**MUNALO v VENGESAI (1974) ZR 91 (HC)**

HIGH COURT

DOYLE CJ

16th APRIL 1974

(1973/HP/641) 20

**Flynote**

**Succession - Administration of deceased's estate - Deceased a Rhodesian governed by Shona customary law - Whether estate to be administered according to Shona customary law.**

**Customary Law - Administration of deceased's estate - Circumstances in**25 **which, under s. 38 of the Local Courts Act, the estate of the deceased may not be administered under customary law.**

**Local Courts - Jurisdiction of local court under s. 38 of the Local Courts Act.**

**Headnote**

The deceased was resident and domiciled in the Republic of Zambia for many years, clearly with the intention of staying here permanently. 30 Both the deceased and his widow were Rhodesian, members of the Kalanga tribe which is a sub-division of the Shona tribe. In 1961 the deceased had married his wife in Zambia by Shona law. The deceased and his wife were living in Zambia as ordinary Africans but among a fairly large Shona community in the Mumbwa District. Apart from their marriage their 35 life had not been affected by Shona law. The deceased was killed in an accident. The widow of the deceased took out a summons to obtain an order that the deceased's estate be administered by the High Court under the English Probate law which applied in Zambia and not under the African customary law. The respondent, a cousin of the deceased, 40 claimed that the estate was governed by Shona customary law. Neither party in the proceeding claimed that the deceased was subject to the African customary law other than Shona law.

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*Held:*

   (i)   That as the deceased was domiciled in the Republic of Zambia, no question of Rhodesia Shona law arose by reason of domicile.

   (ii)   That on the question whether the deceased as a member of the 5 Shona tribe retained his personal law when he came to Zambia, there was no specific law which in terms stated that non - Zambian Africans on arrival in Zambia retained their personal law.

   (iii)   That s. 38 of the Local Courts Act, Cap. 54, appears to indicate that there were circumstances in which an African's estate in 10 Zambia should not be administered or distributed in accordance with African customary law, and though such circumstances are not indicated in the Act, it would be either because African customary law never applied to the particular African or that he had in some way divested himself perhaps by his way of 15 living, from the application of customary law.

   (iv)   That s. 38 (1) *(b)* of the Act was a procedural provision which prevented the local court from exercising jurisdiction until the High Court had determined the matter before it, and in any event it did not prohibit the High Court from making an order 20 or direction in terms of subs. 2 of that section in respect of an application to the High Court under subs. 1, that the estate should be administered or distributed by African customary law and under the authority of a grant from the local court, and s. 38 (1) *(b)* did not permanently oust the jurisdiction of the 25 local court.

   (v)   That on the evidence before the court, the parties to the marriage were living in a Shona community and had been married by Shona law, that the deceased was living among and after the manner of an expatriate Shona, and that it would be catastrophic 30 if it were held that persons living in the manner of the deceased did not retain their customary law, as this would also mean that the customary marriage law would not apply and would bring into doubt the validity of a marriage celebrated under such laws; and that since the deceased had not lived in a manner to divest 35 himself of his customary law, it followed that the law to be applied to the administration or distribution of his estate was Shona customary law.

   (vi)   That whether the administrator was appointed by the High Court or by the local court, he would still have to distribute the estate in accordance with the Shona law applicable and, since 40 there did not appear to be any good reason why the estate should be administered through a grant by the High Court rather than the local court, the application would be refused.

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Legislation referred to:

Local Courts Act, Cap. 54, ss. 12 *(a)*; 36, 38 (2).

Native Courts Ordinance, s. 14.

Subordinate Courts Ordinance (1933), s. 16.

Marriage Ordinance (1918), s. 47. 5

*E  Torgbor, Ellis and Co.,* for the applicant.

*E  Dumbutshena, E  Dumbutshena and Co.,* for the respondent.

**Judgment**

**Doyle CJ:** This is a summons to obtain an order that the estate of Sibanda Frank Munalo, deceased, be administered in the Probate Division of the High Court and be not administered in terms of African 10 customary law. The applicant is the widow of deceased and the respondent is a cousin of the deceased.

Both deceased and the applicant are Rhodesian members of the Kalanga tribe which is a sub-division of the Shona tribe. The deceased was resident and domiciled in Zambia, having come to Zambia many 15 years ago and clearly with the intention of staying permanently. In 1961 he married in Zambia the applicant by Shona law which marriage is constituted by elopement and payment of lobola. There are five children of the marriage, all of whom are living with the applicant. Deceased and the applicant lived in Zambia as ordinary Africans but among a fairly 20 large Shona community in the Mumbwa District. Apart from their marriage their life had not been affected by Shona law. The deceased was killed in an accident and workmen's compensation is being paid to the applicant for herself and the children. These payments do not, of course, form part of the estate. The deceased had no brothers or sisters. 25

The estate consisted of nine head of cattle. The applicant in her affidavit stated that these were the property of deceased, but in evidence she put forward a claim for part - ownership of the cattle by reason of contributions made by her towards the purchase money. The estate, therefore, is subject to this claim for what it is worth.

The first question to be determined is what is the law which governs the administration and distribution of the estate. Neither party to the proceedings claims that the deceased was subject to African customary law other than Shona law, but the applicant is seeking distribution or administration in accordance with the English probate law which applies 35 in Zambia.

According to the applicant, by Shona law the estate would descend to the children of deceased. According to the respondent, the estate by Shona law would descend to brothers and sisters of deceased and, failing them, to the eldest son. Whoever was the heir would also inherit an 40 obligation to look after the children and widow of the deceased. Respondent claims, however, that there is a son of the deceased by an earlier marriage in Rhodesia who is alive and is the heir.

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DOYLE CJ

According to Holleman's *Shona Customary Law,* at page 330, "Shona law of succession is based upon one fundamental principle which may be formulated as follows: the oldest surviving son succeeds to his father's name and assumes control of the estate of his father's house for the 5 benefit of its members, subject to the supervision of the representative head of the wider patri - group of which the deceased's house is considered to be a component part." Holleman goes on to demonstrate the highly complicated procedure by which this trust is carried out.

As the deceased was domiciled in Zambia, no question of Rhodesian 10 Shona law arises by reason of domicile. The real question to be determined is whether the deceased as a Shona retained his personal law when he came to Zambia. If he did, it would seem that, unless by reason of other circumstances he had divested himself of his personal law, his estate would descend by that law. If on the other hand the deceased did not 15 retain his personal law, these whole proceedings would be misconceived, as the marriage by customary Shona law in Zambia would probably not be valid.

There is, so far as I can ascertain, no specific law which in terms states that non - Zambian Africans in Zambia retain their personal law. There are, however, a number of enactments which have a bearing upon the question.

The Local Courts Act enables local courts to be recognised and established by the minister. The reference to recognition refers and presupposes the existence of already constituted courts. Section 12 of 25 the Act states, *inter alia*, that local courts should, subject to the provisions of the Act, administer -

   "*(a)*   the African customary law applicable to any matter before it so far as such law is not repugnant to natural justice or morality or is incompatible with any written law".

Section 30 36 enables local courts to make orders, including the appointment of an administrator required for the administration or distribution of intestate estates which fall to be administered or distributed in terms of African customary law.

Section 38 requires the transfer from the local court to the High 35 Court of certain estates. No such order has been made in this case but it is relevant to note that transfer must be made, *inter alia*, if:

*(a)*   the local court is satisfied that a properly interested party has made application to the High Court for an order relating to the administration of an intestate deceased's estate; 40

*(b)*   a properly interested party or the Administrator -General has made application claiming that the deceased's estate should not be administered in terms of African customary law.

Under subsection (2) of section 38 the High Court shall make such order or give such directions in relation to the transferred application 45 as it thinks fit.

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DOYLE CJ

I mention the provisions of section 38 as they indicate that there are or may be circumstances in which an African's estate should not be administered or distributed according to African customary law. No indication is given of what these circumstances are, but it seems to me that they must either be because African customary law never applied 5 to the particular African or that he had in some way divested himself, perhaps by his way of living, from the application of customary law. I do not read paragraph *(b)* of section 38 as prohibiting the High Court from making a direction under subsection (2) that the estate shall be administered or distributed by African customary law and under the 10 authority of a grant from the local court. It is merely a procedural provision which prevents the local court from exercising jurisdiction until the High Court determines the matter before it. If paragraph *(b)* did preclude any jurisdiction of the local court, a mere application, however unfounded in merit, would permanently oust the jurisdiction of the local 15 court. I cannot accept that this can be the effect of the paragraph. Indeed if it were so, I would be constrained to grant this application at least in part as, although the application has not been referred under section 38, I would be aware that if the parties made application both to the local court and to the High Court, the result would be that the High Court 20 would have to administer the estate.

No definition of African customary law is contained in the Act, nor is there any such definition in the existing Interpretation Act.

At first sight it would appear that a local court would administer the African customary law local to it. As, however, the jurisdiction of a 25 local court relates to the area for which it is constituted, this would be impracticable as the different tribes of Zambia each have, to some degree, differing customary law.

The Act is a replacement of the Native Courts Ordinance which was enacted in 1961 and itself replaced an earlier Ordinance. That 30 Ordinance may be more limited in its jurisdiction as it expressly applies only to Africans, whereas the Local Courts Act is silent on this though the tenor of the Act clearly primarily refers to African. Section 14 of the Ordinance contains a provision identical to paragraph *(a)* of section 12 of the Local Courts Act. It seems to me that the African customary law 35 to be administered by the Local Courts Act must be the same African customary law which was administered by its predecessor. If the Local Courts Act were making a change in this respect one would expect it to be clearly stated.

The Ordinance contains a definition of Africans in the following 40 terms:

   "'African' means any member of the aboriginal tribes or races of Africans or any person having the blood of any such tribe or race and living among and after the manner of such tribe or race and includes anybody or association of persons other than a limited 45 company where membership is composed exclusively of Africans."

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DOYLE CJ

This definition is clearly not restricted to Africans of Zambian tribes but to Africans of the whole continent of Africa, provided that in Zambia they are living among and after the manner of such tribe. That indicates in my opinion that, provided a non - Zambian African was living in a tribal 5 community of his own people, he would be included in the definition of African and presumably be subject to his own customary law.

The Interpretation and General Clauses Ordinance, 1929, which remained in force until 1963, interpreted "native" and "African', in similar terms to the definition of African in the Native Courts Ordinance 10 with the omission of the reference to associations of persons.

Section 16 of the Subordinate Courts Ordinance, 1933, now the Subordinate Courts Act, contained, and still contains, provisions relating to the application of African customary law to cases when the parties are Africans. It makes specific reference to the African customary laws 15 relating to marriage and to inheritance. The reference to Africans in the section was defined by the Interpretation and General Clauses Ordinance already referred to. It would follow, therefore, this included the application of Shona customary law where the African concerned was a Shona living in Zambia amongst Shona and according to their manner.

The 20 Marriage Ordinance, 1918, now in force as the Marriage Act, contained until 1963 a section 47, which read as follows:

   "47. The provisions of this Ordinance shall not apply to natives and for the purposes of this Ordinance the word 'native' shall mean a person being a member of an aboriginal race or tribe of 25 Africans but shall not include a person partly of European descent."

This definition again clearly refers to all Africans of Africa and indicates the tenor of the use of the word African or native at the time of legislation. It also demonstrates the difficulty in marriage facing a non - Zambian African if his personal law did not apply.

As 30 was stated by Mr Dumbutshena at the bar, it is a notorious fact that local and, before these, native courts have applied their personal law to Africans at least of the neighbouring countries. It is also notorious that many non - Zambian Africans have continued to live in their own little groups and have continued to adhere to their customary law in relation 35 to marriage and inheritance, the two main applications of personal law. In the case before me it is clear that the parties were living in a Shona community. When he wished to be married the deceased married by Shona law. No doubt in other respects Shona law had up to his death had little impact, but this was to be expected. If a matter had arisen to 40 which Shona law had applied, it is likely that it would have been followed. I consider that the deceased was living among and after the manner of, so to speak, an expatriate Shona. These aspects of Shona custom, which depended on close contact with his chief, no doubt had little application but generally he adhered to Shona custom.

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DOYLE CJ

It would seem to me catastrophic if the court were to hold that persons living in the manner of the deceased did not retain their customary law, as this would also mean that their customary marriage laws would not apply and would bring into doubt the validity of a marriage celebrated according to such laws. 5

*Prima facie* this estate is to be administered and distributed by Shona customary law. The deceased has not, in my opinion, lived in manner to divest himself of this law. Indeed, the fact that, when he wished to be married, he did so in accordance with Shona customary law, shows a contrary intention. 10

I am satisfied therefore that the law to be applied to the administration or distribution of this estate is Shona customary law.

I am, of course, aware that this application has really little or no relation to the actual estate of nine head of cattle, but is really related to the custody of the children. The Shona law may refer to inheriting 15 children in the sense of inheriting an obligation to look after them, but this could not necessarily determine the custody if that question came before a court by appropriate proceedings. Custody to my mind would be decided in the best interests of the children.

The question of custody cannot, however, be determined by the 20 High Court by the appointment of an administrator of his estate. Whether an administrator were appointed by the High Court or by the local court he would have to distribute the estate in accordance with the Shona law applicable.

There does not appear to me any good reason why this minute 25 estate should be administered through a grant by the High Court rather than by the local court. I must, therefore, refuse the application.

As this matter is not a reference under section 38 of the Local Courts Act, I cannot exercise powers under section 32 (2), though it would clearly be useful had I been able to do so. 30

I am restricted to dealing with the remedy as sought and, as already stated, this must be refused.

*Application refused*

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