

**ISAAC TANTAMENI C. CHALI (Executor of the Will of the late MWALLA MWALLA)
v LISELI MWALA (Single woman) (1997) S.J. 22 (S.C.)**

SUPREME COURT
E. L SAKALA, CHIRWA AND LEWANIKA, JJ.S.
6TH MARCH AND 3RD JUNE, 1997
(S.C.Z. JUDGMENT NO. 6 OF 1997)

Flynote

Probate - Administration of a Will - non-parties to the action - the extent of the Court's power to vary the testator's Will

Headnote

The deceased was not married up to the time of his death. He had two children, a son and a daughter, the respondent. The deceased kept the Respondent in his custody and care from the time she was 11 years of age and also kept the brother up to the time of his death. The Respondent was unmarried. She had three children born out of wedlock. In addition to the two children, the deceased was survived by a mother the sole beneficiary of the Will. Under the Will the deceased left no provisions for the Respondent and her brother and further directed that in the event of his mother dying before him the Estate should devolve to his three sisters namely, Grace Kabanda of Lusaka, Pamela Tembo of Mhangura in Zimbabwe and Mrs Margaret Chipoya of Kalulushi to own the Estate jointly and equally. The deceased's death was by way of suicide. There was evidence that the deceased had had sex with the respondent resulting in her getting pregnant while at school. At the time of the deceased's death the two were not on speaking terms. The respondent challenged the deceased's Will and the High Court varied it in favour of the respondent and also included the respondent's child and brother in the order although they were not parties to the action. The appellant appealed against the High Court's decision.

Held:

- (i) According to the Rules of Practice governing joinder of parties and due to non-joinder of parties before trial of the action, other than the respondent, the learned trial judge was legally and effectively precluded from considering the interests of non parties
- (ii) The trial judge's order requiring the appellant to administer the estate "in consultation with" the respondent's advocates amounted to an appointment of an additional Administrator and should be struck out
- (iii) The first consideration before varying a Will is that the court must be of the opinion that a testator has or has not made reasonable provision for the dependant in the Will. The second consideration is that the absence of or inadequacy of reasonable provision for the dependant in the Will would cause hardship. The third consideration before making the reasonable provision is that the court may take into account all relevant circumstances.
- (iv) Section 20 Act No. 6 of 1989 is a departure from the long standing recognition of unfettered right of disposition by the testator of his property. This departure is a limited one as it only confers on the court a jurisdiction to depart from the dispositions of a testator by providing reasonable provision for certain of his dependants it is of the opinion that he had not done so himself. The court's jurisdiction to make reasonable provision for the dependant only arises if it is of the opinion, that it is satisfied, that

such provision has not been made by the testator.

Cases referred to:

1. Diamond v The Standard Bank of South Africa Limited (Executor) and Others [1965] Z.R.61
2. Simon v National Provincial Bank Limited Limited and Others [1949]2 ALL E.R. 826
3. The Attorney General v Aboubacar Tall and Zambia Airways S.C.Z. Judgment No.5 of 1995
4. Mbikusita Lewanika & 4 Others v F.J.T. Chiluba SCZ/EP/3&4 of 1996

Legislation referred to:

1. Wills and Administration of Testate Estates Act No. 6 of 1989
Authority referred to: 1
2. Order 14 Rules 1-5 of the High Court Rules Cap 50, and Order 15 Rule 4 of the White Book, 1995
3. Alleviation and Maintenance of Children Act No. 5 1995

For the Appellant: Mr. I.C.T. Chali, of Chali Chama & Company

For the Respondent: Mr. H.B. Mbushi of Ndola Chambers

Judgment

SAKALA, J.S; delivered the Judgment of the Court.

This is an appeal by the Executor of the Will of the late Mwalla Mwalla against a judgment of the High Court varying the deceased's Will. The order appealed against is couched in the following terms:

1. That the estate should be divided into two. The house left by the deceased should not be sold but should continue to generate rentals which will continue to be divided between the 3 parties. I order that half of the estate should be devolved to the deceased's mother. If she dies before the Applicant, the house should then be passed to the first child of the Applicant. Should he die, then the house should be passed to the Applicant and her brother.
2. The other half should devolve to the Applicant, her brother and her first child in the following proportions - 15% for the Applicant, 15% for her brother and 20% for the first child of the Applicant.
The Estate should be administered by Mr. Chali the Executor in consultation with Mr. Mbushi of Ndola Chambers. I order costs to be borne by each of the parties.

The facts of the case are that, the deceased was not married up to the time of his death. He had two children, a son and a daughter, the Respondent in this appeal and the Applicant in the Court below. The deceased kept the Respondent in his custody and care from the time she was 11 years of age and also kept the brother up to the time of his death. The Respondent is unmarried. She has three children born out of wedlock. In addition to the two children, the deceased is survived by a mother the sole beneficiary of the Will.

The Will was testated to on 21st January, 1996. It was common cause that under the Will the deceased left no provisions for the Respondent and her brother. It was further common cause that under the Will the deceased directed that in the event of his mother dying before him the Estate should devolve to his three surviving sisters namely, Grace Kabanda of Lusaka, Pamela Tembo of Mhangura in Zimbabwe and Mrs Margaret Chipoya of Kalulushi to win the Estate jointly and equally. The deceased's death was by way of suicide.

There was evidence by the Respondent that when she moved to her father's house, he had carnal knowledge of her resulting in a pregnancy while she was still at school. She subsequently gave birth to a boy who is deaf and dumb. According to the Respondent she could not progress in her education because of the pregnancy. She only completed grade eight. According to the Respondent her father was not co-operative with her to continue with her education but instead organised a forged certificate in her name purporting to show that she had attained 'O' levels when in fact she did not. According to the Respondent's evidence, sometime in 1987, before she became pregnant, she had complained to her mother about her father's involvement with her. Her mother reported the matter to Mpatamatu Police Station. The police interviewed him. The deceased, according to the Respondent, promised, in the presence of the police, to pay her K400,000.00 to set up a business. The Respondent further testified that on the day her father died, they were not on talking terms. And when he was making the Will in issue, he only summoned a Security Guard and a House Worker to witness it. She was not surprised that he left nothing for her. The Respondent testified in cross-examination that although she was then 27 years of age, she relied on her deceased father because of her low level of education which did not enable her to get good employment. She is now working at the hospital as a cook where, according to her, her certificate is treated with suspicion.

The mother of the deceased, the sole beneficiary of the deceased's Will, testified that she was the dependant of the deceased as much as a dependant of her other children and the three sisters of the deceased. She explained that during the life time of the deceased, she used to stay with him once in a while and that he was responsible for her treatment. She further explained that she suffers from a heart problem. After the death of her son a sum of K10 million was taken from his estate for her treatment. She explained that she was prepared to look after the respondent and her children.

After reviewing the evidence before her, the learned trial judge made several observations, among them that this was a sad case because the evidence before her disclosed that the deceased, who did a most unnatural thing to his daughter, resulting in his daughter becoming pregnant, decided to completely disregard his responsibility, and that the conduct of the deceased was not only morally unacceptable but also legally reprehensible. She refused to accept a suggestion by the appellant's counsel that the appellant had blackmailed the deceased by insisting that he was responsible for her first son. According to the learned trial judge the applicant was right to insist that the deceased, who was heartless, had to live up to his responsibilities by at least establishing a business for her. The learned trial judge also pointed out that the Respondent was right to have reported the conduct of the deceased to the Police. It was also the learned trial judge's observation that the respondent had become permanently disempowered and unable to rise to societal responsibilities.

Turning to the issue of varying the Will, the learned trial judge reproduced Section 20 (1) of the Wills and Administration of Testate Estates Act No. 6 of 1989. She then observed that she had jurisdiction to vary the Will and vary it by making reasonable provisions for the dependants. She observed that the respondent and her children as well as her brother were treated like animals by the deceased. She accepted the decision in the case of ***Diamond v The Standard Bank of South Africa Limited (Executors) and others (1)*** which according to her decided that if a person has no other serious means of livelihood other than the deceased, that person is a dependant. She held that in terms of Section 3 of Act No. 6 of 1989, a wife, husband, child or parent are dependants at law, and that a child means a child born in or out of marriage or an adopted child, conceived but not yet born. The learned trial judge was satisfied that the respondent, although aged 27 years and working, and her brother aged 25 years were dependant as well as the respondent's first born child and the deceased's mother.

On the question of the deceased not making reasonable provisions for the maintenance of the dependants and on whether hardship would be caused if no such provision were made, the court found that apart from the deceased's mother, no reasonable provisions were made for the other dependants. On the authority of the decision in **National Provincial Bank Limited and Others (2)** the learned trial judge held that the respondent be given K400,000 as a gift as promised by the deceased before he died. The court concluded by making the order set out above, the subject of this appeal.

In arguing the appeal before us Mr. Chali advanced five grounds. He also informed the court that he was, in addition, relying on the submissions he made in the court below. The first ground argued was that the learned judge erred by making orders providing for persons not parties to the action. The gist of the argument submitted on this ground was that according to the originating notice of motion there were only two parties to the action, the appellant and the respondent, this position remained the same up to the conclusion of the trial. Counsel pointed out that while Order 14 Rules 1-5 of the High Court Rules Cap 50, and Order 15 Rule 4 of the White Book, 1995 edition provide for joinder of a party, the joinder has to be made before the trial of the action. He submitted that due to the non-joinder of the persons other than the respondent, the learned trial judge was legally and effectively precluded from considering the interests of non-parties to the action. It was finally submitted on this ground that the orders made by the learned trial judge in relation to the Respondent's child and the brother were wrong and ought to be struck out.

The second ground was that the learned trial judge's orders requiring the appellant to administer the estate "in consultation with" the respondent's advocate amounted to an appointment of an additional administrator not justified in the circumstances of the case. Counsel pointed out that there was no application or prayer in the originating notice of motion before the learned trial judge for the appointment of an additional executor or administrator. Mr. Chali submitted that in these circumstances the order made by the learned trial judge that the appellant should administer the estate "in consultation with" the respondent's advocate ought to be struck out.

The third ground was that the learned trial judge's decision of varying the will was contrary to the letter and spirit of the provisions of the Wills and Administration of The Estates Act No. 6 of 1989 and was unjustified in the circumstances of the case. In arguing this ground Mr. Chali referred the court to the statutory definition of "dependent" and "child" as found in section 3 of Act No. 6 of 1989 and section 2 of the Alleviation and Maintenance of Children Act No. 5 1995. Counsel submitted that under these statutes the respondent was effectively excluded as a "dependant" on account of the fact that she was a working person with means of her own and also on account of her age given as 27 at trial. Counsel pointed out that under section 20 (2) of Act No. 6 of 1989 matters for consideration before varying the terms of a Will are "children" under 18 years or are in school or disabled. Counsel further pointed out that other important matters as provided under section 21 of the Act are the testator's reasons for not making any particular provision for a dependant; the past present and future capital or income of such dependant; and the dependant's conduct in relation to the testator. Mr. Chali submitted that on the evidence on record, reasons have been given why the deceased made the will in the manner he did, among them being the respondent being in employment, accommodated by her employers, and her own testimony of her alleged intimate relationship with her father and if true made it obvious as to what led to the testator's death. Counsel submitted further that the testator was blackmailed into his death by the respondent and therefore the respondent ought not to benefit from the deceased's estate. It was Mr. Chali's final submission on this ground that, all these matters although put before the learned trial judge, were not taken into account before the judge decided to vary the Will.

The fourth ground was that the learned trial judge's orders as to the devolution and

administration of the estate, including the order concerning the house, are not in the best interests of the beneficiaries of the estate. Mr. Chali argued that should this court consider that the respondent ought to benefit from the said estate it should then interfere with the extent of the interest to which the respondent ought to so benefit on account that the Respondent was in employment and on account of her conduct. Counsel submitted that the interests of the respondent and her grandmother cannot be said to be at par.

The fifth ground related to the order of costs. The gist of the submission on this ground was that the order will operate unfairly against the appellant. Counsel contended that the learned trial judge's order as to costs ought to have specifically provided for the appellant's cost of action to be borne out of the estate because it is the duty of an executor to institute or defend actions to protect the interest of the estate if the institution or defence of the action is deemed reasonable. Mr. Chillu urged the court to uphold the appeal and vary the findings and orders of the court below.

In his brief reply, Mr. Mbushi submitted that under section 3 of Act No. 6 of 1989, the respondent and her deaf and dumb child as well as her brother qualify and are therefore entitled to reasonable provision under the will. He further submitted that the orders made by the learned trial judge were all reasonable. He also submitted that the other three beneficiaries namely, the sisters of the deceased were not destitutes and the learned trial judge rightly excluded them from benefiting from the house.

In dealing with this appeal we have been very mindful of the fact that the matter was decided upon by one of our learned senior female judges, and involving a female applicant. We are, however, constrained to comment on some of the observations and findings made by the learned trial judge which in our considered opinion appear to have heavily influenced the learned trial judge in making the orders she did. Our observations will be based on some aspects of the evidence that was before the learned trial judge.

According to the learned trial judge this was a sad case because the evidence disclosed that the deceased did an unnatural thing to the applicant. While we accept that there was some evidence, for that matter from the respondent herself, the evidence was in our view not conclusive and not corroborated. Above all, there was also evidence that the respondent who is unmarried has two other children. The finding that the conduct of the deceased was not only morally unacceptable but also legally reprehensible was in our view not justified. On the available evidence it was not fair to the deceased, when he could not defend himself, to conclude that he was heartless. The observation that the respondent had become permanently disempowered and unable to rise to societal responsibilities was not supported by the evidence which clearly established that the respondent was working and is accommodated by her employers. The determination of whether the deceased's Will had to be varied depended on an interpretation of section 20 (1) and 3 and 21 of Act No. 6 of 1989. But before dealing with the issues of interpretation it is necessary to dispose of the other grounds raised by counsel for the appellant.

One of the grounds argued by Mr. Chali related to parties to an action. He submitted that the inclusion of the respondent's child and her brother in the deceased's Will was wrong in law and should be struck out as not being parties to the action at any stage.

Order 14 of Cap 50 provides for various situations of parties to an action. It provides for when a person can be made a party either at the instance of the person suing or being sued or at the instance of the court. The court can also strike out a party where it is shown there is a misjoinder. The contention by Mr. Chali was that a person should be made a party to or if made a party be struck out from an action before the action is concluded. In the case of **The Attorney -General v Aboubacar Tall and Zambia Airways (3)** the High Court made the

Attorney General a party to the proceedings after the close of the defence, but before judgment, which had already been prepared in draft form, had been delivered. This court upheld the learned trial judge on appeal. Very recently, this court struck out the Electoral commission as party to an election petition for misjoinder before the hearing of the election petition in ***Mbikusita Lewanika and 4 Others v F.T.J. Chiluba*** S.C.Z./E.P. 3 & 4 of 1996. We totally agree with Mr. Chali that according to the Rules of Practice governing joinder of parties and due to non-joinder of parties before trial of the action, other than the respondent, the learned trial judge was legally and effectively precluded from considering the interest of non parties. The orders made by the learned trial judge in relation to the respondent's child and brother were, in our view, wrong in law and are struck out. This ground of appeal therefore succeeds.

The next ground argued by Mr. Chali was that the order requiring the appellant to administer the estate "in consultation with" the respondent's advocates amounted to an appointment of an additional Administrator. The contention of Mr. Chali is that this remedy was not pleaded and not prayed for and must therefore be struck out. We agree with counsel. This order requiring the appellant to administer the deceased's estate "in consultation with" the respondent's advocates is struck out. This ground of appeal also succeeds.

The other ground not related to the interpretation of the Statutes relates to orders of the devolution and administration of the estate of the house. Counsel urged the court to interfere with the extent of the interest to which the respondent ought to benefit if the court considers that she ought to benefit. Counsel argued that on the evidence that she is employed, and the evidence as to her conduct, her interest and those of her grandmother cannot be said to be at par. While we agree with this submission it is our considered view that success or failure of this ground depends on the question of whether the Will should or should not be varied.

The other ground argued related to costs. The gist of the submission by counsel was that to order costs against the appellant operates unfairly because it is the duty of any executor to institute or defend action against the estate if the institution or defence of an action is deemed reasonable. Counsel submitted that the costs of the action should be borne out of the estate. We agree with counsel. The proper order should have been that costs be borne out of the estate. This ground of appeal also succeeds.

The ground on statutory provisions was that the variation of the Will was contrary to the letter and spirit of the provision of the Wills and Administration of Testate Estates Act No. 6 of 1989. The relevant Sections of that Act are 20(1) 3, and 21 (1) Section 20(1) reads as follows:

"20.(1) If, upon application made by or on behalf of a dependant of the testator, the court is of the opinion that a testator has not made reasonable provision whether during his life time or by his Will, for the maintenance of the dependant, and that hardship will thereby be caused, the court may, taking account of all relevant circumstances and subject to such conditions and restriction as the court may impose, notwithstanding the provisions of the Will, order that such reasonable provision as the court thinks fit shall be made out of the testator's estate for the maintenance of that dependant."

The language of the section is clear. It does not suggest the rewriting of the Will by the court. The first consideration before varying a Will is that the court must be of the opinion that a testator has or has not made reasonable provision for the dependant in the Will. The second consideration is that the absence of or inadequacy of reasonable provision for the dependant in the Will would cause hardship. The third consideration before making the reasonable provision is that the court may take into account all relevant circumstances.

Section 3 defines dependant to mean a wife, husband, child or parent. The age at which one

ceases to be a child is not specified in the Act. But the age of a minor is given as a person who has not attained the age of 18 years. On the other hand section 20(2) (b) (iii) acknowledges that where the reasonable provision order provides for periodical payments, it shall provide for termination not later than, "in the case of a child, his attaining the age of eighteen years or upon leaving secondary school, or under graduate university or whichever is the later". Mr. Chali referred the court to section 2 of the Affiliation and Maintenance of children Act No. 5 of 1995 where "child" has been defined to mean a person below the age of eighteen years whether a marital or non-marital child from the statutory definition of "dependant" and child". Mr Chali submitted that the respondent is effectively excluded from being a "dependant" on account that she is a working person with means of her own and on account of her age of 27 years as given at the trial. Mr. Chali also pointed out that matters for consideration as provided in section 20(2) of Act No. 6 of 1989 seem to concern themselves with a "child" under 18 years, or in school or disabled. Counsel also drew the court's attention to matters to be considered by a court when varying the Will as provided under Section 21 (1) of Act No. 6 of 1989. Among these are: the testator's reasons for not making any provision for a dependant; past, present and future capital or income of such dependant; and the dependant's conduct.

Mr. Chali submitted that all these matters were not taken into account or considered by the learned trial judge before varying the Will.

We have anxiously examined the learned trial judge's judgment and her considerations and findings. As already observed, the evidence from the respondent that the deceased made her pregnant, seem to have heavily influenced the learned trial judge's findings. While she alludes to section 20 (1) of Act No. 6 of 1989, and cited it, she seems to have only been concerned with the issue of her jurisdiction "to visit the Will and vary it making reasonable provisions for the dependants". In our view the issue of jurisdiction was not in dispute.

With all the respect to the learned trial judge, it appears to us that she totally misapprehended the decision in ***Diamond v The Standard Bank of South Africa Limited (Executor) and Others (1)***. According to her the case dealt with the definition of dependant at law and her understanding of the case was that if a person has no other serious means of livelihood other than the deceased, that person was a dependant. This was an incorrect and unfair interpretation of the decision. We have also visited that case. The issue of dependant in that case never arose. And it could not arise because the application was by wife and two children who were before the age of 18 years. The court in that case was only concerned with whether the provision made by the deceased was reasonable. In other words the deceased made provisions for his wife but she complained that it was not reasonable. Hence the court varied it by increasing it.

We are satisfied that on the evidence as a whole, the learned trial judge in the present case, did not apply the proper principles of law and her findings were not supported by a proper approach to the evidence. Consequently, her conclusions could not be correct and cannot be supported. The ground based on the interpretation of statutory provisions also succeeds.

Our conclusion in this appeal which is based on the law as it stands may appear morally hard. But it must be recognised that section 20 Act No. 6 of 1989 is a departure from the long standing recognition of unfettered right of disposition by the testator of his property. This departure is a limited one as it only confers on the court a jurisdiction to depart from the dispositions of a testator by providing reasonable provision for certain of his dependants if it is of the opinion that he had not done so himself. The court's jurisdiction to make reasonable provision for the dependant only arises if it is of the opinion, that it is satisfied, that such provision has not been made by the testator.

For the reasons we have given in dismissing the ground based on statutory provisions and the

other grounds, we are satisfied that the respondent is in law not covered by the definitions of "dependant" or "child".

The ground of appeal based on the interpretation of statutory provisions also succeeds. We therefore allow this appeal. All the orders by the learned trial judge are set aside. We also set aside the order relating to a gift of K400,000.00 which in our view was not proved. The costs of this appeal and in the court below will be borne by the estate.

Appeal Allowed

1997 ZR p30