REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO THE JUDGES: ~~YES~~ / NO
(3) REVISED.

Signature .....

Date....2024/10/29

CASE NO:4969/2021

In the matter between:

LOVENESS MUKOYI — **APPLICANT**

And

CHIPO CHAROVA N.O — **1ST RESPONDENT**

CHIPO CHAROVA — **2ND RESPONDENT**

MASTER OF THE HIGH COURT — **3RD RESPONDENT**

THE MINISTER OF HOME AFFAIRS — **4TH RESPONDENT**

JUDGMENT

MONENE AJ

INTRODUCTION

1. In the midst of the Zimbabwean war of liberation or the Second Chimurenga also referred to in literature as the Rhodesian Bush War, which spanned the period 1964 to 1979, Misheck Mahohoma Charova (Charova), a black recruit to Ian Smith's Rhodesian Army married the Applicant, then a 17 year old young woman, by customary rites in 1970.

2. The applicant set up residence with Charova in Masvingo and their marriage was blessed with two children, a son, Tapson in 1971 and Function, a daughter in 1973.

3. Clearly owing to him being a black member of a white Army resisting the liberation of blacks, it was never safe for Charova to stay with his wife for any extended length of time at their rural homestead such that his wife, the applicant, at times had go stay with relatives and most times kept the home

fires burning alone with Charova either at Rhodesian Army barracks or in the bushes exchanging fire with Zimbabwean freedom fighters.

4. At the dawn of Zimbabwean freedom in 1980 Charova, a member of the losing army was, despite not being a South African, ostensibly "seconded" to the South African Defence Force of Apartheid South Africa which shared affinity with the defeated Ian Smith Army.

5. Having now somehow become a South African in the South African Army, Charova met and courted the second respondent, a fellow member of the South African Army also of Zimbabwean descent, with whom he established a home in Phalaborwa, a town in the north eastern regions of South Africa.

6. In the meanwhile Charova had also acquired property in Pretoria, a property where later the applicant would be able to visit, particularly around the eighties. In the meantime Charova's children with the applicant could visit his home in Phalaborwa where the second respondent literally raised them.

7. The applicant was aware of the romantic presence of the second respondent in Charova's life, alive to the role the second respondent was playing in bringing up her kids and in her own words considered her to be her husband's other wife.

8. Trouble befell this guarded serenity that was Charova's life when he, on 28 September 2016 died at his Masvingo home with the applicant, having returned to his customary wife when he fell sick. This trouble was over what was to become of his estate in both Zimbabwe and South Africa but particularly in South Africa where the second respondent was appointed executrix of Charova's estate by the third respondent on the basis of her production of her "civil" marriage certificate to Charova, ostensibly dated 1978.

9. This trouble manifested as an application before this court where the applicant sought to have her customary marriage to Charova("the deceased") upheld over the "civil" marriage of the second respondent to Charova and consequent thereon having the appointment of the second respondent as executrix set aside and herself installed in that position. That application was opposed by the first respondent in her official capacity as executrix as well as the second respondent in her personal capacity on the basis that the second respondent was the only lawfully wedded wife of Charova. The third and fourth respondents offered no resistance to the application

10. When this application served before Sikhwari AJ 's opposed motion roll, the Learned Justice employed Uniform rule 6(5) (g), referring the matter to oral evidence and crystalizing the questions on which the parties were to lead evidence as follows:

10.1 Whether this court has jurisdiction to hear the application.

10.2 Whether the applicant's marriage to the deceased is valid.

10.3 Whether the first respondent's marriage to the deceased is valid.

10.4 Whether the appointment of the first respondent as executrix of the estate of the deceased should be upheld or set aside.

11. This referral to oral evidence served before this court on 11 and 12 June 2024.

12. However, there were two preliminary issues which needed determination prior hearing of the oral evidence, to wit; the jurisdiction issue as captured in the questions referred to oral evidence and a point taken by the applicant that the first respondent's answering affidavit was defective to a point of not being an affidavit before court.

13. I found that this court has jurisdiction to hear this application and determined that the answering affidavit substantially complied with the requirements of an affidavit.

14. I turn now to, before delving into the merits of the balance of the questions referred to oral evidence, briefly give reasons why I found this court to have jurisdiction and determined the answering affidavit to be compliant.

THE JURISDICTION POINT

15. I ruled that this court has jurisdiction to hear this application on account of the following considerations:

15.1 In terms of section 165(1) of the constitution of this country, judicial authority vests in our courts. The questions raised in this application, are although involving issues around foreign marital law, intertwined and interrelated with administration of estate issues emanating in the main from property situated in Phalaborwa which is within the geographical jurisdiction of this court. Furthermore, both the deceased and the second respondent appear to have been South African citizens resident ordinarily in Phalaborwa. It is simply not available to this court to fold its arms or wash them in biblical Pontius Pilate fashion because there is mention of some foreign law in the dispute.

15.2 It is trite that a court on these shores is competent when dealing with *lis* attracting the employ of foreign law to determine that *lis* in accordance with that foreign law. Litigation involving foreigners and/or transactions concluded in foreign land cannot be ousted from our courts' jurisdiction simply because that litigation calls for the application of foreign legal instruments. In fact, from the first and second respondents' own heads of argument it is clear from authority they refer to such as ***L.E v L.A (1884/2018) [2024] ZAGPJHC 104(9 February 2024)*** and ***Bell v Bell 1991(4) SA 195(W)*** that faced with litigation involving foreign law but prosecuted by litigants on our shores, our courts have jurisdiction and may

decide such matters by applying relevant foreign laws to the extent necessary.

15.3 More to the point and apt for current purposes, in ***Beninia Chitima v Road Accident Fund (18996/2011) Western Cape Division (15 December 2011)*** the court applied Zimbabwean law on customary marriages to entitle a spouse of a deceased person to claim damages arising from a road accident.

15.4 As I understand the lack of jurisdiction point raised by the first and second respondent from only one sentence of their answering affidavit as they did not give evidence on any question before me, this court's jurisdiction is assailed because it is said that it is not empowered to apply the "*lex loci celebrationis* and the laws of Zimbabwe to determine the validity of a customary marriage concluded in Zimbabwe." Beyond this single line nothing was stated by the first and second respondents in sustenance of their alleged *point in limine*. This from the respondents when in the same argument they argue Zimbabwean law by contesting the validity of the applicant's marriage to the deceased on the grounds of purported non-compliance with the Customary Marriages Act of Zimbabwe. I do not see merit in their point at all as it is established that the lex loci celebrationis or marital regime of the place where a marriage was celebrated is employed when dealing with disputes relating to foreign law.

15.5 As is evident from what I alluded to immediately supra, this preliminary point taken by the first and second respondents is completely without merit. I shudder to think that perhaps they were suggesting that our courts should, when faced with a dispute in this country with the slightest flavour of foreign law in it, sent the litigants packing with a directive that they must go determine that "foreign portion" of the dispute in another country and perhaps come back later. That is simply not the law.

16. It was for these reasons that I dismissed the *point in limine* on jurisdiction and in the same breath answered the first of the questions referred to oral evidence by Sikhwari AJ in the positive.

WHETHER THE ANSWERING AFFIDAVIT IS COMPLIANT

17. I found no merit in the applicant's point that because a wrong pronoun was used in that affidavit then there was no answering affidavit before the court.

18. A simply typographical error of using "he" instead of "she" or vice versa in a situation where the gender of the deponent or person referred to is clear and not at issue is a typical storm in a teacup which should not be entertained to any degree.

19. Indeed in the unreported matter of ***Capriati v Bonnox(Pty)Ltd and Another(101816/2016) [2018] ZAGPPHC 345(10 May 2018)*** the court found

that it had a discretion to condone non-compliance with the regulations on the deposition to affidavits where there was lack of clarity on the gender of the deponent to an affidavit.

20. In this division the Full Court in ***Q4 Fuel (Pty) Ltd v Ellisras Brandstof En Olie Verspreiders (Pty) Ltd and Others (HCAA 08/2021) [2021] ZALMPPHC 81(11 November 2021)*** per Kganyago J gave a clear exposition of the law on this aspect as being that if there is substantial compliance with the regulations then an affidavit must be admitted and that generally trivial condonable errors should not be magnified unnecessarily in favour of non-admittance of affidavits as non-compliant.

21. I am in no doubt that the deponent to the answering affidavit was the second respondent and that she is female. Reference to her as "he" is clearly a typographical error which neither subtracts from the substantial compliance of the affidavit nor confuses any reasonable person.

22. Having no appetite to turn molehills into mountains, I found the use of the wrong pronoun to be condonable and dismissed the applicant's *point in limine*.

THE ORAL EVIDENCE LED BEFORE ME

23. Despite the matter having been referred to oral evidence before me, only the applicant testified. No witnesses were called by the first and second respondent to help attend to the four questions referred to oral questions in terms of uniform rule 6(5)(g).

24. In her evidence the 71 year-old applicant gave a detailed uncontroverted narration of how she, as then a teenager, met the deceased in the late sixties, how they fell in love and how her marriage to the deceased was customarily negotiated, concluded and celebrated according to hers and the deceased's customs and how they lived together and apart up to the deceased's death and burial in Masvingo as generally accounted to in the introduction to this judgement.

25. Cross-examination of this witness did not challenge her evidence that she was married customarily in 1970 at all. No wonder Mr Mureriwa, counsel for the applicant, correctly decided to not call the surviving very aged members of the 1970 marriage delegations who had been brought from Zimbabwe to confirm the existence of the marriage.

26. What the cross-examination of the applicant seemed to concentrate on appeared to be the teenage age of the applicant at the conclusion of the marriage in 1970, the allegation that she might, over the years, have married some person known as Billy Chipangwe on which no evidence whatsoever was adduced, and the half-hearted version that she could not have visited the deceased in Pretoria and that therefore maybe she was not in touch with the deceased as she claimed to have been. Completely peripheral and irrelevant considerations these were regarding the core dispute in this matter.

27. She was a very credible witness who conceded easily to pieces of evidence which may ordinarily be deemed to be favourable to the second respondent. For example, she readily accepted with clear appreciation that the second respondent had helped take care of and raise her children with the deceased in Phalaborwa. She also readily acknowledged that she knew about the existence of the second respondent in the deceased's life, referring to the love relationship between the deceased and the first respondent without worry as "*what men do*" and unselfishly, magnanimously and gracefully saying, "*I accepted over the years that me and her were both his wives.*"

28. This court was most impressed with this semi-literate old woman's evidence which, in my view, gave all in court timeless and appreciable insights into African custom and the ancient selfless, forgiving love of a common people.

29. With the applicant closing her case with this evidence, the first and second respondents decided, as already mentioned above, to close their case in this rule 6(5)(g) referral to oral evidence without leading any evidence.

30. I thus must decide this application based on the full set of affidavits before me and the only oral evidence led.

THE PARTIES' SUBMISSIONS IN THE PAPERS AND IN ARGUMENT

31. I was invited by Mr Mureriwa on behalf of the applicant to find that the applicant's marriage was a valid marriage on account of the following considerations:

31.1 That applicant's oral evidence on the conclusion of that customary marriage is the only evidence before and has not been controverted.

31.2 That there is nothing placed before this court to suggest that either according to Zimbabwean custom and/or customary law or any other law the age of 17 of the applicant as at 1970 invalidates the marriage.

31.3 That even comparatively, our Recognition of Customary Marriages Act 120 of 1998 in this country does not currently compared to 1970 rural Zimbabwe, absolutely bar customary marriages involving 17-year-olds because they can marry with the further consent of parents.

31.4 That at worst the marriage of the applicant to the deceased can be said to be putative, the consequences of which, according to ***Zulu v Zulu and Others 2008(4) SA 12 D***, would be for the marriage to be treated as valid if on the estimation or view of the parties involved it is valid.

31.5 That the validity of the applicant's marriage to the deceased, which predates that of the second respondent, will, by operation of law, invalidate that of the second respondent to the deceased.

31.6 That at factual level, the gaps in the version of the second respondent regarding where her civil marriage to the deceased was concluded, why the certificate of the alleged marriage was only generated for the first time post the deceased's death when the marriage was concluded in 1978 and why the certificate did not have the deceased's identification numbers remained gaping as the second respondent did not lead any oral evidence.

32. Seeking to persuade me to hold that the second respondent's marriage to the deceased was the only valid marriage counsel for the first and second respondents urged to magnify the following considerations:

32.1 That section 3 of the Customary Marriages Act(Chapter 5: 07) of Zimbabwe provides that customary marriages are not valid unless solemnized by a

marriage officer in terms of section 7 thereof. It was contended that the marriage of the applicant and the deceased was not solemnized and as such was invalid.

32.2 That that marriage of the applicant was also invalid on account of the applicant having been married at 17 years of age.

32.3 That the absence of a place where the marriage of the second respondent to the deceased occurred on the second respondent's marriage certificate is not on its own decisive to invalidate the marriage as the document submitted was the best documentary proof available.

32.4 That if the court found the second respondent's marriage to be invalid then it must find it to be a putative marriage.

32.5 That if everything is against the second respondent then this court should, in terms of section 172(1)(b) of the constitution, exercise its discretion to arrive at a just an equitable order in the light of the second respondent possibly having enriched the deceased's estate while she laboured under the impression that she was validly married to the deceased.

THE LAW, ITS APPLICATION AND ANALYSIS

33. Key to the question of the validity of the applicant's marriage, an instructive and very helpful section of the Zimbabwean Administration of Estates Act (Chapter 6:01) is section 68(3) thereof which provides that:

"A marriage concluded according to customary law shall be regarded as a valid marriage for the purpose of this part notwithstanding that it has not been solemnized in terms of the Customary Marriages Act (Chapter 5:07)"

34. This statutory provision is helpful regard being had to the fact that at the heart of the dispute which underlies the competing declarator prayers in this matter, is the administration of the estate of the deceased and that in Zimbabwe, for purposes only of administration of estates, the applicant's customary marriage would, even if not solemnized, be recognized as a valid marriage.

35. In ***Beninia Chitima v Road Accident Fund("Beninia")*** referred to *supra* already, Bozalek J, although falling short of declaring a none solemnized Zimbabwean customary union to be a valid marriage and holding out that only Zimbabwean courts can appropriately exercise that power, declared that that unregistered, or none solemnized customary marriage gave rise to rights to the surviving spouse in South Africa.

36. In this case however, the situation is clearer than in ***Beninia*** regard being had to section 68(3) of the Administration of Estates Act (Chapter 6:01) of Zimbabwe referred to verbatim *supra*. Surely this section puts paid to the respondents' attack on the validity of the marriage on the ground of not being solemnized.

37. There is no provision in the Zimbabwean marriage legal instruments which sets a particular age as a marriage age for the spouses in customary marriages, let alone female parties to those marriages. If anything, the Customary Marriages Act of Zimbabwe (Chapter 5:07) appears to provide for a requirement that there be guardians for all the women at the solemnization of the customary marriages regardless of their age. An attempt by the respondent at impugning the applicant's marriage to the deceased based on her age in 1970 when she got married is thus misplaced in Zimbabwean law. It would seem, as argued by counsel for the applicant, such an attack would also have failed if our Recognition of Customary Marriages Act was to find application, that is, if there was proof that the necessary consents of the young woman and her parents were obtained.

38. It seems to me that the question to whether the applicant's marriage to the deceased is valid should be answered in the qualified positive covered by section 68(3) of the Administration of Estates(Chaper 6:01) of Zimbabwe as well as by the rationale of the **Beninia matter** to the effect that even if not registered, a Zimbabwean marriage should in the spirit of our constitution give rise to rights of such a marriage at least in so far as it concerns the enjoyment of the panopaly of constitutional rights and protections on our shores.

39. Like in **Beninia**, the applicant's description of the applicant's customary marriage practices testified to in this matter mirror those of South Africa. In this

country constitutional and statutory protection is given to spouses married according to customary law, more so to women. Like the protection of the customary union wife's loss of support rights in **Beninia**, the 71-year-old applicant *in casu* deserves protection regarding rights arising from her 1970 customary marriage to the deceased, even if this court, not being a Zimbabwean court, may not go the whole mile to declaring her unregistered marriage valid for all purposes. She can only be regarded as married for the purposes of the administration of the deceased's estate as counselled by Zimbabwean law.

40. The above said, then ***Monyepao v Ledwaba and Others(1368/18) [2020]* ZASCA("Monyepao")** which held that any marriage which comes subsequent to a pre-existing or earlier customary marriage is invalid kicks in.

41. This means that the upholding of the applicant's marriage to the deceased as a valid marriage for purposes of administration of estates, notwithstanding it not having been solemnized, pursuant to section 68(3) of the Administration of Estates Act (Chapter 6:01) invalidates the purported marriage of the second respondent to the deceased, at least for purposes of the administration of the deceased estate of Charova.

42. In the unreported matter of ***Sedinyane v Malatji and Others (10756/2023) 2024 ZALMPPHC 88(8 August 2024)*** dealing with a dispute on the validity of a customary marriage pitted against a "civil" marriage, albeit not

involving only *perigrinus* of South Africa, this court, counselled by the SCA in **Monyepao** made the following remarks which find a qualified application again in casu:

"*[22] Taking a leaf thus from the SCA matters of* ***Netshituka and Monyepao*** *referred to supra, the question is what to make of the "civil marriage" of the first respondent to the deceased which, in my view, clearly superimposed itself, through the unfortunately too regular conduct of culturally bombed persons like the deceased, onto a subsisting customary marriage of the applicant and the deceased. It is clearly, as the law stands, a nullity ab initio and should quite clearly be so declared. A consequence of that declaration of nullity means therefore that all benefits or rights which accrued from that marriage that never was, like the appointment of the first respondent as executrix of the estate of the deceased, should fall victim to the same sword.*

43. I thus have no hesitation in declaring the second respondent's marriage invalid, a consequence of which will be that her appointment as executrix of the late Charova's deceased estate must also be said aside as it arose from a premise that the second respondent was the deceased's wife.

44. Even if I could be wrong in that finding, which I have a view I am not, there are in, my view, further insurmountable hurdles in the papers and in the matter as appeared before, which do not favour a finding upholding the second respondent's marriage as valid. These are the following:

44.1 The document purporting to be the second respondent's marriage certificate issued by the fourth respondent is a picture of doubt, mystery and incredulity in that:

44.1.1 It does not state where the marriage took place. Yet the second respondent decided not to take the stand to clarify this aspect orally and perhaps even bring an updated better, more informative copy.

44.1.2 It was issued for the first time, as it seems, post the death of the deceased in 2016 although the marriage allegedly took place some 28 years ago in 1978. The second respondent did not take the opportunity to testify on this and to explain why she would not have had a copy of her marriage for close to 28 years.

44.1.3 The purported marriage certificate does not even have the deceased's identification number which begs the question whether in 1978 he was already a South African citizen, seeing that the date of issue of this member of the South African Defense's Identity document copy is in 1996. Yet the second respondent declined the opportunity provided by the rule 6(5)(g) referral to oral evidence to clear this and all other cobwebs of uncertainty around her alleged marriage to the deceased.

44.2 As I understand the papers and the uncontroverted evidence of the applicant, the deceased would only have come to South Africa upon the defeat of the Rhodesian army and the dawn of freedom in Zimbabwe in 1980. He thus could not have been in South Africa, at least legally enough

to even marry "civilly", in 1978. I looked forward to the second respondent testifying about this aspect and leading further testimony thereon, but such evidence never arrived. That is despite the referral of the question of the validity of her marriage to oral evidence by Sikhwari AJ.

45. Accordingly, I find that even without recourse to the *lex loci celebrationis* of the applicant's marriage to the deceased, the validity of the second respondent's marriage to the deceased is in serious doubt. It is doubtful to this court whether the second respondent would, on the facts before me, have succeeded in getting a declarator that she was married to the deceased before any court even if she had been unopposed.

46. I noted the invitation by Mr Moyo, counsel for the respondents, in his eloquently laid out heads of argument and again in submissions before me, to find some middle ground and order joint or co-executorship of the deceased's estate between the applicant and the second respondent. I decline that invitation on the strength of the following considerations:

46.1 The second respondent did not take this court into her confidence and thus failed to clarify a lot of questions at least around her marriage to the deceased and at most around how she and the deceased managed to be South Africans and members of the South African army while they were Zimbabweans in the hey day of Apartheid in this country.

46.2 Hers cannot be found to be some form of putative marriage in circumstances where she failed to testify and indicate how she had been ignorant of an impediment or defect at the conclusion of her marriage and during its subsistence.

46.3 The applicant was benevolent and receptive of the second respondent and had she not hardened her attitude and accepted the ubuntu of the applicant, there clearly, in my view, would have been an informal way of them co-operating as the two women who had been in the deceased's life. A traditionally negotiated alternative remedy may, in this court's view, having observed the magnanimity of the applicant before this court, still be within reach of the second respondent. She just must, if she may, reach out to the already extended hand of the African humanity from the applicant.

46.4 Should it be that any portion of the deceased has been unduly enriched at her expense and to her prejudice over the years, she should have legal recourse to redress that.

47. Much as I am inclined to find for the applicant to the extent indicated *supra*, I am disinclined to order the third respondent to appoint her as executrix of the deceased's estate. Such appointments are administrative in nature and the court has no business needlessly usurping administrative functions and ordering whom to appoint. Given the orders to be made in casu in favour of the applicant, it remains available for her to forward another person of her choice, for example, a child of hers to be appointed executor, more so given her

advanced age. Such a secondment or recommendation by her may even help in breaking new ground in ubuntu-inspired equity in the distribution of the estate particularly seeing that both children likely to be seconded as executor or executrix were mothered and raised by the second respondent.

COSTS

48. The applicant having achieved substantial success in this matter and the respondent having *hardly* covered herself in roses particularly as regards spurning the opportunity to give oral evidence despite the rule 6(5)(g) order, I see no reason why the traditional route of costs following the event should be deviated from.

ORDER

49. Resultantly, I make the following order:

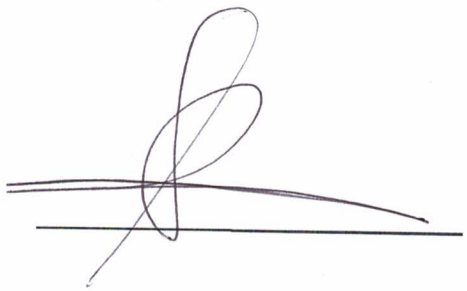
49.1 The customary marriage between the applicant and the deceased Misheck Mahohoma Charova concluded in Zimbabwe on 8 August 1970 is, for the purposes of the administration of the deceased estate in South Africa, recognized as a valid marriage.

49.2 The "civil" marriage of the second respondent and the deceased Misheck Mahohoma Charova concluded on 13 July 1978 is declared null and void and set aside.

49.3 The Letters of Executorship issued to the second respondent by the third respondent for the purposes of estate number 007695/2016, being the deceased estate of Misheck Charova, are set aside.

49.4 The first and second respondents are directed to render an account of all funds and benefits received by them from and in the deceased estate of Misheck Charova to the third respondent.

49.5 The second respondent is ordered to pay the costs of this application on a party and party scale including the costs of counsel on scale B.



MALOSE S MONENE

ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	*: 11 and 12 June 2024*
Judgment delivered on	*: 29 October 2024*
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