaving a will, the right to inherit the free residue of the estate devolves to the surviving spouse in terms of legislation. Section 3A of the Deceased Estates Succession Act provides for the succession of the surviving spouse to the free residue of the estate of the spouse married out of community of property who died intestate. Section 26(d) of the Constitution was given effect to by the State in enacting the provisions of s 3A of the Deceased Estates Succession Act. The Deceased Estates Family Maintenance Act [*Chapter 6:03*] is another example of a statute enacted by the State in the performance of the duty imposed on it under s 26(d) of the Constitution.

Article 21 of the Maputo Protocol on the right to inheritance imposes on Zimbabwe an obligation, the performance of which would manifest in the fulfilment by the State of the constitutional duty imposed under s 26(d) of the Constitution. The Article provides:

"Right to Inheritance

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it."

Article 21(1) of the Maputo Protocol is, of course, concerned with the rights of the widow in the event of dissolution of a marriage through death of the husband. It does not concern itself with the right to inheritance of the widower. What is important for the purposes of the fulfilment of the constitutional duties by the State, which is based on the principle of gender equality, is that the first part of Article 21(1) of the Maputo Protocol has been partly implemented by Zimbabwe through the enactment of s 3A of the Deceased Estates Succession Act.

The second part of Article 21(1) of the Maputo Protocol is based on the principle that the appropriate measures taken by the State for the provision of the necessary protection of a surviving spouse in the event of dissolution of a marriage through death must respect and protect the rights and obligations arising from the testamentary disposition of the deceased's estate. The provision for the widow remaining in occupation of the matrimonial house in which she lived with her husband immediately before his death until she remarries must take into account the fact that the widow may not be the owner of the matrimonial house. It must also take into account the fact that the deceased may of right have left a will by which he disposed of his estate, including the matrimonial house, to a person other than the widow.

It is clear that Article 21(1) of the Maputo Protocol recognises the fact that States may have to respect the principle of freedom of testation with its consequential negative effects on the interests of the widow, which they may ameliorate through the provision to her of the right to occupy the matrimonial house until she remarries notwithstanding the testamentary

disposition disinheriting her of the house. The right to succeed to the deceased's estate remains vested in the legatee or heir who then takes dominion when the widow dies or remarries.

The only difference between the measures Article 21(1) of the Maputo Protocol requires States Parties to take and those required to be taken by the State under s 26(d) of the Constitution is that the latter measures would apply to both widows and widowers. Of importance, for the purposes of the determination of the questions raised by the appeal, is the application of the fundamental principle that the exercise by the deceased of the right to dispose of his or her estate by will to whomsoever he or she pleases must be respected.

The argument by the first respondent's counsel was that women as a vulnerable group must be protected and that inheriting property that belongs to their husbands is one way through which such protection can be given. The first respondent is a property owner who holds real rights in immovable property and may not be deemed to be in the class of economically vulnerable people. In any event, a case can be made to the effect that the best way to protect members of economically vulnerable groups in society is to endow them with the power to dispose of their hard earned assets in the way they please regardless of gender or marital status.

DISPOSITION

To deny a person married out of community of property the right to dispose of his or her property by will to whomsoever he or she chooses is to erode the foundation on which the doctrine of freedom of testation lies.

The decisions of the High Court based on the proposition that a person married out of community of property may not dispose of his or her estate by will to whomsoever he or she chooses, being allegedly bound to leave the property to the surviving spouse, are inconsistent

with the fundamental right in s 71(2) of the Constitution and s 5(1) of the Wills Act [*Chapter 6:06*].

In the result, it is ordered that -

"1. The appeal succeeds with costs.

2. The decision of the court *a quo* is set aside and substituted with the following:

'i) The plaintiff's claim be and is hereby dismissed with costs.'"

GARWE JA: I concur

MAKARAU JA: I concur

GOWORA JA: I concur

BERE JA:

F G Gijima & Associates, appellant's legal practitioners

Mandizha & Company, first respondent's legal practitioners