



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number 2092/2022

In the matter of:

MASE MINAH MBALI

Applicant

and

TLALENG ALINA MHLEKWA

First Respondent

**THE MASTER OF THE FREE STATE HIGH
COURT BLOEMFONTEIN**

Second Respondent

KGAUGELO CARISON MIKOSI

Third Respondent

KGOMOTSO GORDON MALULEKE

Fourth Respondent

CORAM: NAIDOO, J

HEARD ON: 15 JUNE 2023

DELIVERED ON: 9 OCTOBER 2023

JUDGMENT

[1] This is an application for, *inter alia*, declaratory orders in the following terms:

1.1 The applicant was involved in a permanent heterosexual life partnership with the late John Mahamba Maluleke (the deceased);

1.2 The applicant is entitled to benefit from the estate of the deceased in terms of the Intestate Succession Act;

1.3 The applicant is entitled to claim maintenance from the estate of the deceased in terms of the Maintenance of Surviving Spouses Act;

1.4 The finalisation of the administration of the estate of the deceased by the first respondent be held in abeyance pending finalisation of this application;

1.5 Costs to be paid out of the proceeds of the estate.

Adv RJ Nkhahle represented the applicant, while AdvDM Gruwer represented the first, third and fourth respondents.

[2] The applicant's case briefly is that she and the deceased were not married to each other but were in a heterosexual life partnership and as such she was entitled to inherit from his estate. The deceased had three biological sons at the date of his death, the youngest of whom is the deceased's son, Kamogelo Mbali, with the applicant. He was a minor at the time that this application was launched, while the two other sons were from two other women,

and were adults at the time this application was launched. The applicant initially cited only the first and second respondents in the application.

[3] The first respondent, who is the executrix of the deceased's estate, raised in her Answering Affidavit, a number of points *in limine*, the first of which was the non-joinder of the deceased's sons, who were his descendants. The applicant denied that it was necessary for her to have joined the deceased's sons as parties to these proceedings, contending that the first respondent's assertion that they have a direct and substantial interest in the outcome is unsustainable. The matter was heard on 25 August 2022 by my brother Molitsoane J, who comprehensively set out the background to this matter. His ruling was delivered on 15 September 2022. He considered only the first point *in limine* of non-joinder. He undertook an analysis of the provisions of Uniform Rule 10 and the requirements for joinder of interested parties in legal proceedings, which included discussing the relevant cases in support of the settled law that persons with a direct and substantial interest in the proceedings should be joined thereto. A direct and substantial interest has been held to be a legal interest in the subject matter of the case which could be prejudicially affected by the order of the court. [*Standard Bank of SA Ltd v Swartland Municipality and Others 2011(5) SA 257 (SCA)*]

[4] Molitsoane J's concluding remarks, at para 11, before he delivered his order were the following:

“While the nub of this application is the declaration whether the applicant was

in a permanent heterosexual partnership with the deceased during his lifetime. The other prayers follow from the determination of the declaration

of the heterosexual life partnership. The interests that the biological children

of the deceased have in the outcome of this case relate to the right to inherit

from the estate of their father. It cannot simply be said that such a right is financial in nature. The right to inherit is a legal interest in the subject matter

of the litigation which interest may be prejudicially affected by the judgment this court may hand down. Should this court find that the applicant was in a heterosexual life partnership with the applicant (sic), it follows that whatever

the biological children were to inherit from the estate of their father may be affected. The relief sought clearly affects their right to succession. It is axiomatic that they ought to have been joined in these proceedings. In my view failure to join them is fatal to the applicant's case. It is unnecessary to deal with the other issues raised in this application in view of the order I make..."

[5] The court made the following order:

- “1. The matter is stayed for a period of three months calculated from the date of this order to enable the applicant to join the biological children of the Late JOHN MAHAMBAMALULEKE in the main application, whose rights may be affected by the relief sought by the applicant;
2. Costs shall be costs in the main application”
3. In the event of the joinder referred to in 1 above not being effected, the respondents may approach this court on the same papers duly amplified for the dismissal of the main application with costs

[6] Subsequent to this order the applicant brought an application to join only the two adult sons of the deceased, the third and fourth respondents. Her reasoning for not joining her minor son as a party is that he is under her care and she will take care of his

interests, therefore it is unnecessary to join him as a party. This is in spite of the court order of 15 September 2022 directing that the biological children of the deceased be joined as parties. The applicant

persisted in this view, even after it was pointed out by the first respondent that the minor child Kamogelo's interests would not be properly protected by the applicant, as the relief she seeks is prejudicial to Kamegelo's right of inheritance. One of the initial points *in limine* raised by the first respondent is that the applicant failed to appoint a *curator ad litem* to act for and in the interests of the minor child.

- [7] After the third and fourth respondents were joined to the proceedings, they filed an opposing affidavit to the applicant's Founding Affidavit in the main application, which was deposed to by the fourth respondent. In essence they agreed with the Answering Affidavit by the first respondent. The fourth respondent alleges that the applicant is acting *mala fide* in that she attempted to obtain a court order, without the knowledge of the deceased's descendants. He further denies that the applicant was in a permanent heterosexual life partnership with the deceased, or that she moved in with the deceased shortly after the death of the deceased's wife, Irene, who was the fourth respondent's mother. He avers that his father would have observed the traditional mourning period after his mother's death
- [8] The fourth respondent, further alleges that while there was a relationship between the deceased and the applicant, it was not one akin to that of husband and wife, nor was it for the period (seventeen years) which the applicant alleges. The relationship

also lacked the element of reciprocal support, as the applicant often abandoned the deceased, especially when he became ill just before his death. The applicant did not attend the funeral of the deceased. The deceased

also did not have an exclusive relationship with the applicant, but had relationships with several other women, which the applicant was aware of. In addition, the deceased's brother, Wilson, was also involved in a romantic relationship with the applicant at the time she was in a relationship with the deceased.

[9] The fourth respondent also denied that the applicant looked after him subsequent to the death of his mother and alleges that it was his father and his uncle Wilson who took care of him. He also did not stay with his maternal grandmother as alleged by the applicant. On this point I mention that the applicant, in her Replying Affidavit alleges that she did indeed take care of the fourth respondent and attached a confirmatory affidavit by the brother of the late Irene (fourth respondent's mother), confirming that he lived with the applicant and the deceased when she took care of the fourth respondent. This is in direct conflict with the fourth respondent's allegation that it was his paternal uncle, Wilson, that took care of him. In response to the court's question, Mr Nkhahle conceded that it would have carried more weight had the applicant attached affidavits from her family and that of the deceased in support of her case. She, of course does not explain why this was not done.

[10] In addition, the fourth respondent denies strongly that the applicant was involved in any of the business activities of the deceased, that she was involved in the expansion of his businesses or the building of his estate, alleging that his uncle Wilson, ran the businesses with the deceased. Another important aspect raised by

the fourth respondent is that the applicant was never introduced to the

deceased's family, who did not know her. The applicant's family was likewise unknown to the deceased's family as they had never been introduced.

[11] The parties prepared Heads of Argument on the merits of the matter and in fact argued the merits as well. In my view, it is unnecessary to traverse the merits, as important preliminary issues militate against dealing with the merits at this stage. The most important of these is the order of Mollitsoane J, directing that the "biological children" of the deceased were to be joined in these proceedings. There was no specific exclusion of Kamegelo from that order. The applicant's interpretation of the order to mean that the court referred only to the biological children born of other women and not her minor son is illogical and misplaced. So too is the applicant's denial that Kamegelo's interests will not be prejudiced by this application. I am in agreement with the remarks of Mollitsoane J in this regard, in the extract from his judgment, which I cited earlier.

[12] Kamegelo was a minor at the time the application was launched and was still so when the matter was heard. It was necessary not only to join him to these proceedings but to appoint an independent person in the form of a *curator ad litem* to ensure that his interests were properly protected. The applicant's failure to do so on the basis of the misguided notion that she as his guardian could adequately protect his interests, is fatal to her application. The fourth respondent raised the valid point that there is no indication that Kamegelo is even aware of these

proceedings. In addition, the disputes of fact raised by the fourth respondent go to the very heart of the applicant's case, which case she did not substantiate

in any way. Such disputes are material and cannot be resolved on the papers. The applicant ought to have realised this and taken steps not to proceed further and incur further costs in this matter. Applying the test in the case of Plascon Evans, I find that material disputes of fact have arisen, which prevent this court from making a final order. The applicant would best be served if she had proceeded by way of action proceedings instead of Motion proceedings.

[13] In the circumstances I make the following order:

The application is dismissed with costs, such costs to be paid by the applicant



S NAIDOO J**On Behalf of the Applicants:****Instructed by:**

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