

COURTS' EXCLUSIVE JUDICIAL TURF OR MASTER OF THE HIGH COURT'S DOMAIN: DETERMINATION OF THE STATUS OF A PERSON AS A SURVIVING SPOUSE OR OTHERWISE FOR PURPOSE OF ENTITLEMENT TO INTESTATE INHERITANCE IN AN UNREGISTERED CUSTOMARY LAW UNION IN ZIMBABWE.

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INTRODUCTION

The determination of the status of a person as a surviving spouse in an unregistered customary law union in Zimbabwe is a very important decision which operates as a precursor or condition precedent to any legal claim for intestate inheritance from the applicable deceased estate by the concerned person. This issue has always been lying unresolved but it was recently brought to the fore by a related newspaper story that was reported in the Herald edition of 17 April 2017² entitled,

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²² The Herald Newspaper quoted a High Court judgment by Zhou J stripping the surviving spouse's status off a Harare woman Ms Easter Dzwowa in the estate of the late Zimbabwe Electoral Commission chief elections officer Lovemore Sekeramayi after evidence of payment of lobola was not produced before the Master of the High Court or a magistrate who had dealt with the case. Ms Dzwowa was staying with the deceased at the time of his death at his Chisipite house, but no proof of lobola payment was produced. According to that story, the High Court set aside the Master's decision declaring Ms Easter Dzwowa as a surviving spouse of the late Lovemore Chipunza Sekeramayi, further set aside the allocation of the immovable property located at Number 31 Hindhead Avenue, Chisipite, Harare to Easter Dzwowa and ordered the Master of the High Court to reconvene and call evidence from witnesses regarding the status of the relationship between Ms Dzwowa and the late Sekeramayi. Whether the High Court was correct or not in mainly relying on the alleged absence proof of payment of lobola to set aside the recognition of Easter Dzwowa as a customary law surviving spouse of the late Lovemore Chipunza Sekeramayi is a debatable issue. However, the same High Court judgment is noteworthy in that it seeks to promote a purposive approach and marks a departure from a conservative approach in deciding a surviving spouse's entitlement to the matrimonial home merely on the basis that the surviving spouse was residing at that particular matrimonial home with the deceased up to the deceased's time of death, something that may be practically difficult if a man ejects or forces his wife to leave the matrimonial home after bringing another woman to stay at the same matrimonial home. Thus the following remarks made by Zhou J in the estate late Lovemore Chipunza Sekeramayi are very instructive: "*Living together is not the same as being married...the conclusion by the first respondent that the deceased had two wives is therefore not based on any evidence which was placed before him. To disinherit a woman who is legally married on the basis that she did not live in the house without considering where she would live, is in my view, grossly irregular.*" (emphasis added by underlining). The purpose rule of interpretation to a surviving spouse's legislative entitlement to the matrimonial home where he/she resided with the deceased up to the

“ no lobola, no inheritance...ruling brings closure to surviving spouse debate³.” The classification of a person as a surviving spouse of a deceased person is one of the gateway to acquiring inheritance from the deceased person’s estate, especially where the deceased died without leaving behind a valid will⁴ (intestate). The legal history of post independent Zimbabwe contain some indelible

time of death was also nicely articulated in the case of Alex Chimhowa and others v Joyce Chimhowa HH 183-12 (per Chiweshe JP) where the court refrained from applying the literal rule to avoid injustice in favour of the purposive rule to achieve justice. The brief facts of the Chimhowa case are that the deceased man, Lloyd Chimhowa was previously married to his first wife, one Mary Maria Mabwe who predeceased him but the couple was blessed with six children. The late Lloyd Chimhowa and his first wife acquired an immovable property in Glen View, Harare during their lifetime and subsistence of the marriage and jointly contributed to its development and the construction of a dwelling house, where they resided as a family with their six children. Upon the death of Mary Maria Mabwe, the late Lloyd Chimhowa entered into second marriage with Joyce Chimhowa which initially started as a customary law union but was later solemnised in terms of the then Marriage Act (Chapter 37). The second marriage was blessed with four children. The Master initially appointed Joyce Mabwe, the surviving spouse as the executrix for estate late Lloyd Chimhowa but later removed and replaced her with a neutral executor after a bitter dispute erupted among the estate beneficiaries. The neutral executor awarded Joyce Mabwe the aforesaid sole estate immovable property as the surviving spouse in terms of section 3A of the Deceased Estates Succession Act[Chapter 6:02] on the basis that it was the matrimonial home. The deceased’s children from the first marriage mounted a legal challenge to the award of the concerned immovable property exclusively to Joyce Chimhowa on the basis that their late mother, Mary Maria Mabwe contributed to the acquisition and development of that immovable property as the first wife of the deceased. The High Court adopted a purposive construction of section 3A of the Deceased Estates Succession Act, section 68F(b)(i) of the Administration of Estates Act and the Deceased Persons Family Maintenance Act [Chapter 6:03] and came to the conclusion that the intention of the legislature, in the case of widows, was to protect them in relation to the property acquired during the subsistence of their marriage to the deceased persons. According to the court, this protection not just benefitted widows but their minor children as well. The court further held that it did not perceive it to be the legislature’s intent to extend this protection and privilege to persons outside the marriage within which such property might have been acquired as to impute that kind of interpretation would lead to absurdities in the application of the law. The rigid literal rule approach to a widow’s entitlement to the matrimonial home on the basis of being physically residing at the concerned matrimonial home was adopted by the High Court in the case of Jessie Chinzou v Masomera and Others HH 593-15 (per Chitakunye J judgment delivered on 9 July 2015) wherein the High Court denied a woman who was married in terms of a civil monogamous marriage in 1965 sole legal entitlement to the matrimonial home on the basis that she had been banished from the matrimonial home by the deceased husband for 37 years up to the time of his death when the couple separated in about 1977 and that even though her marriage legally subsisted up to the time of the deceased’s death, the deceased had de facto divorced the widow due to the long period of their separation as husband and wife. In the Chinzou case, the High Court upheld the distribution of the matrimonial home between the surviving spouse with a monogamous marriage and the deceased’s out of wedlock children sired between him and the girlfriend he was cohabiting with at that particular matrimonial home at the time of his death. The case is also legal authority for the proposition that an aggrieved litigant cannot bypass legal recourse of taking the Master’s decision on motion (application) within the prescribed time limit provided for in terms of section 52(9)(i) of the Administration of Estates Act by resorting to an application for a declaratory order which is not fettered by time limits. The Chinzou case was launched as a test case by Women and Law in Southern Africa(WILSA) fully supported by the same organisation, whose sterling efforts to promote women’s legal rights must be greatly commended.

³ With due respect to the Herald, quite on the contrary, this ruling has opened a serious legal debate about the determination of a person’s status as a surviving spouse as opposed to bringing closure to that debate. If anything the ruling has opened a legal pandora box.

⁴ The High Court judgment in the case of Estate late Bridget Wakapila v Dennia Matongo HH 71-08 (per Kudya J) illustrates the legal concept of freedom of testation and the advantage of writing a valid will before one dies. In this case the deceased man wrote a will awarding the immovable property he acquired with his late first wife to his children from the first marriage. When he remarried after the death of his wife, no child was born out of the second marriage but the wife brought her son from a previous marriage to reside at the immovable property which the deceased man acquired with his first wife. Upon the death of the husband, the

imprints of certain women who suffered palpable injustice in the area of intestate succession under customary law⁵. In some cases, the question of whether or not one is a surviving spouse or even a beneficiary⁶ of a given deceased is a highly contested terrain involving complex material disputes of fact which cannot be resolved amicably between the deceased's family members and other interested parties due to an interplay of a myriad of factors that includes but not limited to greedy, polarisation and settling of personal scores, thereby warranting the intervention a neutral third party to adjudicate. The crux of this paper is to provide an answer to the pricking question of who between the Courts and the Master of the High Court is reposed with the jurisdiction to determine the status of a person as a surviving spouse or otherwise in an unregistered customary law union in Zimbabwe.

LEGAL CONFINES OR BOUNDARIES OF THE MASTER'S JURISDICTION IN A CUSTOMARY LAW ESTATE DISPUTE AMONG BENEFICIARIES REGARDING WHETHER OR NOT CUSTOMARY LAW APPLIED TO THE DECEASED PERSON.

The Master of the High Court's (hereinafter referred to as "the Master") jurisdiction in a customary law estate dispute among beneficiaries pursuant to section 68G of the Act is clearly marked and circumscribed within the four corners of the applicable legislation and not open ended⁷. Jurisdiction refers to the legal capacity and power to determine a matter. In terms of the law, the Master's jurisdiction is only restricted to deciding a dispute among beneficiaries as to whether or not customary law applied to the deceased person, nothing more nothing less. The peremptory provisions of the Administration of Estates Act⁸ (hereinafter referred to as the "Act") are very instructive in this regard as follows:

" Where there is a dispute among the beneficiaries of an estate as to whether or not customary law applied to the deceased person for purposes of this Part, the question shall be referred to the Master, who shall determine it in the speediest and least expensive manner consistent with real and substantial justice⁹." (emphasis added by underlining).

second wife proceeded to register the estate and unbeknown to her that the deceased had already written a will giving that immovable property to his children with the first wife, claimed the house acquired by her late husband and his late first wife as matrimonial home. She challenged the validity of the deceased's will but the High Court upheld that will as legally valid.

⁵ See *Magaya v Magaya* 1999(1)ZLR 100(SC), an infamous case in which the eldest female child was denied inheritance to her late father's estate in preference to a younger male child of the deceased on the basis of the archaic patriarchal basis that under customary law, male children are preferred to inherit ab intestatio over their female counterparts and that the position of women under customary law has nothing to do with their majority or minority status. This case illuminates the demerit of dying without leaving behind a valid will.

⁶ See the case of *Elsie Bhila v Master of the High Court and others* HH 549 -15 (per Mwayera J) wherein the surviving spouse in a civil monogamous marriage mounted a legal challenge against the recognition of her deceased husband's out of wedlock children as estate beneficiaries but she lost that legal challenge after the High Court dismissed her application and upheld the recognition of such children as estate beneficiaries based on the ant-discrimination provisions entrenched in terms of section 56(3) of the Constitution of Zimbabwe which proscribe discrimination on various grounds including but not limited to whether one was born in or out of wedlock.

⁷ An example of an open ended legislative provision is section 52(9) of the Administration of Estates Act which gives the Master of the High Court the wide ranging discretionary powers to give any direction he deems fit when dealing with objections to an estate account.

⁸ Chapter 6:01

⁹ See section 68G(2) of the Administration of Estates Act.

Thus, the statutory jurisdiction of the Master specifically apply to and is limited to a determination of a dispute among the beneficiaries of an estate as to whether or not customary law applied to the deceased person based on the legal guidelines embedded in the Act as follows:

“ Section 3 of the Customary Law and Local Courts Act (Chapter 7:05) shall apply in determining the question whether or not customary law applied to a deceased person for the purpose of this Part:

Provided that it shall be presumed, unless the contrary is shown, that-

- (a) customary law applied to a person, who at the time of his death, was married in accordance with customary law; and***
- (b) the general law of Zimbabwe¹⁰ applied to the person who, at the time of his death, was married in accordance with the Marriage Act (Chapter 5:11) or the law of foreign country, even he was also married to the same person under customary law¹¹.”***

¹⁰ See the case of Jessie Chinzou v Masomera and others HH 593-15.

¹¹ See section 68G(1) of the Administration of Estates Act. This rebuttal presumption on the choice of law based on the nature of the marriage which the deceased contracted is very crucial in preventing the blurring of the distinction between customary law and general law and also a situation whereby one tries to enjoy both worlds of customary and general law simultaneously. A civil marriage solemnised in terms of the Marriage Act (Chapter 5:11) or a marriage according to the law of a foreign country gives rise to the presumption that the general law of the country applies to that deceased person's estate unless credible evidence can be adduced to discredit the application of general law and prove that customary law applies. In the same vein, where the deceased person was married in accordance with customary law, whether registered or unregistered, at the time of his death, the presumption is that such a person's deceased estate is governed by customary law unless compelling evidence can be availed rebutting the application of customary law and proving the application of general law. The extent of the legal recognition of both a registered and unregistered customary law marriage is unambiguously provided for in terms of section 68(3) of the Administration of Estates Act which states that, “ A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this Part notwithstanding that it has not been solemnized in terms of the Customary Marriages Act [Chapter 5:07], and any reference in this Part to a spouse shall be construed accordingly:

Provided that such a marriage shall not be regarded as a valid marriage for purposes of this Part if, when it was contracted, either of the parties was married to someone else in accordance with the Marriage Act (Chapter 5:11) or the law of a foreign country under which persons are not permitted to have one spouse”. (see Chinzou v Masomera and others HH 593-15). The mischief which the preceding legal provision seeks to prevent is the legal undermining of a prior civil or monogamous marriage by a later customary law marriage which is potentially polygamous in nature. Thus a monogamous marriage which registered before acts as a legal bar to any attempt by any party to that marriage to enter into a legally valid customary law marriage with anyone post the registration of the monogamous marriage by making such a purported customary law marriage null and void. A valid and subsisting monogamous marriage renders any latter customary law marriage by one of the spouse who is a party to the former marriage void. The legal validity of a registered civil or monogamous marriage can only be lawfully terminated by death of one of the parties to that marriage or a decree of divorce terminating that marriage issued by a competent court of law. This means that marriage fraudsters who seek to first enter into a civil or monogamous marriage with one party and later decide to enter into a separate customary law marriage with a different party will be stopped in their tracks or unholy crusade by the mighty arm of the law. However, where a customary law marriage already exists and the spouse(usually the male) marries another person under the Marriage Act (Chapter 5:11) or the law of a foreign country, the second marriage is not void but it is downgraded to a customary law marriage (and ranked accordingly based on the date it was contracted for purposes of deciding the seniority of wives in that customary law marriage) as per the provisions of section 68(4) of the Administration of Estates Act which has this to say, “ A marriage contracted according to the Marriage Act (Chapter 5:11) or the law of a foreign country under which persons are not permitted to have more than one spouse shall be regarded as a valid marriage for purposes of this Part even if, when it was contracted, either of the parties was married to someone else in accordance with

The law is crystal clear that the Master's legal authority is exclusively one of making a determination as to whether or not the estate of the deceased person is governed by customary law in the event of a dispute among the beneficiaries to that estate regarding whether or not the estate is subject to customary law. Section 68G(1) of the Act is a classic codification of the dual legal system that exists in Zimbabwe in terms of which customary law is juxtaposed and placed at par with general law¹². In making a determination in terms of section 68G(2) of the Act, the Master does not sit as a court of law or a judicial authority but maybe one may say that the Master will be performing quasi judicial functions. The rationale behind section 68G(2) of the Act is to promote faster and cheaper resolution of a dispute among beneficiaries as to whether or not customary law applies to that estate but in so doing, the Master will operate in sync with real and substantial justice. In the course of making a determination whether or not customary law applies to the estate of the deceased person, the Master may make statements in passing (akin to *obiter dictum*) as to the identity or identities of the spouse(s) in that estate but reason for the decision(*ratio decidendi*) in the determination must be whether or not customary law applies to that estate and not who or who is not a spouse in that estate. The Master of the High Court is legally precluded from making a determination on the status of a person a surviving spouse or otherwise in a customary law estate because that is a judicial determination which can only be made by a competent court of law. Clearly where there is a registered customary law dispute solemnised in terms of the Customary Marriages Act (Chapter 5:07), which was (not dissolved, annulled or cancelled by any competent court of law) legally valid up to the time of the deceased's person's death, the living party to such a valid marriage certificate's status as a surviving spouse is easily answered in the positive by the existence of that marriage certificate as prima facie proof. A conundrum arises in connection with an unregistered customary law union where it may be invariably necessary to call extrinsic evidence to prove or disprove the status of a person as a surviving spouse under customary law where a dispute regarding that status arises among the beneficiaries. The lawmaker

customary law, whether or not the customary law marriage was solemnised in terms of the Customary Marriages Act [Chapter 5:07]:

Provided that, for the purpose of this Part, the first-mentioned marriage shall be regarded as a customary law marriage." The mischief behind the preceding legislative provision is to prevent a marriage fraud being perpetrated against a spouse in a customary marriage through the contracting of a civil or monogamous marriage by the other spouse in that marriage, whose legal effect, if it had not been for this saving legal provision, would be to invalidate and close out the subsisting customary marriage which came into legal effect before the civil or customary marriage. Women usually fall prey as victims of this marriage scam especially where the customary law spouse who married the man first may be residing in the rural areas or some faraway place and unbeknown to her, her husband falls head over heels with another female lover and the two lovebirds hastily register the latter marriage purportedly as a civil or monogamous marriage to the great prejudice of the first wife who is labouring under a cloud of ignorance that her marriage is under legal threat of extinction at the hands of the civil or monogamous marriage and consequently disinheriting the spouse(wife) from the first customary law marriage. The legislature must be commended for enacting a law that gives a viable legal remedy to the victims of double tragedy of marriage fraud and subtle overtures to disinheritance. In most cases, this startling revelation emerges when one of the parties (or sometimes the real villain and architect) to the marriage scam is deceased thereby epitomising the saying of the late prolific writer, Chinua Achebe that, "the good that men do die with them but the evil live after." This legal protection augurs well with the fundamental constitutional right to equality before the law as well as the equal benefit and protection before the law firmly guaranteed in terms of section 56(1) of the Constitution of Zimbabwe. According to the late Dr Martin Luther Jnr, " the law cannot give people a good heard but it can restrain the heartless."

¹² General law refers to both the common law(Roman Dutch law) and legislation/statute law.

deliberately arrogated the Master with a specific legal mandate to decide whether or not customary law applies to a deceased person's estate and left out the determination of the legal status of whether a person is or is not a surviving spouse to a judicial authority which vests in competent courts of law. If the legislature intended the Master to decide whether or not the Master must make a determination regarding a dispute on the status of whether or not one is a spouse in a customary law estate, it would have expressly stated that intention within the prevailing legislation but it did not do so. The Master's office is a creature of statute which can only exercise such powers as are expressly provided for in the enabling legislation. There is nothing in the applicable law which expressly or impliedly give the Master the jurisdiction to make a determination on any dispute regarding the status of a person as a surviving spouse or otherwise in a customary law estate. The judgment in the case of **In re: Estate late Amos Chirunda**¹³ is not a legal authority for the proposition that section 68G(2) of the Act gives the Master the jurisdiction to make a ruling on whether or not a person is a surviving spouse in a customary law estate.

Consequently, part of the operative part of the High Court judgment by Zhou J in the estate of the late Lovemore Sekeramayi Chipunza ordering the Master to reconvene and call evidence from witnesses regarding the status of the legal relationship between Ms Dzwowa and the late Sekeramayi, is legally incompetent on the basis that the Master lacks jurisdiction to exercise such a judicial authority as it is the exclusive preserve of a competent court of law. A competent court of law will be in a position to weave through any material disputes of fact by thoroughly assessing the veracity of evidence and credibility of witnesses through an action where oral (*viva voce*) evidence is adduced going through the mill and grill of examination in chief, cross examination and re-examination. A dispute that involves material disputes of fact¹⁴ cannot be resolved on the basis of written papers or submissions only but it requires oral evidence to clarify such teething disputes of fact.

DETERMINATION OF THE STATUS OF A PERSON AS A SURVIVING SPOUSE IN AN ESTATE GOVERNED BY CUSTOMARY LAW AS AN EXCLUSIVE JUDICIAL TURF FOR A COMPETENT COURT OF LAW

¹³ HH 119-2006. In this case Makarau JP (as then she was) came to the conclusion that a ruling that had been made by a provincial magistrate whether the concerned person was a spouse in a customary law estate was not founded on any legal basis and hence a legal nullity. It is noteworthy that at pages 3 & 4 of the same cyclostyled judgment, the learned judge made some statements in passing that she was not dealing with the question of whether or not the Master can make a ruling on whether or not a person is a spouse in a customary law estate but all the same, she expressed serious reservations on whether the Master has the jurisdiction to make such a ruling. The Chirunda judgment left this legal issue unanswered.

¹⁴ See Hebshtein and Van Winsen in their book, *The Civil Practice of the Superior Courts in South Africa*, 3rd ed, at p 61, "it is trite that the court can only entertain proceedings on motion where there is no genuine dispute of fact." See also *Masukusa v National Foods Ltd* and another 1983 (1) ZLR 232 (H), *Nyazorwe v Guta and others* HH 234-88, *Doris Dewa v Magadalen Sibanda and others* HB 110-08, *W and D Consultants (Private) Limited and another v Justice Masaka and others* HH 27-16, *Supa Plant Investment (Pvt) Ltd v Edgar Chidavaenzi* HH 92-09, *Muzenda and Others v Usayiwevhu and Others* HH 107-12, *Chipaurashe and others v Triangle Limited and another* HH 196-15, *Tlokwe v Gyamfi* 2007 (3) BLR 397(HC), *Combination of Construction (Pty) Ltd v Kweneng Land Board* 2006 (2) BLR 277(HC), *Jonsson Workerwear (Pty) Ltd v Williamson and Another* (2014) 35 ILJ 712 (LC)

In the absence of a clear legislative provision legally empowering the Master to make a determination in any dispute among the estate beneficiaries regarding the status of a person as a surviving spouse or otherwise, in an estate to which customary law applies, it logically follows that such exclusive jurisdiction vests in a formal competent court of law. e.g the customary law courts, the magistrates courts, the High Court, the Supreme Court and the Constitutional Court. Specialist courts like the Labour Court, Administrative Court, Fiscal Appeal Court, Water Court e.t.c do not have jurisdiction to determine a dispute of this nature as their respective jurisdiction is restricted to specialised areas in terms of which legislation bestow them with jurisdiction. It is important to note that the customary law courts, magistrates courts and High Court are courts of first instance in any dispute falling within such courts' jurisdiction mindful of the fact that the High Court has inherent jurisdiction which the customary law courts and magistrates courts lack. The Constitution of Zimbabwe unequivocally vests judicial authority in the courts in the following salutary terms:

“ 162 Judicial Authority

Judicial authority derives from the people of Zimbabwe and vested in the courts, which comprise-

- (a) the Constitutional Court;***
- (b) the Supreme Court;***
- (c) the High Court;***
- (d) the Labour Court;***
- (e) the Administrative Court;***
- (f) the magistrates courts;***
- (g) the customary law courts; and***
- (h) any other courts established by or under an Act of parliament.”***

In terms of the provisions of the supreme law of the land, the Constitution, there is no judicial authority outside the legal parameters of the aforementioned section 162 of the Constitution. The determination of the status of a person as a surviving spouse in a customary law estate is a judicial determination that can only be legally made by a competent judicial authority as provided for in terms of section 162 of the Constitution. Customary law courts¹⁵ are likely to loom large in providing the legal avenue for judicial determination of the status of a person as a spouse under customary law due to their specialised knowledge in customary law.

WHERE LAW AND PRACTICE CONFLICT, LAW PREVAILS

¹⁵ See section 162(g) of the Constitution of Zimbabwe

An argument may be presented that the practice of the Master's office, by practice, has always been to make a determination in a dispute among the beneficiaries in an estate governed by customary law regarding the status of a person a surviving spouse but that argument is legally demolished by a compelling and superior legal argument that where there is a conflict between law and practice, the law prevails. If the Master has been carrying out the practice of making a determination in a dispute among beneficiaries concerning the status of a person as a surviving spouse in an estate which is subject to customary law, that practice does not have any legal foundation. Law supersedes practice. The pre-eminence of law over practice is graphically exemplified by section 2(1) of the Constitution in explicit terms as follows:

“ This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of inconsistency.” (emphasis added by underlining)

CLARION CALL FOR THE AMENDMENT OF THE ADMINISTRATION OF ESTATES ACT TO CONFER THE MASTER WITH SPECIAL JURISDICTION TO MAKE A DETERMINATION IN A DISPUTE AMONG BENEFICIARIES REGARDING THE STATUS OF A PERSON AS A SURVIVING SPOUSE IN A CUSTOMARY LAW ESTATE

The Master and other interested parties can lobby or request parliament to amend the existing legislation to bestow the specialised office of the Master with express jurisdiction to make a determination in any dispute among the beneficiaries regarding the status of a person as a surviving spouse in an estate that is governed by customary law. It is respectfully submitted that if the law is amended to accord the Master with the jurisdiction to make a determination on any dispute regarding the status of whether or not a person is a surviving spouse in a deceased estate governed by customary law, the Master's office can legally deal with that issue in a competent manner because that office has the necessary skills and specialists in the field of deceased estates law. The legal conferment of such jurisdiction upon the Master will bode well with the objective of speedy and cheaper resolution of estate disputes espoused in terms of the letter and spirit of section 68G(2) of the Act. It has already been alluded to that where the person who claims to be a surviving spouse in a customary law estate is a party to a legally valid customary law marriage registered in terms of the Customary Marriages Act (Chapter 5:07), resolving such a dispute is legally easy because the existence of a valid marriage certificate is ample proof of the status of the holder and party as a surviving spouse. However, in practice, problems and disputes flare regarding the status of a person as a surviving spouse in some unregistered customary law unions. Some of the parties to unregistered customary law unions lack the necessary resources and knowledge to mount a formal legal action to vindicate their legal rights and hence the victim friendly environment of the Master's office can offer a conducive atmosphere for a fast, cheap and informal resolution of the dispute without negating real and substantial justice. The legislature may still maintain the legal caveat that any party aggrieved by the Master's determination in this realm has the right to appeal to the High Court against such determination. Vesting the concerned jurisdiction in the formal courts of

law may dissuade deserving victims of injustice, in most cases marginalized women, from having access to justice due prohibitive litigation costs for hiring legal practitioners and procedural barriers posed by some cumbersome court rules and procedure. This may render access to justice a mere pie in the sky or talk shop for those who fail to get access to any legal remedy.

CONCLUSION

It is abundantly clear that in terms of the prevailing law, the Master is legally restricted from making a determination regarding a dispute concerning any person's status as a surviving spouse in a customary law estate. In the same vein, any competent court of law established and clothed with judicial authority in terms of section 162 of the Constitution is reposed with jurisdiction to determine any dispute concerning the status of any person as a surviving spouse in a customary law estate. The legislature is urged to amend the relevant provisions of the Act to extend the jurisdiction of the Master to determine whether customary law applies to the estate in terms of section 68G(2) of the Act to also cover the determination of the status of a person or otherwise as a surviving spouse under the same estate.