

The Supreme Court of Zimbabwe's *Chigwada* Decision and Its Implications for Testamentary Dispositions and Enforcement of Section 26 of the Constitution of Zimbabwe

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Abstract

The Supreme Court of Zimbabwe recently handed down a judgment on the determination of whether the law that governs testamentary dispositions of estates binds a testator to bequeath his or her share of property to the surviving spouse. This was an appeal case against the judgment of the High Court which had held that a testator is bound to leave his or her property to the surviving spouse. Albeit the fact that section 5(1) of the *Wills Act* establishes the doctrine of freedom of testation, section 5(3)(a) of the *Wills Act* prohibits a testator to execute a will that disinherits a surviving spouse. The provision has been interpreted inconsistently by the High Court for the past years. One category of judgments held that a testator could disinherit a surviving spouse based on freedom of testation and that the provisions of the *Deceased Estates Succession Act* are not applicable to testamentary dispositions. In contrast, the other set of dissenting judgments held that a will that disinherited a surviving spouse was invalid. Further, the courts held that the provisions of the *Deceased Estates Succession Act*, in particular section 3A which grants a surviving spouse the right to inherit the matrimonial home applies to testate succession. In overturning the High Court decision, the Supreme Court authoritatively held that section 5(3)(a) of the *Wills Act* could not be interpreted to mean that a surviving spouse cannot be disinherited in a will. The Court based its decision on the doctrine of freedom of testation entrenched in the *Wills Act* and the Constitution. The Supreme Court also conclusively held that the provisions of the *Deceased Estates Succession Act* are not applicable to testamentary dispositions. In arguing her case in the Supreme Court, the surviving spouse among other arguments contended that section 26 of the *Constitution of Zimbabwe* provides for equality of rights of spouses and the protection of children and spouses upon the dissolution of marriage through death or divorce. The Supreme Court disapproved the previous High Court decisions which held that a will that disinherited a surviving spouse was invalid as it contravenes section 26 of the Constitution. The Court held that section 26 of the Zimbabwean Constitution is not directly enforceable, does not bestow rights on individuals and does not prohibit the disinheritance of a surviving spouse. The Court held that the provisions of section 26 are found under the National Objectives which are intended to guide the state in the formulation of laws relating to dissolution of marriage through death. In this article, I argue that the Supreme Court decisively answered the discordant questions on whether a surviving spouse can be disinherited through a will and whether the provisions of the *Deceased Estates Succession Act* apply to testamentary dispositions. However, the Court missed an opportunity to develop the Zimbabwean jurisprudence on the enforcement of National Objectives, in particular section 26 of the Constitution.

Keywords

Chigwada v Chigwada; testamentary dispositions; *Wills Act*; freedom of testation; disinheritance of a surviving spouse; section 26 of the *Constitution of Zimbabwe*; justiciability of human rights; enforcement of National Objectives.

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1 Introduction

The law of testamentary dispositions¹ encompasses rules or norms which govern the distribution of a deceased person's estate according to the testator's wishes as expressed in a will.² A testator is an individual who dies having written a will. A will is a written document in which a testator voluntarily sets out his instructions as to how his assets are to be transferred following his death.³ In Zimbabwe, the law governing testamentary dispositions of estates is the *Wills Act*.⁴ An individual who wishes to transfer a commodity either movable or immovable which must operate at their death does so through writing a will.⁵ The will has no effect until the testator dies.⁶ Over the years, the Zimbabwean Courts have struggled with the question of freedom of testation in correlation to the disinheritance of a surviving spouse in a will.⁷ Freedom of testation refers to the freedom of a person to make any provision he or she desires in a will and the right to have his estate distributed in a manner that he or she wishes.⁸ Disinheritance entails excluding an individual from a will as a beneficiary. Section 5(1) of the *Wills Act* entrenches the doctrine of testation. Even so, section 5(3)(a) of the *Wills Act* bars a testator from executing a will that disinherits a surviving spouse. The interpretation and application of section 5(3)(a) of the *Wills Act* has given rise to inconsistent judgments in the High Court.⁹ One cluster of judgments held that a testator has freedom of testation and that under the Zimbabwean law of testamentary dispositions, he or she is not mandated to dispose through a will his or her estate to his or her surviving spouse. The courts in the cases held that the provisions of the *Deceased Estates Succession Act* are not applicable to testamentary dispositions. The dissenting judgments held that a testator is mandated to dispose his or her estate by a will to the surviving spouse and that the provisions of the *Administration of Estates Act* and the *Deceased Estates Succession Act* are applicable to testate succession. The *Chigwada v Chigwada*¹⁰ Supreme Court

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¹ The law of testamentary dispositions is sometimes referred to as testate succession.

² Jamneck "Testate Succession" 62.

³ Pace and Van der Westhuizen *Wills and Trusts* 2.

⁴ *Wills Act* 13 of 1987 (hereafter *Wills Act*).

⁵ Chirawu *Principles of the Law of Succession* 30.

⁶ Chirawu *Principles of the Law of Succession* 30.

⁷ *Zaranyika v The Master of the High Court* HH 526-19 18 para 3.

⁸ Jamneck "Freedom of Testation" 128.

⁹ *Chigwada v Chigwada* SC 188/20 5 para 2 (hereafter *Chigwada* Supreme Court decision).

¹⁰ *Chigwada* Supreme Court decision.

decision should be viewed from a way of thinking that it was an attempt to settle this confusion and uncertainty.

A five-member Bench of the Supreme Court had to be set up to answer the discordant questions conclusively.¹¹ In this article, the author argues that the Supreme Court decisively settled the question on whether a surviving spouse can be disinherited in a will. The Supreme Court held that a surviving spouse can be disinherited by a will complying with all the formalities of a will.¹² The Court based its decision on section 5(1) of the *Wills Act* which guarantees freedom of testation¹³ and section 71(2) of the *Constitution of Zimbabwe*¹⁴ which entrenches the doctrine of freedom of testation.¹⁵ The Court also authoritatively answered the question of whether or not the provisions of the *Deceased Estates Succession Act* apply to testamentary dispositions. The Court held that the Act only applies upon dissolution of marriage through the intestate death of a spouse.¹⁶ In this context, the Supreme Court reversed the High Court decision.

The Supreme Court had occasion to determine the place of section 26 of the Constitution in the Zimbabwean constitutional structure in so far as property rights of spouses are concerned. Section 26 of the Constitution, which is under the National Objectives provides that the state must take appropriate measures to ensure that there is equality of rights of spouses during and upon dissolution of the marriage and that in the event of dissolution of a marriage, by death or divorce, children and spouses are to be protected. The Court held that the provisions of section 26 of the Constitution do not prohibit the disinheritance of a surviving spouse.¹⁷ It was the decision of the Supreme Court that section 26 of the Constitution is not directly enforceable by the courts as it does not grant rights to individuals.¹⁸ The Court held the provisions of section 26 could only have been interpreted and applied if the question for determination was whether or not the state had fulfilled its obligations.¹⁹ This article is of the view that the Supreme Court created an unsettling precedent on the enforcement of National Objectives. There are rights which flow from the state's obligations under section 26 of the Constitution which the Supreme Court ought to have protected. These

¹¹ *Chigwada* Supreme Court decision 5 para 2.

¹² *Chigwada* Supreme Court decision 19 para 2.

¹³ *Chigwada* Supreme Court decision 19 para 2.

¹⁴ *The Constitution of the Republic of Zimbabwe*, 2013 (hereafter the Constitution).

¹⁵ *Chigwada* Supreme Court decision 25 para 1.

¹⁶ *Chigwada* Supreme Court decision 19 para 4.

¹⁷ *Chigwada* Supreme Court decision 26 para 2.

¹⁸ *Chigwada* Supreme Court decision 27 para 1.

¹⁹ *Chigwada* Supreme Court decision 29 para 1.

are the right of equality of spouses and the right to protection of children and spouses in the event of a dissolution of marriage by death or divorce.

The article argues that the rights which flow from National Objectives should influence the interpretation of fundamental rights and that the two should be applied harmoniously. The author argues that the Supreme Court should have interpreted and applied section 26(c) which provides for equality of spouses parallel to section 56 of the Constitution which provides for equality and non-discrimination. The article argues that the Constitution is an incorporation of different rights to the extent that it recognises rights protected by different legislations if they are consistent with the Constitution. Section 47 of the Constitution states that Chapter 4 does not rule out the existence of other rights and freedoms that may be conferred by law. The Supreme Court could have interpreted the provisions of section 26(d) of the Constitution which provides for the protection of children and spouses in the event of a dissolution of marriage by death or divorce considering the right of a spouse not to be disinherited in a will. Scholars have argued that the provisions of section 26 of the Constitution favour the right of a spouse not to be disinherited through a will.²⁰ The article will discuss this right as entrenched in the Ghanaian Constitution and it will draw similarities between the Ghanaian and the Zimbabwean legal system which include the fact that both jurisdictions have the Constitution as the supreme law and the judicial authority is vested in the courts.

The article is divided into six parts, the first being this introduction. The second part discusses the Zimbabwean legal structure that governs testamentary disposition of estates. The part discusses the provisions of the *Wills Act* and the doctrine of freedom of testation as provided for in the Act and the Constitution. The third part converses about the High Court judgments on the interpretation of section 5(3)(a) of the *Wills Act* which bars a testator from executing a will that disinherits a surviving spouse. In the fourth part of the article, I discuss the facts and judgment in the *Chigwada* Supreme Court decision. In this part, the author discusses what the Supreme Court decisively answered and settled. In the fifth part, the article discusses the concept of justiciability of human rights and National Objectives juxtaposed with fundamental human rights. Under this part, I argue that the Supreme Court missed an opportunity to develop the jurisprudence on the enforcement of National Objectives in Zimbabwe.

²⁰ See Chirawu *Principles of the Law of Succession* 35.

2 The Zimbabwean legal framework that regulates testamentary disposition of estates

2.1 *The Wills Act (Chapter 6.06)*

Section 5 of the *Wills Act*²¹ provides for the capacity to make dispositions by will. The provision states as follows:

- 5 Power to make dispositions by will
- (1) Subject to this Act and any other enactment, any person who has capacity in terms of section 4²² to make a will may in his will-
 - (a) Make provision for the transfer, disposal or disposition of the whole or any part of his estate.
 - (2) Subject to this Act and any other enactment, a will shall not be invalid solely because the testator has disinherited or omitted to mention any parent, child, descendant or other relative or because he has not assigned any reason for such disinheritance or omission.
 - (3) No provision, disposition or direction made by a testator shall operate so as to vary or prejudice the rights of-
 - (a) Any person to whom the deceased was married to a share in the deceased estate or in the spouses' joint estate in terms of any law governing the property rights of married persons.

Section 5(1) of the *Wills Act* by authorising a testator to transfer the whole or part of his estate entrenches the principle of freedom of testation. Transfer of property "means an act by which a living person conveys property, in present or in future, to one or more other living persons..."²³ The principle is further established in the provision as the testator has power to make provision for the disposal or disposition of his estate. The Oxford Dictionary defines the word "dispose" as getting rid of an object²⁴ and "disposition" as the power to deal with a thing as one pleases.²⁵ In the context of this article, the testator has the power to convey his or her property to another living person, to get rid of and to do as he or she pleases with his or her property.

²¹ *Wills Act*.

²² Section 4 of the *Wills Act* provides that a person who is of or over the age of sixteen years may make a will.

²³ Section 5 of the *Indian Transfer of Property Act* of 1882.

²⁴ Stevenson and Waite *Concise Oxford Dictionary* 413.

²⁵ Stevenson and Waite *Concise Oxford Dictionary* 414.

2.2 Freedom of testation

The entire law of wills derives from the assumption that an owner is entitled to dispose of his property as he pleases in death as in life.²⁶ The golden rule for the interpretation of wills is to ascertain the wishes of the testator from the language used and the court is bound to give effect to them.²⁷ Freedom of testation was a highly regarded manifestation of private autonomy in Roman law.²⁸ As such, it was received into Roman Dutch law²⁹ and it was strengthened by the English law.³⁰ Courts must enforce the provisions of a will according to the maxim *voluntas testatoris servanda est*.³¹ According to this concept of freedom of testation, succession law regards the "golden rule" of interpretation to be ascertaining the wishes of the testator from the language used in a will.³² In the case of *Zvobgo v Zvobgo*³³ Chitakunye J reiterated the principles of testamentary dispositions and interpreting wills as follows:

1. The main rule of construction is to ascertain the intention of the testatrix.
2. The testator's intention as ascertained from the will may be supplemented if necessary, by an 'armchair evidence' that may be admissible, and
3. The court cannot make or remake a testator's will for him. It cannot change the devolution of his estate as he has directed.³⁴

The Court endorsed that the doctrine of freedom of testation is part of the Zimbabwean law. The doctrine is further confirmed by section 71(2) of the Constitution which states that, every person has the right to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others. The effect is that freedom of testation is a right. In exercising his or her right of freedom of testation, a testator can disinherit a child, descendant or other relative but not any surviving spouse to whom the deceased was married to a share in the deceased estate "in terms of any law governing the property rights of married persons".³⁵ As earlier indicated, the interpretation of this provision as provided for in the *Wills Act* has

²⁶ Langbein 1975 *Harv L Rev* 491.

²⁷ *Robertson v Robertson's Executors* 1914 AD 503.

²⁸ Buckland *Manual of Roman Private Law* 173.

²⁹ Lee *Introduction to Roman Dutch Law* 352.

³⁰ Miller *Machinery of Succession* 3-5.

³¹ Jamneck "Freedom of Testation" 128.

³² *Greyling v Greyling* 1978 2 SA 114 (T) 118C.

³³ *Zvobgo v Zvobgo* HH 96-2006.

³⁴ *Zvobgo v Zvobgo* HH 96-2006 3.

³⁵ Sections 5(2) and (3)(a) of the *Wills Act*.

led to inconsistent judgments in the High Court. The judgments are discussed in the next part of the article.

3 Conflicting High Court judgments on the interpretation of section 5(3)(a) of the *Wills Act* and the disinheritance of a surviving spouse

The question on whether a testator could write a will that disinherited a surviving spouse was discussed in the case of *Estate Wakapila v Matongo*.³⁶ In the case, the late Pension Wakapila died and he was survived by his wife Bridget.³⁷ They were married in terms of *Customary Marriages Act*.³⁸ Unfortunately, Bridget also died.³⁹ The late Pension Wakapila and Bridget only had children outside the marriage.⁴⁰ Bridget's son, Remigio Tawanda Chagonda was appointed the executor dative of Bridget's estate by the Assistant Master of the High Court while the "other woman" who was in Pension's life was also appointed as the executrix dative.⁴¹ She was appointed in terms of a will that was executed by Pension Wakapila.⁴² The late Bridget's son launched an application before the High Court on the basis that Pension Wakapila had disinherited Bridget contrary to section 5(3)(a) of the *Wills Act*.⁴³

On whether the will was nullified by section 5(3)(a) of the *Wills Act*, Kudya J stated as follows:

The provisions of section 5 (3) (a) of the Wills Act prevent the testator from eroding the property rights of spouses vested in his spouse by law in either his or their joint estate. These rights, in my view, are those that the spouse has at the time the will is executed as opposed to the future contingent rights that arise on the death of the testator. After all, the variation or prejudice does not arise on the demise of the testator but at the time the will is written notwithstanding that the will commences to operate on his demise.⁴⁴

The Court rejected the argument that a surviving spouse is vested with rights in a deceased estate in which a testamentary disposition has been made at the time of death. It held that at the time Pension Wakapila wrote the will, Bridget did not have any legal rights in the immovable property and that she was not

³⁶ *Estate Wakapila v Matongo* HH 71/08.

³⁷ *Estate Wakapila v Matongo* HH 71/08 1 para 1.

³⁸ *Customary Marriages Act* 29 of 1951.

³⁹ *Estate Wakapila v Matongo* HH 71/08 1 para 1.

⁴⁰ *Estate Wakapila v Matongo* HH 71/08 1 para 1.

⁴¹ *Estate Wakapila v Matongo* HH 71/08 1 para 1.

⁴² *Estate Wakapila v Matongo* HH 71/08 1 para 1.

⁴³ *Estate Wakapila v Matongo* HH 71/08 2-3.

⁴⁴ *Estate Wakapila v Matongo* HH 71/08 4 para 2.

deprived of any rights when he bequeathed them to another in a will.⁴⁵ Kudya J stated that disposal by will is similar to disposal by sale. "They are not prohibited by any legal regime that governs matrimonial property rights".⁴⁶ The Court held that the divesture of the immovable property from the late Bridget's control did not contravene section 5(3)(a) of the *Wills Act* and that the provisions of the *Deceased Estates Succession Act*⁴⁷ were not applicable.⁴⁸ The Court's reasoning why the *Deceased Estates Succession Act* could not apply was that the deceased did not die wholly or partially intestate.⁴⁹ Relying on this decision, the Court in the case of *Roche v Middleton*⁵⁰ also held that section 5(3)(a) of the *Wills Act* could not have been intended to interfere with a spouse's sole rights in a property, the rights which conferred him the power to dispose of the property without the consent of the other spouse during his lifetime.⁵¹

The Court in the case of *Chimbari v Madzima*⁵² took a different approach and held that a will that disinherited a surviving spouse was invalid. In the case, the deceased executed and left a will in which he disinherited his wife Jessy Muzanya.⁵³ The Court held that the will was a nullity as section 5(3) of the *Wills Act* prohibits a spouse from disinheriting his or her spouse through a will.⁵⁴ The Court stated as follows:

Section 5 (3) of the Wills Act prohibits a testator from making provisions which prejudices the rights of a spouse to whom he is married in the deceased estate in terms of any law...from receiving any property or benefit from the testator's estate. In terms of section 3 A of the Deceased Estates Succession Act⁵⁵ and section 68

⁴⁵ *Estate Wakapila v Matongo* HH 71/08 5 para 2.

⁴⁶ *Estate Wakapila v Matongo* HH 71/08 5 para 2.

⁴⁷ *Deceased Estates Succession Act* 6 of 1997 (hereafter *Deceased Estates Succession Act*). The *Deceased Estates Succession Act* is the legislation that regulates the law of intestate succession in Zimbabwe. "The law of intestate succession comprises the legal rules or legal norms that determines how succession should take place in cases where a testator fails to regulate succession on death by way of a valid will" See Mohamed "Intestate Succession" 42. Section 3A of the Act provides for inheritance of matrimonial home and household goods and effects. It states as follows: "The surviving spouse of every person who, on or after the date of commencement of the Administration of Estates Amendment Act, 1997, dies wholly or partly intestate shall be entitled to receive from the free residue of the estate- (a) The house or other domestic premises in which the spouses or the surviving spouse, as the case may be, lived immediately before the person's death."

⁴⁸ *Estate Wakapila v Matongo* HH 71/08 6.

⁴⁹ *Estate Wakapila v Matongo* HH 71/08 6.

⁵⁰ *Roche v Middleton* HH 198/16.

⁵¹ *Roche v Middleton* HH 198/16 7.

⁵² *Chimbari v Madzima* HH 32/13.

⁵³ *Chimbari v Madzima* HH 325/13 1 para 3.

⁵⁴ *Chimbari v Madzima* HH 325/13 2 para 2.

⁵⁵ *Deceased Estates Succession Act*.

F (2) (d) of the Administration of Estates Act,⁵⁶ the deceased's spouse is entitled to inherit from his estate.⁵⁷

The deceased's will was declared invalid on the basis of section 5(3) of the *Wills Act* which the Court stated that it prohibits a testator from disinheriting his or her surviving spouse through a will. The Court also held that the provisions of the *Deceased Estates Succession Act* and *Administration of Estates Act* are applicable to testate succession. This was a major departure from the *Wakapila* decision which had held that based on the concept of freedom of testation, a testator has a right to disinherit a surviving spouse of his share of the property.

The approach by Uchena J in the *Chimbari* decision was adopted by Mwayera J in the case of *Chiminya v Chiminya*⁵⁸ where the Court also declared a will that disinherited a surviving spouse as invalid. In the case, the surviving spouse to the late Dennis Chiminya approached the High Court challenging a will that was executed by Dennis on the basis that the deceased bequeathed the matrimonial home to her exclusion.⁵⁹ The case was decided after the enactment of the Constitution. The Court stated that the *Constitution of Zimbabwe* outlaws provisions that are discriminatory and referred to section 56 of the Constitution which provides for equality and non-discrimination.⁶⁰ The Court reiterated that the Zimbabwean Constitution is the supreme law of Zimbabwe.⁶¹ It held that section 5(3)(a) of the *Wills Act* protects a surviving spouse from being disinherited.⁶² Mwayera J stated that that the provision bars a testator from making a disposition that affects the other spouse's rights.⁶³ While acknowledging that the *Deceased Estates Succession Act* deals with intestate succession, the Court held that the provisions of the Act support the entitlement of surviving spouses to inherit.⁶⁴ On this basis, the Court declared the will of Dennis Chiminya as invalid.

⁵⁶ *Administration of Estates Act* 6 of 1997 (the *Administration of Estates Act*). The *Administration of Estates Act* is legislation that provides for the law relating to the administration of estates of deceased persons in Zimbabwe. S 68F(2)(d) provides that where the deceased person is survived by one spouse and one or more children, the surviving spouse should get ownership or usufruct over the house she lived in at the time of the deceased person's death.

⁵⁷ *Chimbari v Madzima* HH 325/13 3 para 1.

⁵⁸ *Chiminya v Chiminya* HH 272/14.

⁵⁹ *Chiminya v Chiminya* HH 272/14 1-2.

⁶⁰ *Chiminya v Chiminya* HH 272/14 2 para 2.

⁶¹ *Chiminya v Chiminya* HH 272/14 2 para 3.

⁶² *Chiminya v Chiminya* HH 272/14 6 para 2.

⁶³ *Chiminya v Chiminya* HH 272/14 5 para 4.

⁶⁴ *Chiminya v Chiminya* HH 272/14 3 para 1-2.

The line of reasoning espoused in the *Chiminya* decision was followed in the decision of *Majuru v Majuru*⁶⁵ where the Court held that the doctrine of freedom of testation is recognised to the extent that it does not infringe on the right of a surviving spouse not to be disinherited.⁶⁶ In the case, Stancilous Majuru (the applicant) approached the High Court seeking the nullification of a will by late wife Caroline Majuru.⁶⁷ Mr Majuru alleged that the will that was executed by the late Caroline disposed him as the surviving spouse which rendered the will invalid.⁶⁸ The Court held that a testator could not execute a will that disinherits a surviving spouse.⁶⁹ Commenting on section 5(3)(a) of the *Wills Act*, the Court reiterated that the provision seeks "to protect a surviving spouse from being disinherited under the realm of freedom of testation".⁷⁰ The Court also relied on the *Administration of Estates Act* and the *Deceased Estates Succession Act* which it stated entitles a surviving spouse rights to inherit.⁷¹ The Court furthermore invoked section 26(c) and (d) of the Constitution which provides that there is equality of rights and obligations of spouses during marriage and its dissolution and that necessary provision should be made for any children and spouses in the event of dissolution of marriage through death or divorce.⁷² The High Court held that the will that disinherited Mr Majuru as the surviving spouse was ultra vires the Constitution and it declared it invalid.

The approach in the *Majuru* decision mirrors the one that was taken by the Courts in the cases of *Chimbari* and *Chiminya*. The Court relied on section 5(3)(a) of the *Wills Act*, the *Administration of Estates Act* and the *Deceased Estates Succession Act* to declare invalid a will that disinherited the surviving spouse. In addition, the Court relied on section 26 the Constitution which is a major subject of this article. A full discussion of section 26 of the Constitution will come at the later part of this article. It is evident from the discussion above that there are conflicting High Court judgments on the doctrine of freedom of testation and the disinheritance of a surviving spouse. The first category of judgments discussed under this part rejected the argument that section 5(3)(a) of the *Wills Act* grants a surviving spouse the right not to be disinherited. The courts held that a spouse has sole rights in a property which confers him or her power to dispose of his or her share of property without the consent of the other spouse during their lifetime. The courts also held that the provisions of the

⁶⁵ *Majuru v Majuru* HH 404/16. See also the case of *Nyamushaya v Nyamushaya* HH 693/17.

⁶⁶ *Majuru v Majuru* HH 404/16 3 para 2.

⁶⁷ *Majuru v Majuru* HH 404/16 1 para 1.

⁶⁸ *Majuru v Majuru* HH 404/16 1 para 1.

⁶⁹ *Majuru v Majuru* HH 404/16 3 para 2.

⁷⁰ *Majuru v Majuru* HH 404/16 3 para 2.

⁷¹ *Majuru v Majuru* HH 404/16 4 para 1.

⁷² *Majuru v Majuru* HH 404/16 4 para 2.

Deceased Estates Succession Act are not applicable in testamentary dispositions.

On the other hand, the second set of judgments held that freedom of testation is limited by section 5(3)(a) of the *Wills Act* which protects a surviving spouse from being disinherited. According to the courts, freedom of testation could not be viewed as absolute to the extent that it eroded the property and inheritance rights of a surviving spouse.⁷³ The second class of the judgments held that the provisions of the *Administration of Estates Act* and the *Deceased Estates Succession Act* apply to testate succession and that they confer a surviving spouse a right not to be disinherited. Some of the decisions were decided after the enactment of the Zimbabwean Constitution in 2013 and the Courts in *Chiminya* and *Majuru* also relied on constitutional provisions that provide for equality of spouses and the protection of children and spouses upon dissolution of a marriage by death or divorce. In the next part of the article, I discuss the *Chigwada v Chigwada* Supreme Court decision which settled the position decisively.

4 Facts and Judgment in *Chigwada v Chigwada* SC 188/20

The judgment was delivered by Malaba CJ. This was an appeal against the whole judgment of the High Court interrogating the determination of whether the law that governs the property rights of married persons binds a testator to bequeath his or her right in an estate to the husband or wife.⁷⁴ Penelope Chigwada (1st respondent) was married to the deceased late Aaron Chigwada in 1971.⁷⁵ The parties solemnised their union in terms of the *Marriage Act* (Chapter 5:11) in 1975.⁷⁶ Before marrying Penelope, the late Aaron had been married to Gerald Chigwada's mother (the appellant's mother).⁷⁷ The parties had divorced.⁷⁸

The late Aaron had six children with Gerald's mother, Gerald being the fifth and the youngest.⁷⁹ During the subsistence of their marriage, Penelope and the late Aaron acquired a house stand in Harare which became their matrimonial home and was registered in their joint names.⁸⁰ Each owned half of the beneficial

⁷³ *Chiminya v Chiminya* HH 272/14 6 para 1.

⁷⁴ *Chigwada v Chigwada* and HH 69-16 (hereafter *Chigwada* High Court decision).

⁷⁵ *Chigwada* Supreme Court decision 2 para 4.

⁷⁶ *Chigwada* Supreme Court decision 2 para 4.

⁷⁷ *Chigwada* Supreme Court decision 2 para 4.

⁷⁸ *Chigwada* Supreme Court decision 2 para 4.

⁷⁹ *Chigwada* Supreme Court decision 2-3 para 4.

⁸⁰ *Chigwada* Supreme Court decision 3 para 1.

interest in the house.⁸¹ In 2007, the late Aaron made a will bequeathing his half share to his son Gerald (the appellant).⁸² He appointed Sherperd Kusada (the second respondent) as the executor to give effect to the testamentary disposition.⁸³ Aaron died in 2011 and the will became an issue after his death.⁸⁴ Penelope, the surviving spouse approached the High Court challenging the right of Gerald to succeed to the half share of the matrimonial home left to him by the late Aaron in terms of the will.⁸⁵ The issue before the High Court was whether the will that disinherited Penelope was valid under the *Wills Act*.⁸⁶

In the High Court, Ndewere J reiterated that the bequeathing of 50% of the house to Gerald prejudiced Penelope of her rights to a fair share in the deceased estate.⁸⁷ The learned Judge held that section 3 of the *Deceased Estates Succession Act*, compels a married person to dispose his or her estate by a will to the surviving spouse.⁸⁸ Commenting on the provisions of the *Deceased Estates Succession Act*, the learned High Court Judge stated as follows:

The fact that section 3 A above includes situations where part of the estate is covered by a will as evidenced by the use of the phrase "dies wholly or partly intestate" is an indication that the intention of the legislature was to protect such spouses even in situations where there is a will. Section 3 A of the Deceased Estates Succession Act⁸⁹ is part of the law referred to in section 5 (3) (b) of the Wills Act which would have made the plaintiff to obtain 50 % of the house from the testator's estate if the bequest to the first defendant had not been made by the testator in his will.

This means that the bequest of 50 % of the matrimonial home to the first defendant in the will by the late Aaron Chigwada is the obstacle which is now prejudicing the plaintiff from the enjoyment of the only home she has ever known since she got married. In my view, this is the mischief which the legislature intended to cure when it enacted section 5 (3) of the Wills Act.⁹⁰ The intention was to intervene in situations where surviving spouses would be rendered homeless by the wills of their deceased partners in situations where the will bequeathed the spouse's home, or part of it, to a third party as in the present situation.

Whilst the rest of the will is not contentious, the provisions bequeathing 50% of No 85 Vito Street to the first defendant in the second part of paragraph 5 of the Wills Act flies in the face of the provisions of section 5 (3) of the Wills Act and cannot be allowed to stand.⁹¹

⁸¹ *Chigwada* Supreme Court decision 3 para 1.
⁸² *Chigwada* Supreme Court decision 3 para 2.
⁸³ *Chigwada* Supreme Court decision 3 para 2.
⁸⁴ *Chigwada* Supreme Court decision 3 para 2-3.
⁸⁵ *Chigwada* Supreme Court decision 3 para 3.
⁸⁶ *Chigwada* Supreme Court decision 3 para 4.
⁸⁷ *Chigwada* High Court decision 2 para 3.
⁸⁸ *Chigwada* Supreme Court decision 5 para 1.
⁸⁹ *Deceased Estates Succession Act*.
⁹⁰ *Wills Act*.
⁹¹ *Chigwada* High Court decision 3 paras 1-3.

It was the Court's decision that the will was invalid for contravening section 3A of the *Deceased Estates Succession Act* and section 5(3)(a) of the *Wills Act* as it did not dispose the property to the surviving spouse.⁹² The late Aaron's will was set aside.⁹³ The High Court in the *Chigwada* decision followed the approach that was taken by the Courts in the *Chimbari*, *Chiminya* and *Majuru* decisions. The High Court endorsed the position that a testator cannot execute a will that disinherits a surviving spouse of his share in the property. Aggrieved by the High Court decision, Gerald appealed to the Supreme Court. With the background of conflicting judgments discussed earlier, including the *Chigwada* High Court decision, the author is of the view that the Supreme Court answered and settled the questions on the interpretation of section 5(3)(a) of the *Wills Act* in light of the concept of freedom of testation and the disinheritance of a surviving spouse in a will and the application of the provisions of the *Deceased Estates Succession Act* to testamentary dispositions.

4.1 The Wills Act and the disinheritance of a surviving spouse

The Supreme Court settled the conflicting interpretations of section 5(3)(a) of the *Wills Act*. The Court held that section 5(3)(a) of the *Wills Act* could not assist Penelope as the provision does not take away the freedom of testation that is entrenched in section 5(1) of the *Wills Act*.⁹⁴ To be protected by section 5(3)(a) of the *Wills Act*, Penelope had to prove that the late Aaron Chigwada executed a will which its implications were to dispose her of her own property.⁹⁵ Malaba CJ stated that in terms of section 5(3)(a) of the *Wills Act*, a testator is at liberty to include in the disposition by will assets containing of his or her estate.⁹⁶ The Court held that a surviving spouse can be disinherited by a will complying with the formalities of a will.⁹⁷ Malaba CJ reiterated that section 5(3)(a) of the *Wills Act* should not be read to mean that a husband or wife cannot disinherit the surviving spouse by a will and further stated that the requirements of will writing are not to the effect that the testator must leave his or her estate to the surviving spouse.⁹⁸ The *Chigwada* Supreme Court decision answered the "divisive" question on the interpretation of section 5(3)(a) of the *Wills Act*. The implications of the decision for testamentary dispositions is that based on the freedom of testation, a spouse can be disinherited through a will.

⁹² *Chigwada* High Court decision 3 paras 1-3.

⁹³ *Chigwada* High Court decision 3 para 4.

⁹⁴ *Chigwada* Supreme Court decision 18 para 1.

⁹⁵ *Chigwada* Supreme Court decision 18 para 1.

⁹⁶ *Chigwada* Supreme Court decision 18 para 3.

⁹⁷ *Chigwada* Supreme Court decision 19 para 2.

⁹⁸ *Chigwada* Supreme Court decision 19 para 2.

4.2 The provisions of the Deceased Estates Succession Act and testamentary dispositions

On appeal, the Supreme Court reiterated that in terms of section 3A of the *Deceased Estates Succession Act*, it is the spouse of a person who died wholly or partly intestate who is entitled to inherit the matrimonial home.⁹⁹ The Supreme Court held that Penelope was a surviving spouse of a person who died testate and thus section 3A of the *Deceased Estates Succession Act* was not applicable to her case.¹⁰⁰ Malaba CJ stated that the *Deceased Estates Succession Act* gives rights to a surviving spouse upon dissolution of marriage through the death of the intestate husband or wife.¹⁰¹ The Court stated that the Act governs property rights of a surviving spouse once the other spouse has died without leaving a valid will.¹⁰² The Supreme Court answered and settled the confusion of whether the provisions of the *Deceased Estates Succession Act* apply to testamentary dispositions. The position is now settled. The Court also answered the question on whether Section 3A of the *Deceased Estates Succession Act* is the law that governs the property rights of married persons that is made reference to in section 5(3)(a) of the *Wills Act* or not.¹⁰³ The Court held that the law that governs the property rights of married persons that is made mention of in section 5(3)(a) of the *Wills Act* is the *Married Persons Property Act*¹⁰⁴ which states that Zimbabwean marriages are out of community of property.¹⁰⁵ According to the Supreme Court, the *Deceased Estates Succession Act* is not the law that governs the property rights of married persons.¹⁰⁶ The position is now settled. The implications of the decision are that the provisions of *Deceased Estates Succession Act*, in particular section 3A which grants the surviving spouse the right to inherit will no longer be applied to testate succession. There is now certainty that the law that regulates the property rights of spouses referred to in the *Wills Act* is the *Married Persons Property Act* and not the *Deceased Estates Succession Act*. The Supreme Court did not discuss the application of the provisions of the *Administration of Estates Act* to testate

⁹⁹ *Chigwada* Supreme Court decision 17 para 1.

¹⁰⁰ *Chigwada* Supreme Court decision 17 para 1.

¹⁰¹ *Chigwada* Supreme Court decision 19 para 4.

¹⁰² *Chigwada* Supreme Court decision 20.

¹⁰³ *Chigwada* Supreme Court decision 19-20.

¹⁰⁴ *Married Persons Property Act* 10 of 1928.

¹⁰⁵ *Chigwada* Supreme Court decision 19-20. A marriage that is out of community of property entails that the property of the spouses (movable or immovable) obtained by either of the spouse in the course of the marriage is individually owned by the spouses in their individual names.

¹⁰⁶ *Chigwada* Supreme Court decision 20.

succession. As the *Deceased Estates Succession Act*, the *Administration of Estates Act* does not apply to testamentary dispositions.¹⁰⁷

4.3 The interpretation and application of section 26 of the Constitution

The Supreme Court cited with disapproval the earlier High Court decision in *Majuru v Majuru* where Mwayera J held that a will that disinherits a surviving spouse is invalid as it contravenes section 26(c) and (d) of the Constitution¹⁰⁸ which recognises equality of rights of spouses and the protection of children in the event of death or divorce. The Court stated that the decisions that departed from the *Wakapila* decision including the *Majuru* judgment were based on the mistaken view that section 26(d) of the Constitution prohibits disinheritance of a spouse by the deceased.¹⁰⁹

The following from the Supreme Court's decision is worth reproducing:

A reading of section 26 (d) of the Constitution in its proper context reveals that it is not a legislative provision for direct enforcement by the courts. It does not confer rights on individuals. It is found in *Chapter 2* of the Constitution in which national objectives are set out. In that context, section 26 (d) of the Constitution contains an important objective intended to guide the state in the formulation and implementation of laws relating to the specific area of dissolution of marriage through death...

Section 26 (d) of the Constitution imposes a constitutional duty on the state to take appropriate measures for the provision of the necessary protection of surviving spouses in the event of dissolution of a marriage through death....

The use of the words "appropriate measures" and "necessary protection" in section 26 (d) of the Constitution prescribes a standard that the organ of the state under the constitutional obligation to take the necessary measures has to meet. In the absence of appropriate measures taken by the organ of the state with the power to do so under the Constitution, a court may not apply the provisions of section 26 (d) of the Constitution as if it contained the appropriate measures for the provision of the necessary protection of a surviving spouse in the event of dissolution of a marriage through death....¹¹⁰

The Supreme Court endorsed the position that section 26(d) of the Constitution is not directly enforceable as it is found in the National Objectives which are not enforceable but intended to guide the state in the formulation of laws relating to dissolution of marriage through death. Malaba CJ reiterated that the provisions

¹⁰⁷ Section 68A(2) of the *Administration of Estates Act*.

¹⁰⁸ Sections 26(c) and (d) of the Constitution states as follows: "The State must take appropriate measures to ensure that - (c) there is equality of rights and obligations of spouses during marriage and at its dissolution, and (d) In the event of dissolution of marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses".

¹⁰⁹ *Chigwada* Supreme Court decision 26 para 2.

¹¹⁰ *Chigwada* Supreme Court decision 27-28.

of section 26(d) had no connection with the interpretation of section 5(3)(a) of the *Wills Act*.¹¹¹ A major take way from the Supreme Court's explanation of the enforcement of section 26 of the Constitution is that National Objectives can only be subject of adjudication if there is a question on whether or not the state has fulfilled them.¹¹² This is an unsettling precedent on the enforcement National Objectives.¹¹³ The Supreme Court missed an opportunity to develop the Zimbabwean jurisprudence on the interpretation, application and enforcement of National Objectives. Based on the freedom of testation and section 5(1) of the *Wills Act*, the Supreme Court reversed the decisions of the High Court which held that a will that disinherits a surviving spouse is invalid.

Similar sentiments on section 26 of the Constitution were echoed in an earlier High Court decision by Tsanga J in the case of *Madzara v Stanbic Bank Zimbabwe Limited*.¹¹⁴ On the enforceability of section 26 of the Constitution, Tsanga J remarked as follows:

The provision is part of the national objectives in the Constitution which are designed to guide the state and all its institutions in formulating and implementing laws and policy decisions. Materially it does not fall under fundamental rights whereby an applicant can say that her rights have been violated. Its primary thrust is to guide the state and its institutions. It can thus be used in its fullest to cajole the state to take concrete action and measures on an issue that requires intervention...¹¹⁵

As in the *Chigwada* decision, the Court in the case of *Madzara* also entrenched the position that section 26 of the Constitution is not part of the bill of rights where one can approach the courts to seek a redress in the case of a violation. The legal issues arising from the *Chigwada* Supreme Court decision key to this article include the justiciability and enforcement of National Objectives, in this instance section 26 providing for the equality of spouses and the protection of children and spouses. The non-enforcement of section 26 of the Constitution is tracked down to the concept of justiciability. The provision is "non-justiciable". Non justiciability entails that a court is deprived power to enforce a right or make a ruling on a matter. At this point, it is key that the article explains the concept

¹¹¹ *Chigwada* Supreme Court decision 29 para 2.

¹¹² *Chigwada* Supreme Court decision 29 para 1.

¹¹³ The approach by the Supreme Court should be contrasted with the approach that was taken by Charewa J in the case of *S v Banda, S v Chakamoga* HH 47-16 2 para 2. In the case, the Court relied on s 19(2)(c) of the Constitution (national objective) which states that the state must adopt policies and measures to ensure that children are protected from maltreatment, neglect or abuse to indicate that the trial Magistrate had passed sentences which were inadequate to protect young persons.

¹¹⁴ *Madzara v Stanbic Bank Zimbabwe Limited* HH 546/15.

¹¹⁵ *Madzara v Stanbic Bank Zimbabwe Limited* HH 546/15 14 para 1.

of justiciability, non-justiciability and the "national objectives versus the bill of rights scenario".

5 Justiciability of fundamental human rights

The effective protection of human rights calls for, among other things that they be justiciable.¹¹⁶ Some scholars have argued that justiciability is not the only manner of protecting human rights. Commenting on the protection of economic, social and cultural rights, Boyle states that models of incorporation or justiciability are not the only means of protecting economic, social and cultural rights.¹¹⁷ The author states that justiciability offers a more comprehensive system of protection and is a means of last resort when other mechanisms fail.¹¹⁸ "Justiciability refers to the capability of rights to be enforced by a judicial or quasi-judicial organ and the existence of procedures to contest and redress violations."¹¹⁹ It pertains to the law and how it is adjudicated.¹²⁰ The concept is concerned with the issues which are capable of being the subject of legal norms or adjudication by a court of law.¹²¹ It is key to state that there are two forms of justiciability which are normative and institutional justiciability. Normative justiciability was explained in the case of *Ressler v Minister of Defense*,¹²² as follows:

A dispute is justiciable in the normative sense if legal standards exist for its resolution. A dispute is not justiciable in the normative sense if legal standards do not exist for its determination. The question is not whether the dispute ought to be resolved by the law and in court, but rather whether it is feasible to decide it in that way. Normative justiciability therefore does not deal with what is desirable but with what is possible. Justice Brennam addressed this aspect of justiciability in the case of *Baker v Carr* (1961) [68], at 217 by stating that a dispute is non-justiciable...if regarding it there exists- "a lack of judicially discoverable and manageable standards for resolving it".¹²³

Normative justiciability answers the question of whether there exists a legal basis to determine a discourse that is presented before a court.¹²⁴ It deals with the question of whether for every legal question, there exists a legal answer.¹²⁵ Institutional justiciability answers the question of whether the court instead of other arms like the legislature and executive is the appropriate organ to decide

¹¹⁶ Yeshanew 2008 *AHRLJ* 273.

¹¹⁷ Boyle *Economic and Social Rights Law* 2.

¹¹⁸ Boyle *Economic and Social Rights Law* 3.

¹¹⁹ Yeshanew 2008 *AHRLJ* 274.

¹²⁰ Bendor 1997 *IICLR* 312.

¹²¹ Bendor 1997 *IICLR* 312.

¹²² *Ressler v Minister of Defense* HCJ 910/86 (hereafter *Ressler*).

¹²³ *Ressler* 46.

¹²⁴ *Ressler* 474.

¹²⁵ Bendor 1997 *IICLR* 315.

a dispute.¹²⁶ This article's focus is on normative justiciability. For a dispute to be justiciable, there has to be mechanisms for resolving it. Justiciability should be distinguished from legal standing. Right of standing concerns the petitioner's power to present the matter to court for adjudication; justifiability concerns the appropriateness of the petition for judicial consideration.¹²⁷ Non-justiciability entails that a matter is not proper for judicial resolution. With regards to the National Objectives, the non-justiciability stems from section 44 of the Constitution which provides that the state, every person and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in Chapter 4.¹²⁸ Chapter 4 contains the Bill of Rights and this does not include section 26 of the Constitution which is under the National Objectives. As a result, section 26 of the Constitution which is found under the National Objectives has been "reduced to mere letters with no spirit".¹²⁹ This position was endorsed by the Supreme Court in the *Chigwada* decision where the Court held that section 26(d) of the Constitution does not bestow rights on individuals and that it is not enforceable. The later part of this article will critique this viewpoint that was adopted by the Supreme Court on the basis that there are rights which flow from the state obligations under section 26 of the Constitution and that not all the provisions of the Constitution need to be justiciable to be enforced.

5.1 National Objectives vis-a-vis fundamental human rights

Tripathi traced the notion of rights and principles to the American Constitution of the 18th century, the British encounter, the German Constitution and the Irish Constitution of 1937 which led to incorporation of directives and principles in the Indian Constitution.¹³⁰ In 1950, part III of the Indian Constitution entrenched seven fundamental human rights, which are the right to equality, the right to freedom, the right against exploitation, the right to freedom of religion, cultural and educational rights, the right to property and constitutional remedies.¹³¹ Article 13 of the Indian Constitution offers a constitutional protection of the rights by stating that all laws in force in India ... in so far as they are inconsistent with the provision on "fundamental rights" are void. Part IV of the Indian Constitution

¹²⁶ *Ressler* 46-47.

¹²⁷ *Ressler* 46.

¹²⁸ Chapter 4 of the Constitution.

¹²⁹ Opadere 2018 *JLPG* 37-46.

¹³⁰ Opadere 2018 *JLPG* quoting Ready 1980 *JILI* 402. The directive principles can be equated to state objectives that are entrenched in ch 2 of the Constitution. S 8(1) of the Constitution states that the national objectives that are set out in ch 2 of the Constitution guide the state and all institutions and agencies of government in formulating and implementing laws and policy decisions.

¹³¹ Aikman 1987 *VUWLR* 375.

provides for directive principles.¹³² Directive principles are a group of directly unenforceable goals which are foundational to the governance of a country, and which place positive obligations on the state.¹³³ They guide the state in formulating and implementing laws and policy decisions. Directive principles provide a constitutional structure within which fundamental rights should be understood.¹³⁴ The directive principles in India took the form of a statement of economic rights that were yet to be realised and policy instructions that were yet to guide the government of India.¹³⁵ The state was to direct its policy toward securing:

- (a) That the citizens, men and women have the right to an adequate means of livelihood,
- (b) That the ownership and control of the material resources of the community are so distributed as best to serve the common good,
- (c) That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.¹³⁶

Although the provisions set out in Part IV of the Indian Constitution are not justiciable and directly enforceable by the courts,¹³⁷ Article 37 states that the state is obliged to take them into account when making law. Commenting on directives vis-à-vis fundamental rights, Baxi¹³⁸ states that the constitutional status of national directives and the fundamental rights is different. Courts cannot proclaim an invalid law that breaches directive principles and they are not entitled to compel state action in pursuance of directive principles whereas they can do so when fundamental rights are involved.¹³⁹ De Villiers¹⁴⁰ stated that although the national directives are not justiciable, they cannot be ignored by the Courts.¹⁴¹ The national directives should impact the interpretation of fundamental human rights.¹⁴² They provide a framework in which fundamental rights are to be interpreted.¹⁴³ Fundamental rights and directive principles are complementary.¹⁴⁴ In the Indian case of *Sajjan Singh v State of Rajasthan*¹⁴⁵

¹³² The *Constitution of India*, 1950.

¹³³ Errabi "Constitutional Scheme of Harmony" 176 as cited by De Villiers 1992 *SAJHR* 31.

¹³⁴ De Villiers 1992 *SAJHR* 31.

¹³⁵ Aikman 1987 *VUWLR* 375.

¹³⁶ Aikman 1987 *VUWLR* 376.

¹³⁷ Duhan 2016 *JARSSH* 1.

¹³⁸ Baxi 1969 *JILI* 245-272.

¹³⁹ Basu *Shorter Constitution of India* 212-214.

¹⁴⁰ De Villiers 1992 *SAJHR* 32-33.

¹⁴¹ De Villiers 1992 *SAJHR* 33.

¹⁴² De Villiers 1992 *SAJHR* 33.

¹⁴³ De Villiers 1992 *SAJHR* 33.

¹⁴⁴ De Villiers 1992 *SAJHR* 43.

¹⁴⁵ *Sajjan Singh v State of Rajasthan* AIR 1965 SC 845 846.

the Court held that directive principles and fundamental human rights were to be interpreted compatibly as they are both the cornerstone of the Constitution. In another Indian Supreme Court case of *Chandra Bhawan Boarding and Lodging Bangalore v The State of Mysore*,¹⁴⁶ the Court also held that directive principles and fundamental rights are "complementary and supplementary". In the Nigerian case of *Okogie v Attorney General for Lagos State*¹⁴⁷ an action was brought against Archbishop Okogie and others.¹⁴⁸ In the case, the Court held that the directive principles in the Nigerian Constitution had to "conform and run as subsidiary to the fundamental rights under Chapter 4 of the same Constitution".¹⁴⁹

The point being made under this part is that although National Objectives are not justiciable on their own, they are indirectly enforceable. They should influence the interpretation of fundamental human rights which are justiciable. The Supreme Court of Zimbabwe endorsed this approach in the case of the *Zimbabwe Homeless People's Federation v Minister of Local Government*.¹⁵⁰ Commenting on the justiciability and enforceability of sections 19 and 28 (National Objectives) of the Constitution which are found under Chapter 2 of the Constitution, the Court stated that the provisions are relevant for the purposes of informing and shaping fundamental human rights.¹⁵¹ The Supreme Court in the *Chigwada* decision missed an opportunity to develop the jurisprudence on the interpretation and application of National Objectives, in particular section 26 of the Constitution. There is a complementary provision of section 26(c) which provides for equality of rights and obligations of spouses during marriage and at its dissolution under the fundamental human rights which are entrenched in Chapter 4 of the Constitution. The supportive provision is section 56¹⁵² of the Constitution which provides for equality and non-discrimination. Section 26(c)

¹⁴⁶ *Chandra Bhawan Boarding and Lodging Bangalore v The State of Mysore* 1970 2 SCR 600.

¹⁴⁷ *Okogie v Attorney General for Lagos State* 1973 ASC 1461.

¹⁴⁸ Okere 1983 ICLQ 226.

¹⁴⁹ Okere 1983 ICLQ 226.

¹⁵⁰ *Zimbabwe Homeless People's Federation v Minister of Local Government and National Housing* SC 94/2020.

¹⁵¹ *Zimbabwe Homeless People's Federation v Minister of Local Government and National Housing* SC 94/2020 8 para 2.

¹⁵² Section 56 of the Constitution provides that:

- "(1) All persons are equal before the law and have the right to equal protection and benefit of the law.
- (2) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as...custom, culture, sex, gender, marital status"

could have been interpreted in light of section 56 of the Constitution so as to protect the right to equality of spouses which flow from the state obligations.

Section 47 of the Constitution states that Chapter 4 of the Constitution does not prevent the existence of other rights and freedoms that may be recognised or conferred by the law. The Supreme Court could have interpreted section 26(d) of the Constitution which provides for the protection of children and spouses in the event of dissolution of a marriage by death or divorce considering the right of a surviving spouse not to be disinherited through a will. Section 26(d) of the Constitution inclines favourable with the right of a spouse not to be disinherited through a will.¹⁵³ The right of a spouse not to be disinherited through a will is recognised and entrenched as a fundamental right in other jurisdictions. The Constitution of Ghana¹⁵⁴ in section 22 provides for property rights of spouses. Section 22 states that a spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.¹⁵⁵ The legal system of Ghana is similar to the Zimbabwean legal system. Ghana as Zimbabwe is a constitutional supreme state.¹⁵⁶

The concept of constitutional supremacy grants the highest power in a legal system on the Constitution.¹⁵⁷ Constitutional supremacy entails that a constitution has a higher status compared to statute. It follows that all authority must be exercised in accordance with all the provisions of the Constitution.¹⁵⁸ On the basis of section 2 of the Constitution, Zimbabwe is a constitutional supreme state.¹⁵⁹ Section 2(1) of the Constitution states that the Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid.¹⁶⁰ Section 2(2) of the Constitution further states that the obligations imposed by the Constitution are binding on every person including the state and all executive, legislative and judicial institutions. It follows that the obligations imposed in section 26 also bind the courts.

¹⁵³ Chirawu *Principles of the Law of Succession* 35.

¹⁵⁴ *Constitution of the Republic of Ghana*, 1993 (hereafter Ghanaian Constitution).

¹⁵⁵ Section 22 (1) of the Ghanaian Constitution.

¹⁵⁶ Section 1 of the Ghanaian Constitution provides for the supremacy of the Constitution. S 1(2) states that: "This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of the Constitution shall, to the extent of the inconsistency, be void."

¹⁵⁷ Limbach 2001 *MLR* 1.

¹⁵⁸ Makwaiba *Welfare of Children* 20.

¹⁵⁹ Makwaiba *Welfare of Children* 20.

¹⁶⁰ Section 2(1) of the Constitution. S 3(1) of the Constitution further entrenches the supremacy of the Constitution as a founding value and principle. In Zimbabwe, courts are constitutionally mandated to promote the values and principles that underlie a democratic society. See Moyo and Makwaiba 2020 *AJCCL* 41.

As in Ghana, judicial authority in Zimbabwe vests in the courts. Judicial authority entails that an individual or group of individuals are conferred with authority to adjudicate and resolve conflicts. Section 25 of the Ghanaian Constitution states that judicial power shall be administered by the judiciary. Similarly in Zimbabwe, section 160 of the Constitution states that judicial authority is vested in the courts. The provision empowers the judiciary to determine the constitutionality of the acts of the legislature and the executive and to enforce the provisions of the Constitution. Judicial authority entails a "legitimacy credit".¹⁶¹ The establishment of courts implies an acceptance of a binding judicial authority.¹⁶²

6 Conclusion

The article was set out to analyse the *Chigwada v Chigwada* Supreme Court decision analysing its implications for testamentary dispositions and the enforcement of section 26 of the Constitution of Zimbabwe. The article established that before the *Chigwada* decision was handed down, there were some conflicting High Court judgments on the interpretation of section 5(3)(a) of the *Wills Act* which provides that a testator cannot execute a will that disinherits a surviving spouse. One category of judgments held that a testator could disinherit a surviving spouse on the basis of freedom of testation while the other group held that a will that disinherits a surviving spouse is invalid. There was also confusion in the High Court on whether the provisions of the *Deceased Estates Succession Act* are applicable to testamentary disposition of estates or not. Overturning the High Court decision, the Supreme Court authoritatively held that section 5(3)(a) of the *Wills Act* could not be interpreted to mean that a spouse cannot be disinherited through a will. The Court held that a surviving spouse can be disinherited in a will based on freedom of testation entrenched in the *Wills Act* and the Constitution.

The article also confirmed that the Supreme Court decisively answered the question on whether the provisions of the *Deceased Estates Succession Act* apply to testate succession or not. The Supreme Court held that the *Deceased Estates Succession Act* is only applicable where a spouse has died testate. The questions on the disinheritance of a surviving spouse and the application of the *Deceased Estates Succession Act* to testate succession were authoritatively answered by the Supreme Court. The implications of the Supreme Court decision for testamentary dispositions are that a surviving spouse can be disinherited through a will and that the provisions of the *Deceased Estates Succession Act* will no longer be applied to testate succession. The author

¹⁶¹ Traisbach 2021 *Global Constitutionalism* 77.

¹⁶² Traisbach 2021 *Global Constitutionalism* 77.

explained that the Supreme Court had occasion to discuss the provisions of section 26 of the Constitution which provides for equality of spouses and the protection of children and spouses upon the dissolution of marriage by death or divorce. The Supreme Court held that the surviving spouse could not rely on section 26 to make her case as the provision is not justiciable. The article explained the concept of justiciability as being concerned with issues which are capable of being the legal norms or adjudication by a court of law.

The article critiqued the approach that was taken by the Supreme Court in explaining the enforcement of section 26 of the Constitution. The article argued that although National Objectives are not directly enforceable and justiciable, they can be indirectly enforced. The author argued that National Objectives should be interpreted harmoniously with fundamental human rights to protect the rights that flow from the state obligations. The article contended that the Supreme Court ought to have interpreted section 26(c) of the Constitution which provides for equality of spouses parallel to section 56 which provides for equality and non-discrimination. It further asserted that section 26(d) which provides for the necessary protection of spouses and children should have been interpreted considering the right of a surviving spouse not to be disinherited through a will as section 47 of the Constitution does not preclude the existence of other rights which may be recognised or conferred by law. The author discussed this right as entrenched in the Ghanaian Constitution and also the discussed the similarities between the two legal systems. It was the argument of the article that the Supreme Court missed an opportunity to develop the jurisprudence on the enforcement of National Objectives in Zimbabwe.

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List of Abbreviations

AHRLJ	African Human Rights Law Journal
AJCCL	African Journal of Comparative Constitutional Law
Harv L Rev	Harvard Law Review
ICLQ	International and Comparative Law Quarterly
IICLR	Indiana International and Comparative Law Review

JARSSH	Journal of Advance Research in Social Science and Humanities
JILI	Journal of the Indian Law Institute
JLPG	Journal of Law Policy and Globalisation
MLR	Modern Law Review
Oslo L Rev	Oslo Law Review
SAJHR	South African Journal on Human Rights
VUWLR	Victoria University of Wellington Law Review