IN THE SUPREME COURT OF ZAMBIA **Appeal No.190/2015**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

STEWART SCOTT **APPELLANT**
(Sued as Executor of the Will of the Late Andrija Vidmar)

AND

EDWIN ALOIS BILALI VIDMAR **RESPONDENT**

CORAM: Malila, Kajimanga and Kabuka, JJS

On 10th July 2018 and 22nd October 2018

FOR THE APPELLANT : **Mr. M. Mukupa of Messrs Isaac and Partners**

FOR THE RESPONDENT : **Mr. C. Magubbwi of Messrs Magubbwi and Company**

J U D G M E N T

Kajimanga, JS delivered the judgment of the court

Cases referred to:

1. **Wilson Masauso Zulu v Avondale Housing Project Limited [1982] Z.R. 172**
2. **Road Contractors Company Zambia Limited v Pacific Parts (Zambia) Limited-Appeal No. 146 of 2011**

3. **Graham v Murphy [1977] 1 FLR 860**
4. **Jelley v Iliffe [1981] 2 All ER 138**
5. **Isaac Tantameni C. Chali (Executor of the Will of the late Mwala Mwala) v Liseli Mwala (Single Woman) (1997) Z.R. 199**
6. **Mususu Kalenga Building Limited and Others v Richman's Money Lenders Enterprises (1992) Z.R. 27**
7. **Mwananshiku and Others v Kemp and Mwananshiku (1990 – 1992) Z. R. 42**

Legislation and other works referred to:

1. **Wills and Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia**
2. **Halsbury's Laws of England, 4th Edition; Volume 50**
3. **Theobald on Wills, 13th Edition, London: Stevenson & Sons.**
4. **Bromley's Family law, 10th Edition, Oxford: Oxford Press.**

Introduction

1. Grievances of individuals alleging that they have not been provided for, adequately or not at all, by a testator in the Will, have not spared the courts. This appeal is an epitome of such grievances. It is an appeal by the executor of the Will of the late Andrija Vidmar (the deceased) against a judgment of the High Court dated 30th December 2014 which varied the deceased's Will in favour of the respondent.

Background to the dispute in this appeal

2. The brief facts of this case are that Andrija Vidmar died on 25th April 2007, leaving a Will dated 19th April 2007 in which he appointed the appellant as executor. Under the Will, the deceased bequeathed the whole of his estate to his sons, Viktor Mark Vidmar and Antun Jason Vidmar but left no provisions for the respondent who also alleged to be a child of the deceased. On 21st August 2007, probate of the deceased's last Will was granted to the appellant. The respondent then made a claim for a share in the deceased's estate but the same was rejected by the appellant on the grounds, *inter alia,* that there was no provision for him in the Will. Consequently, the respondent brought an action in the court below against the estate of the deceased.

The Pleadings of the parties before the High Court

3. By an originating summons issued on 17th June 2008, the respondent claimed:

> **1) An order for production before Court of the Will of the Late Andrija Vidmar.**

2) **An order that the Will be altered to include the Applicant [the respondent in this appeal] as one of the beneficiaries.**
3) **Any other relief that the Court may deem fit and**
4) **Costs.**

4. During the trial and with the concurrence of the appellant, the originating summons was amended at the instance of the lower court to include the following relief:

> **"An order that the Applicant is a biological son of the late Andrija Vidmar."**

5. The affidavit in support of the originating summons disclosed that the respondent was born on 25th May 1971 and that his father is the deceased and his mother is one Brenda Luwize Mubanga. In support of this averment, the respondent produced, among other documents, an affidavit of birth sworn by his mother on 2nd November 2007, his National Registration Card (NRC) and his Under Five clinic card which showed that at the time of birth, the deceased was his father.

6. The respondent contended that apart from him, his father was survived by two other sons namely, Viktor Mark Vidmar and

Antun Jason Vidmar who were born from his step mother. According to the respondent, his biological mother did not stay long with the deceased after he was born. The deceased was a farmer and businessman based in Mkushi and lived there with his young brothers and stepmother while the respondent used to live on the Copperbelt with his mother.

7. He also contended that from the time his father died, he had been requesting for a share of his estate but his brothers informed him that the deceased left a Will which did not include him and that the appellant was the executor of the said Will. However, all efforts to persuade the appellant to include him in the distribution of the estate of the deceased were unsuccessful as the appellant wanted him to prove that he was the son of the deceased. That despite giving him the necessary proof, the appellant had not done anything and had also refused to show him the Will that his father left.

8. The respondent, therefore, contended that if he were not included as a beneficiary of the estate, he could suffer hardship

and prejudice. On that account, the deceased's Will should be altered to take his interests into consideration.

9. The appellant's affidavit in opposition disclosed that the original copy of the Will and Testament of the deceased was in the custody of the probate registrar of the High Court and that the same did not shed any light on the pedigree of the respondent. The appellant challenged the validity of the affidavit of birth, the respondent's Under Five clinic card and his national registration card and contended that it was his duty to effect the Will as settled by the deceased. That nowhere in the Will was the respondent mentioned or made a beneficiary and his paternity was never recognized by the deceased.

10. The appellant, therefore, contended that the documentation produced by the respondent clearly established the particulars of his mother but did not show those of his father. Further, it was not clear how and why the respondent became entitled to the name Vidmar. Coupled with the fact that the respondent is not in the Will, the appellant had no authority to impose an

unrecognized child of the deceased and he had not in any way failed in his duty as an executor by not providing for him.

11. According to the appellant the respondent's application was unsubstantiated as his claim did not disclose that he had been a dependant of the deceased. Consequently, he had proceeded to distribute the estate in accordance with the contents of the Will which did not include the respondent.

12. In his affidavit in reply, the respondent deposed that his Under Five clinic card clearly stated that the deceased was his father. He also deposed that the deceased recognized him as his son and at some stage, introduced him to his uncle one Zadico of Dubica Motors who was present at the time when he was born. Further, the deceased paid his school fees at Deluk High School from Grades 9 to 12 and provided him with money for uniforms, shoes, clothing and transport from Lubuto to town every year for three years.

13. After his grade 12, the deceased paid for his 3-year electrical

course and thereafter sent him to another uncle in Kitwe at MS Mechanics, one Savo who unfortunately died earlier than his father. According to the respondent, the deceased did everything for him for twenty years since he met him.

Evidence of the parties in the High Court

14. In addition to his affidavit evidence, the respondent testified that sometime in 1988, a DNA test was conducted and the results came out positive indicating that he was the biological son of the deceased. His step father, Mr. Bilali, subsequently instituted proceedings against the deceased in the Kitwe Magistrate's Court for compensation, for the period before he took over the responsibility of the respondent but the action was later withdrawn at the instance of the respondent's mother.

15. The respondent also stated that prior to his death, the deceased had given him money to start a bar which he was currently running in Lubuto and that he used the same money to purchase a van.

16. Brenda Luwize Mubanga (PW2), the respondent's mother, gave evidence that the deceased was the biological father of the appellant. She was in a relationship with the deceased from 1965 to 1972 and lived with him in Ndola from 1968 to 1972. It was during this period that the respondent was born and the deceased paid nsalamu and damages in the sums of K50,000.00 and K500,000.00 respectively. In addition, the deceased supported the respondent financially from the time of his birth up to 1972 when he moved to Lusaka.

17. At the time the deceased left Ndola, he informed PW2 that he was going to Lusaka to renew his work permit. However, in 1973, she discovered that the deceased had married another woman in Lusaka. In 1975, she went on to marry Mr. Bilali and they shifted to Kitwe. Thereafter, the respondent was being supported by the said Mr. Bilali. In 1988, the deceased and his wife came to the respondent's school requesting for a DNA test and the results of that test confirmed that the respondent was the deceased's son. PW2 stated that the birth record also shows

that the deceased was the respondent's father.

18. It was also her testimony that the respondent's first name Edwin, was given to him by the deceased and that at the time when the respondent went to obtain an NRC, they used the particulars of her husband, Mr. Bilali, because she did not know the deceased's personal details.

19. For the appellant, Viktor Mark Vidmar (DW1) testified that his parents led him to believe that he only had two brothers namely, Ashley Vidmar, his older brother who is now deceased and Antun Vidmar his younger brother. Ashley was his half-brother born from his mother's previous marriage whom the deceased fully supported before his demise.

20. DW1, however, admitted that the deceased had been taken to court sometime in 1998 by the respondent or his representatives and that his own mother was aware of the respondent's paternity claim. However, neither his mother nor the deceased accepted the said claims.

21. It was DW1's testimony that he met the respondent in April 2007 at the deceased's funeral and that if the deceased had actually accepted the respondent as his son, he would have openly provided for him in all ways and would have allowed him to grow up with him in the same way as his half-brother Ashley.

22. As regards support, DW1 testified that he had no knowledge of any support that was given to the respondent by the deceased and that it would not have been an embarrassment on the part of his father to acknowledge the respondent as his son because his mother was also aware of the respondent's claim and if the deceased wanted to conceal that claim he would not have informed his mother.

23. DW1 also stated that if his father had acknowledged the respondent as his son, he would have included him in his Will. In the said Will, the deceased referred only to "his two sons", that is, Antun and himself. Further, that he did not accept the respondent as his brother because he did not know him. That had his parents introduced the respondent to him, he would

openly have acknowledged him and accepted him as his brother.

24. Antun Jason Vidmar (DW2) testified that he only became aware of the respondent about five years before the death of his father but that there was no bond between them. Prior to that, he saw the respondent at the farm; once in the workshop and the second time on the road to the farm, but the deceased did not introduce the respondent to him as his brother.

25. He, however, confirmed that sometime between 1995 and 1998, the deceased was summoned to Court in Kitwe by Mr. Bilali for the maintenance of the respondent but he did not know what transpired thereafter as he was still young and, therefore, did not take much interest in the matter.

26. The appellant gave evidence in the matter to the effect that he was the executor of the Will of the deceased; that there are only two beneficiaries in the Will namely, Antun Jason Vidmar and Viktor Mark Vidmar and that his position is that the wishes of

the deceased should be carried into effect and to that extent, it was not his wish that the respondent should be a beneficiary.

27. The appellant also testified that just before his demise he met the deceased. In their conversation, the deceased requested him to carry out his wishes as per his Will and that in so doing, he should protect the bond of love and friendship between his two sons Antun and Viktor.

28. The appellant admitted that upon the deceased's death, the respondent approached him and produced documents in support of his claim as the deceased's son but that he could not accept them because they were not adequate. He stated that as an executor he was bound by the Zambian law not to consider anything outside the Will.

Consideration of the matter by the Learned High Court Judge and decision

29. The learned trial judge found that two issues fell for determination namely, whether the deceased was the

respondent's paternal father; and whether the Will should be varied.

30. On the issue of paternity, he found that the respondent had proved that he was born during the time when the deceased was staying with his mother from 1968 to 1972, which evidence the appellant had failed to challenge and that the respondent had established on a balance of probabilities that he was the biological son of the deceased.

31. As regards variation of the Will, the learned trial judge found that excluding the respondent from the Will meant that he would not be entitled to any of the properties that were left by the deceased, including the fixed assets and as such, the respondent would have to fend for himself which would evidently cause hardship to him. He, therefore, concluded that no reasonable provision had been made for the respondent in the deceased's Will and this justified the variation of the Will.

32. The respondent's claim was accordingly upheld and the

appellant was directed to render a full account of the estate of the deceased and distribute the same equally among DW1, DW2 and the respondent.

The grounds of appeal to this Court

33. The appellant now appeals against the judgment of the lower court on the following grounds:

1. **The learned trial Judge misdirected himself when he held that the respondent was a bonafide child of the deceased based on the premise that at the time of [the] respondent's birth the deceased and respondent's mother were cohabiting; Under Five Clinic Card; and blood group test in the absence of evidence in support.**
2. **The learned trial Judge erred in law when he held that the respondent was a person of necessity who qualified to be provided for under section 20(1) of the Wills and Administration of Testate Estates Act Chapter 60 of the Laws of Zambia, without considering the meaning of maintenance as provided for therein.**
3. **The learned trial Judge erred in law as he did not take into account section 21 of the Wills and Administration of Testate Estates Act Chapter 60 of the Laws of Zambia which urges the court to give consideration to the financial inadequacies of the dependant in relation [to the] deceased's decision to leave out the dependant.**
4. **The learned trial Judge erred in law and fact when he held that no reasonable provision was made for him in the Will and this justifies the variation of the Will as the provisions of section 20 are not**

applicable to the respondent.

5. **The learned trial Judge erred in law and fact when he directed that the executor of Andrija Vidmar's Will shall make a full account of the estate of the deceased including those assets shown in paragraph 5 of the Will and distribute the same equally among the three beneficiaries namely, Edwin Alois Bilali Vidmar, Viktor Mark Vidmar and Autun Vidmar.**

The arguments presented by the parties

34. Both parties filed written heads of argument which were briefly augmented by counsel at the hearing. In support of ground one, the learned counsel for the appellant, Mr. Mukupa, submitted that the issue for determination as established by the trial court judgment at pages J15 - J16 was to whether the deceased was the paternal father of the respondent. That in dismissing the evidence of DW1 and DW2, the trial court correctly found that at the time the respondent was born, the two witnesses were not born but astonishingly went on to stipulate that based on this fact, the evidence of the two witnesses was speculative.

35. A perusal of the record and the evidence tendered in support of the appellant's case at trial clearly reveals that neither DW1 nor

DW2 attempted, or did at any time tender evidence, in relation to the occurrences at the time of the respondent's birth. That despite this fact, the learned trial judge opted to wholesomely disregard the evidence tendered in support of the appellant based solely on the fact that the two witnesses were not born at the time the deceased was purportedly staying with the respondent's mother.

36. The lower court misdirected itself in this regard by failing to take into account the type of evidence and the reason the said evidence was tendered by DW1 and DW2. In refusing to accept the evidence tendered by the two witnesses, due evidential weight was not accorded to their statement and as such, the lower court's findings were based solely on the evidence tendered on behalf of the respondent.

37. The trial court went on to find at pages J16 - J17 of its judgment that the respondent had proved that he was born during the time the deceased was staying with his mother from 1968 to 1972. This finding was neither supported by law nor the facts

and was based solely on the uncorroborated evidence of the respondent's mother who clearly had an interest in the court finding in favour of the respondent. In this regard, the competence of the witness on whose evidence a major part of the finding is based ought to come into question.

38. In assessing the weight to be attached to the evidence of this witness, the court ought to have taken into account and duly addressed its mind to the personal bias and interest the witness had to serve in the matter. Counsel argued that the judgment of the trial court entirely disregarded the evidence on record in support of the appellant to include the affidavit evidence of Bozidar Petrovic and Petar Zeravica in the record of appeal which discredited the testimony of PW2, the respondent's mother as to the time when she met the testator.

39. Part of the finding was based on the evidence tendered by the respondent's mother that a DNA test was conducted in 1988 which showed that the respondent was the son of the deceased.

Our attention was drawn to the trial court's finding of fact at page J18 of the judgment that:

> **"It is in evidence that a DNA test was conducted and did not exclude the deceased as the father..."**

40. It is trite law that a court of appeal can only reverse findings of fact made by a trial judge when it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence, or a misapprehension of the facts or that they were findings which, on proper view of the evidence, no trial court acting correctly could reasonably make. The cases of **Wilson Masauso Zulu v Avondale Housing Project Limited**[1] and **Road Contractors Company Zambia Limited v Pacific Parts (Zambia) Limited**[2] were cited in support of his argument.

41. A perusal of the document appearing in the record of appeal which the court below was referring to as a DNA test result was actually a mere blood group test result purportedly conducted by the Kitwe District Health Management Team in 1988. It was his argument that had the court below directed its mind to the

document, it would not have made such a perverse finding that the said document was evidence of a DNA test which was conducted. That in any case, the said document was not produced by a competent witness and was uncorroborated.

42. The authenticity of the said document was doubtful as it was a notorious fact that though District Boards were established under the repealed Medical Service Act of 1985 due to political will, power and economic factors, apart from Lusaka District Management Board the rest of the District Management Boards came into existence after the advent of the 3rd Republic and health reforms were implemented through the creation of the Central Board of Health which supervised and managed the management boards.

43. We were urged to further take judicial notice that DNA testing was not available especially in government institutions in the year 1988 and at the time the purported DNA test was carried out, the said technology had not been fully developed and/ or introduced in Zambia. It was therefore a notorious fact that at

the time the purported DNA test was obtained by the respondent, there were no facilities at the said District Management Board in 1988 in order for the respondent to have truly obtained a DNA test for proof of parentage. We were also urged to uphold the principle that blood group tests are not an accurate test for the determination of parentage and other scientific methods exist with more accurate results.

44. Counsel went on to refer us to the Affidavit of Birth sworn by the respondent's mother, the Under Five clinic card and the respondent's NRC on record, and argued that the underlying theme as regards the evidence relied on by the court in finding that the respondent was the deceased's son is that all the information was provided by the respondent's mother who herself had an interest which was not considered by the court below.

45. It was, therefore, his submission that this ground of appeal should succeed on the premise that the court below did not take

into account the facts and evidence in finding that the respondent was the child of the deceased.

46. In ground two, counsel submitted that the trial court grossly misdirected itself in law and fact by holding that the respondent was a person of necessity who qualified to be provided for under section 20 of the Wills and Administration Testate Estates Act Chapter 60 of the Lands of Zambia (the Act), without considering the meaning of "maintenance" and "dependant" as provided for in the section.

47. The term "dependant" is defined in section 3 of the Act as wife, husband, child or parent. However, the definition is extended by the provisions of section 20(2)(b)(iii) 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 later. According to counsel, the import of these provisions is to limit the broad definition of dependant as envisaged under the

Act as it is not any person who can benefit from the provisions of section 20 of the Act.

48. Counsel also referred us to section 22(1) which requires that an application be made within six months from the date on which representation in regard to the testator's estate for general purposes is first taken out. He pointed out that the grant of probate was issued by the High Court on 21st August 2007 but the respondent only made his application on 18th June 2008, outside the six months' period within which one ought to make the application.

49. Our attention was brought to the case of **Graham v Murphy**[3], where it was held that if an applicant is relying on de facto dependence during the deceased's lifetime, the court must specifically have regard to the extent to which the deceased had assumed responsibility for his maintenance, the basis upon which he has done so and the length of time for which he had discharged it.

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50. Counsel also referred us to the learned authors of **Theobald on Wills, 13th Edition** at page 322, and submitted that the three cardinal general principles as regards family provisions in a Will as envisaged by section 20 of the Act that a court must always take into consideration are: that only specified dependants can apply; the court's function is merely to award reasonable provision for maintenance of that dependant, its jurisdiction to rewrite the Will is limited to the extent necessary to achieve that objective; and that jurisdiction should only be exercised with great circumspection and only to a limited extent.

51. The rationale behind the enactment of the provisions of section 20 of the Act was not to allow for the addition of persons that have been left out of a Will as this would defeat the entire purpose of a testator executing a Will. Conversely, it envisaged provision for a person who has been left out of a Will resulting in such person suffering hardship if the court does not make a provision. That it is for this reason that an application of this nature is the preserve of a dependant to the Testator. Counsel

referred us to the learned authors of **Bromley's Family Law, 10th Edition** who state at page 1106 that:

> **"For the purposes of this provision, the applicant will be regarded as having been maintained by the deceased only if the latter had been making substantial contribution in money or money's worth towards his or her reasonable needs otherwise than for full consideration."**

52. He also called in aid the case of **Jelley v Iliffe**[4], where it was held that the court has to balance what the [deceased] was contributing against what [the applicant] was contributing, and if there is any doubt about the balance tipping in favour of [the deceased] being the greater contributor, the matter must go to trial. If, however, the balance is bound to come down in favour of [the applicant] being the greater contributor, or if the contributions are clearly equal, there is no dependency. Further, that it is essential to use common sense and ask if the applicant could fairly be called a dependant.

53. The evidence in the record of appeal shows that the respondent voluntarily admitted that he had completed his studies and the

fees for his electrical course were purportedly paid by the deceased before he died though no evidence was adduced to support this assertion. In terms of the provisions of section 20 of the Act, the fact that he has attained tertiary education by itself disqualifies him as a dependant as he is neither disabled, under the age of 18, or yet to leave school. However, the learned trial judge omitted to consider this fact when making a determination that the respondent will find hardship if not provided for from the estate of the deceased.

54. Further, counsel drew our attention to the respondent's evidence in the record of appeal to the effect that he was running a bar in Lubuto, owns a van and has a five-acre farm land along Mufulira Road where he rears chickens. In view of the same, it was his submission that the respondent was a man of means and, therefore, the learned trial judge misdirected himself when he found that:

> **"Excluding the applicant from the Will means that he will not be entitled to any of the properties that were left by the testator including the fixed assets. Thus the Applicant will**

have to fend for himself as he has no fixed assets to lay his hands on. Such a situation will clearly cause hardship to him."

55. Relying on the decision in the **Jelley v Iliffe**[4] case (supra), counsel contended that it was clear from the evidence on record that the balance clearly tips in favour of the respondent as the support provided by the deceased was not substantial if at all, as the evidence was unsubstantiated and uncorroborated. As such, the respondent is not a person that falls within the ambit of a dependant as envisaged by the Act.

56. In support of ground three, counsel submitted that the trial court failed to take into account the essential factors to be considered when an application for reasonable provision is brought before court. The court ought not to grant such an application if the dependant has or is likely to have adequate future income from any other source and that the respondent has clearly shown that he has adequate present and future income and as such, no hardship can be occasioned to him.

57. Counsel referred us to the case of **Isaac Tantameni Chali**

(Executor of the Will of the late Mwala Mwala) v Liseli Mwala (Single Woman)[5], where this court held that:

> **"Our conclusion in this appeal which is based on the law as it stands may appear morally hard. But it must be recognized that Section 20 of Act No. 6 of 1989 is a departure from the long standing recognition of unfettered right to 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 provisions 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."**

58. He, therefore, submitted that this ground must succeed based on the fact that the respondent does not qualify under the provisions of section 20 of the Act, having failed to show that he is unable to support himself from any source whatsoever, either because of poverty or due to some disability.

59. In arguing grounds four and five, counsel submitted that it was trite law that when a person dies testate having left a valid will, the role of the court is merely to construe the contents of the

Will. He referred us to the learned authors of **Halsbury's Laws of England 4th Edition, Volume 50** who state at page 213 that it is a cardinal rule of law as to the effect of the Will that the testator's intention, as declared by him and apparent in the words of his Will, has effect given to it, so far as nearly as may be consistent with the law; the application of the rule requires a court of construction to consider two matters:

i. The intent of the testator disclosed by the Will; and

ii. The manner in which effect can be given to that intention.

60. Counsel pointed out that the second issue for determination by the trial court in its judgment was whether there should be a variation of the testator's Will. It was his submission that the Will of a deceased could not be altered under any circumstances which is essentially what the court below did.

61. The trial court failed to properly address its mind to the interpretation and jurisdiction conferred upon the court in terms of section 20 of the Act. A proper construction of the said section, counsel submitted, does not require a person dying to

make reasonable provisions during his lifetime or by his Will for the maintenance of his dependants. The section merely empowers the court to interfere if it comes to the conclusion that the dispositions in the Will are unwarranted and will cause unreasonable hardship. In as much as the court is empowered in this vein, the exercise of such power can only be done within the limited circumstances provided for in the section.

62. Counsel relied further on the holding in the **Isaac Tantameni Chali**[5] case quoted earlier, and argued that the import of that holding is that the court should only exercise its powers under section 20 of the Act in circumstances that the testator would have, taking into account all the variables and that the language of the said section does not suggest the rewriting of the Will by the court. According to counsel, the powers of the court are limited to the orders stipulated in the section and therefore, it was a gross misdirection on the part of the trial court to go outside the jurisdiction confined by the Act.

63. He referred us to the trial court's judgment at page J20 where

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it was ordered and directed that:

> **"... the appellant as Executor of the Andrija Vidmar's Will shall make a full account of the estate of the deceased including those assets shown in paragraph 5 of the Will and distribute the same equally among the three beneficiaries namely, Edwin Alois Bilali Vidmar, Viktor Vidmar and Antun Vidmar."**

64. By granting the order it did, the trial court effectively re-wrote the provisions of the Will and added a beneficiary thereto and thereby wholly misdirected itself in law as regards its power under section 20 of the Act. He argued that in ascertaining the power of the Court under section 20 of the Act, the provisions of section 20(1) should not be read in isolation but with the provisions of section 20(2) which set out the powers of the court. That the provisions of section 20(2) set out the orders that can be made for one entitled to maintenance and these are limited to:

i. Payment of a lump sum, whether immediate or deferred or grant of an annuity or a series of payments;

ii. Grant of an interest in immovable property for life or any lesser period; and

iii. For periodical payments.

65. Counsel therefore, submitted that the trial court flouted its powers by insisting it had the power to, and proceeded to alter, the provisions of the Will. That further, it also erred by holding that the respondent should be treated as a beneficiary of the estate of the deceased. Counsel accordingly urged us to allow the appeal.

66. In response to ground one Mr. Magubbwi, learned counsel for the respondent, submitted that the lower court correctly evaluated the totality of the evidence at pages J17 – J19 of its judgment and got to the only logical conclusion that the respondent was a biological child of the deceased.

67. Counsel contended that the evidence of PW2, the respondent's mother, is supported or corroborated by the documents annexed to the respondent's affidavit. Furthermore, there is evidence on the record, of the case that was before the court at Kitwe relating to the maintenance/upkeep of the respondent by the deceased, confirmed by the testimony of PW2 and DW2.

There is evidence on record, of the paternity test which the trial Judge made reference to at page J16 of the judgment that the same did not exclude the deceased as a possible sire of the respondent. There is also evidence of the respondent visiting the deceased's farm in Mkushi which was corroborated by DW2.

68. On the appellant's argument that the lower court was perverse in its finding on the paternity of the respondent because it did not even refer to the affidavit evidence on record, counsel submitted that the said evidence was of no probative value to the issue. In any case, counsel contended, the said evidence confirmed that the deceased was in Zambia in 1967 and supports the deduction that he thus could or should be the father of the respondent.

69. The lower court, therefore, upon evaluating all the evidence on record came to a well reasoned and logical conclusion on the paternity of the respondent, which finding is not perverse. On this score, counsel contended, the lower court properly directed itself in rejecting the evidence of DW1 and DW2 which sought

to argue against the paternity of the respondent.

70. According to Mr. Magubbwi, the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[1] is not available to the appellant because he has miserably failed to demonstrate that the conclusions of the court below on the issue of paternity were perverse or made in the absence of or on a misapprehension of the facts and evidence before it.

71. Counsel also submitted that the appellant is bringing a new issue of PW2 being a witness with an interest to serve, which was not raised in the court below during cross-examination of the said witness, or indeed in the appellant's submissions. In this regard, reliance was placed on the case of **Mususu Kalenga Building Limited and Others v Richaman's Money Lenders Enterprises**[6].

72. Mr. Magubbwi accordingly submitted that ground one lacks merit and should fail.

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73. In reacting to the appellant's arguments relating to the second ground of appeal, counsel started by supporting the finding of the lower court that the respondent falls within the ambit of section 20(1) of the Act. The lower court's reading of the said section and its classification of the respondent as a child/dependant of the deceased did not breach the definitions thereof as envisaged under section 3 of the Act.

74. The appellant's contention that by reason of section 20(2) (b)(iii) of the Act, the respondent does not qualify to be a dependant because he had attained 18 years or had completed college is novel and incompetent as it is contrary to the definition under section 3 of the Act. According to counsel, section 20(2) (b)(iii) relates to a provision for periodical maintenance and the action which was before the lower court was not one for periodical maintenance and thus the appellant's argument to obfuscate the respondent's entitlement under section 21(1) using section 20(2) of the Act is incompetent.

75. The appellant's argument that the respondent's application was made after six months from the date on which representation in regard to the administrator's estate for general purposes is taken out contrary to section 22(1) of the Act is incompetent as it was not presented before the lower court.

76. The appellant's contention, to the extent that they intend to oust the definition of child and dependant, are irrelevant and inconsequential as the statute has already provided that definition under section 3. Its meaning, therefore, cannot be a subject of biased or extraneous interpretation. Counsel accordingly submitted that the court below was on firm ground in qualifying the respondent to the provisions of section 20(1) of the Act and that this ground of appeal should fail.

77. In response to the appellant's argument on ground three, Mr. Magubbwi submitted that this ground lacks merit as the court below properly exercised its jurisdiction under section 20(1) of the Act.

78. According to counsel, provision in a Will to some only of one's children to the exclusion of others does not make reasonable provision to those excluded. In this regard, the making of a provision for DW1 and DW2 only, to the total exclusion of the respondent in the deceased's Will made the provision and the non-provision respectively unreasonable. The lower court was therefore on *terra firma* when it invoked section 20(1) of the Act.

79. The second limb of section 20(1) states that:

> **"... as the Court may impose notwithstanding the provisions of the Will order that reasonable provision as the Court thinks fit shall be made out of the testator's estate for the maintenance of that dependant."**

80. Clearly, counsel submitted, the above provision conferred jurisdiction on the trial judge, in the manner he considered the circumstances of the case, to direct that the estate be apportioned equally amongst the beneficiaries, the respondent inclusive. That is consistent with the above part of section 20(1)

which says:

"... the provisions of the Will not withstanding..."

81. Considering the above, Mr. Magubbwi submitted that the appellant's contention under ground three is based on a misinterpretation of section 20(1) and the nature of discretion/jurisdiction thereby conferred on a court.

82. Counsel further submitted that the **Isaac Tantameni Chali**[5] case cited by the appellant actually lends credence to the position taken by the judge in the court below. He accordingly submitted that ground three lacks merit and thus should fail.

83. All in all, counsel contended, the entire appeal lacks merit and we were urged to dismiss it with costs.

Decision by the Court

84. We have considered the oral and written submissions of the parties, the record of appeal and the judgment appealed against.

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85. Ground one attacks the learned trial judge for finding that the respondent was a bonafide child of the deceased based on the premise that the deceased and his mother were cohabiting at the time of his birth; his Under Five clinic card; and blood group test in the absence of evidence in support.

86. At the outset, we should stress that in arriving at its decision the trial court did not only rely on the cohabitation of the deceased and the respondent's mother (PW2), the Under Five clinic card and the blood group results. A reading of the trial court's judgment reveals that other factors were taken into consideration. It is for this reason that at page J18 of the judgment, the learned trial judge stated as follows:

> "**It is also in evidence that a DNA Test was conducted and did not exclude the deceased as the father. Both DW1 and DW2 confirmed that they were aware of their father being summoned to Court in Kitwe but they did not know what transpired as they were still young. Both DW1 and DW2 admitted that they saw the Applicant in Mkushi but they were not introduced to the Applicant as a brother. DW1 admitted that his biological mother knew about the Applicant's claim for paternity.**

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> **All the above evidence shows that there was a connection between the Applicant and the deceased, his wife and two children, DW1 and DW2.**
>
> **On the evidence of the Applicant, the documents he presented before the Court and the evidence of PW2 and of DW1 and DW2 I come to the conclusion that the Applicant has established, on the balance of probabilities, that he is the biological son of Andrija Vidmar."** (Emphasis added)

87. It is plain from the above excerpt that the appellant's assertion that the trial court's finding as to the respondent's paternity being based solely on the evidence of the respondent's mother and disregarding the evidence of DW1 and DW2 is without basis.

88. In our view, the issue concerning the respondent's paternity is somewhat circumstantial in nature as the deceased is not here to give his version of the facts surrounding the respondent's birth. Consequently, the determination as to whether or not the respondent is the son of the deceased can only be inferred from the conduct of the parties, particularly the deceased and the other surrounding circumstances.

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89. According to the testimony of PW2, the deceased and her stayed together from 1968 to 1972 and that the respondent was born in 1971. She also testified that the deceased requested for a paternity test in 1988 which showed that he was the respondent's father. Later, court proceedings were taken against the deceased for maintenance of the respondent. The evidence on record also indicates that following these court proceedings, there was some interaction between the respondent and the deceased. The respondent testified that he visited the deceased's farm on several occasions which evidence was confirmed by DW2. These facts seem to suggest, as rightly observed by the trial court, that there was a connection between the deceased and the respondent.

90. We accept that the "DNA test" results referred to by PW2 were mere blood group results and that this evidence together with the Under Five clinic card were not conclusive as to the paternity of the respondent. However, we have no doubt that when the evidence of the respondent and PW2 is considered

together with the conduct of the deceased and the other factors relied upon by the court below which we have alluded to above, the only reasonable inference to be drawn from them is that it is more probable than not that the deceased was the respondent's father. If this were not the case, the deceased would not have entertained the respondent's visits to his farm.

91. We, therefore, cannot fault the findings of the learned trial judge as they were a correct analysis of the circumstantial evidence deployed before him. For the reasons stated above, we conclude that ground one has no merit and it is accordingly dismissed.

92. Grounds two, three and four are interrelated and will therefore be determined together. The gist of these grounds is that the learned trial judge erred by holding that the respondent was a person of necessity and no reasonable provision had been made for him, thus, justifying a variation of the deceased's Will.

93. Without doubt, the determination as to whether the court below properly exercised its discretion to vary the Will of the deceased is predicated on the interpretation and application of section

20(1) of the Act. The section enacts as follows:

> **"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 restrictions as the court may impose, notwithstanding the provisions of the will, order that such reasonable provisions as the court thinks fit shall be made out of the testator's estate for the maintenance of that dependant."** (Emphasis added)

94. This court had the occasion of considering the effect of section 20 of the Act in the **Isaac Tantameni Chali**[5] case cited by the appellant. In that case, we held that:

> **"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."** (Emphasis added)

95. In this case, the position taken by the court below was that the respondent was a dependant of the deceased who had not been provided for in the Will and would suffer hardship if the court did not consider varying the Will to make provision for him.

96. Having carefully examined the decision in the **Isaac Tantameni Chali**[5] case and the relevant provisions of the Act referred to therein, the view we take is that the respondent is at law not covered by the definitions of 'dependant' or 'child'.

97. In his affidavit in support of originating summons, the respondent did indicate that his date of birth was 25th May 1971, entailing that at the time these proceedings were commenced in 2008, he was 37 years old and, therefore, an

adult. In the **Isaac Tantameni Chali**[5] case, we held that an adult daughter who was not provided for under the Will could not be said to be a dependant even though she was living with her father at the time of his death. We hold that the same principle applies to the respondent in the present case.

98. Our earlier decision in the case of **Mwananshiku and Others v Kemp and Mwananshiku**[7] also fortifies our reasoning, where we said at page 46 that:

> **"In our view, assistance to relatives [or dependants] during one's life does not necessarily create automatic obligation after one's death. Wills must be respected unless there are unreasonable or inadequate provisions to those specified in the Will and entitled in law."**

99. For the reasons stated above, we conclude that grounds two, three and four have merit. In view of the conclusion we have reached in these three grounds, ground five inevitably succeeds.

100. It is also our considered view that the finding by the court below that the respondent would suffer hardship was contrary to the

evidence on record which clearly established that the respondent was running a bar and rearing chickens. This is confirmed by the fact that the occupation which the respondent gave the court at trial, was "businessman". We find that the respondent, having been a man of means and not of straw, and being an adult, was effectively excluded as a dependant under section 20 of the Act. Further, we find that the respondent's "dependant" or "child" status also ceased by the fact that he had attained tertiary education, was neither disabled or under the age of 18.

101. In his judgment at page J20, the learned trial judge directed as follows:

> **"Accordingly this action succeeds and I direct that the Respondent as the Executor of Andrija Vidmar's Will shall make a full account of the estate of the deceased <u>including those assets shown in paragraph 5 of the Will and distribute the same equally among the three beneficiaries namely, Edwin Aloise Bilali Vidmar, Viktor Mark Vidmar and Antun Vidmar</u>."**
> (Emphasis added)

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102. Paragraph 5 of the Will, in so far as it is relevant to the grounds of appeal under consideration, states:

> **"5. My Trustees shall ensure of the following requests/special instructions:**
>
> **(a) 2 acre plot/609 CHUDLIEGH, LUSAKA which was left to my sons Viktor Mark Vidmar and Antun Jason Vidmar by my late wife, Rukeya Vidmar as per her WILL of which I was appointed as Financial Guardian, of which I hereby instruct my appointed administrator to sell and divide the proceeds equally apportioned between my sons Viktor Vidmar and Antun Vidmar.**
>
> **(b) Title deeds for house number 5627 Kalundu, Lusaka was left to my sons Viktor Mark Vidmar and Antun Jason Vidmar by my late wife, Rukeya Vidmar as per her WILL of which I was appointed as Financial Guardian, of which I hereby bequeath this property to Viktor Mark Vidmar. This house must be held by his family at all costs.**
>
> **(c) Flat 406 Jacaranda Gardens, York Avenue, Berea, Johannesburg, which was left to me by my last wife as per her last WILL, sell and apportion all balances equally between my two sons."**

103. It can clearly be discerned from paragraph 5 of the Will that the assets in (a) and (b) were bequests from the deceased's wife

to her sons, DW1 and DW2. Even assuming that the respondent qualified as a dependant, it is inconceivable that he could be a beneficiary of such assets. Similarly, the asset in (c) was initially a bequest from the deceased's wife to the deceased which he in turn bequeathed the proceeds from its sale to DW1 and DW2. In the view we take, there is absence of a legal basis for the three assets to devolve to the respondent even if he were a dependant.

104. It was, therefore, a serious misdirection by the trial judge to make a blanket directive that all the assets shown in paragraph 5 of the Will should be distributed equally among DW1, DW2 and the respondent.

105. We wish to comment on two minor issues before we conclude. Without asking us to do anything, counsel for the appellant stated that the respondent's application was made more than six months from the time a representation in regard to the testator's estate should have been taken out, contrary to section 22(1) of the Act. The respondent's counsel also

lamented that the appellant was bringing a new issue of PW2 being a witness with an interest to serve which was not raised in the court below. In view of the conclusion we have reached in this matter, we consider that it is otiose to exert our energies further by making a determination on the two issues as no useful purpose will be achieved.

Conclusion

106. Consequently, we are satisfied that the learned trial judge's decision of varying the Will was contrary to the letter and spirit of the provisions of the Act and was unjustified in the circumstances of this case.

107. We accordingly allow this appeal. The upshot of our decision is that all orders made by the lower court in relation to the variation of the Will are hereby set aside. In view of the circumstances of this case, we order that each party will bear

his own costs in this court and in the court below.

M. Malila
SUPREME COURT JUDGE

C. Kajimanga
SUPREME COURT JUDGE

J. K. Kabuka
SUPREME COURT JUDGE