

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2017/39865

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

SANDILE SUKATI

Applicant

and

**THE EXECUTOR (MUSA MOTSA)
DECEASED ESTATE SABELO SUKATI**

1st Respondent

MASTER OF THE HIGH COURT

2nd Respondent

MINISTER OF HOME AFFAIRS

3rd Respondent

SIBUZANI GUMEDE

4th Respondent

NESISA GUMEDE5th Respondent**REGISTRAR OF DEEDS**6th Respondent

JUDGMENT

RAMAPUPUTLA, AJ:**FACTS OF THE CASE**

[1] The applicant is an adult male born on ■■■ August 1987. At the age of 13 in the year 2000 he lost his grandmother whom he'd been residing. According to the applicant, after 2011 he moved to stay with his uncle, Sabelo Sukati (the deceased) in Johannesburg. He avers that he was under the care and guardianship of (the deceased) ever since. His mother left for the United States of America in 2003. At the time he was 16 years old. The deceased was the brother to the applicant's mother and they shared the Sukati surname. The applicant's mother is still alive and is living in the United States of America. Nothing is said about the applicant's father.

The applicant brings this application seeking the following orders:

1. A declaration that he is the son and child of the deceased, Sabelo Sukati and is entitled to inherit a share of the estate which had devolved upon his surviving children;
2. Alternatively, a declaration that the applicant and all surviving children of the deceased are entitled to inherit equally the remainder of his estate in equal shares;

3. That third respondent registers the birth of the applicant as the child of the deceased in his books, as at date of birth;
4. That the second respondent reopens an enquiry into the finalisation and distribution of the deceased estate;
5. Alternatively, the second respondent be directed to suspend all determinations and finalisation of the deceased estate pending the outcome of this application;
6. That the second respondent be directed to consider the applicant as an heir to the estate of the deceased;
7. Costs;
8. Alternative relief.

- [2] The deceased passed away on 4 July 2013. He died intestate. On 13 September 2013 the Master issued Letters of Executorship in respect of the deceased's estate to the first respondent in terms Administration of Estates Act¹.
- [3] The applicant is employed with a government department the specifics of which are not provided. At the time of the hearing of this application the applicant was 31 years old.

THE FOLLOWING FACTS ARE COMMON CAUSE

- [4] The applicant lived at the deceased's house from the age of 16 (Sixteen) and all his entire high school career was completed while residing at the deceased's house.
- [5] Throughout he used the surname Sukati which is also his mother's surname.
- [6] The applicants mother (the deceased's sister) is still alive.
- [7] The deceased is survived by four children. He was divorced with two children and had two additional children from two different women.

¹ Section 13 and 14 of The Administration of Estates Act 66 of 1965 (hereinafter referred to as the Administration of Estates Act).

- [8] The deceased's four children are to inherit from the deceased estate.
- [9] At the time of this application the liquidation and distribution account laid for inspection at the Master's office.

ISSUES TO BE DETERMINED BY THE COURT

- [11] The first respondent opposes the application on the ground that the applicant was never adopted by the deceased. The second to the sixth respondents are not opposing this application.
- [12] The issue for determination in this application is whether the applicant is an adopted son of the late Sabelo Sukati (the deceased) and if he was, whether he is entitled to inherit from the deceased estate.
- [13] The court also has to determine whether the adoption was in terms of in terms of Children's Act² or African customary law.
- [14] The court further has to determine whether the applicant's objection to the administration of the estate by the Executor is compliant with the Administration of Estates Act and whether he has followed prescribed procedure.

RESPONDENT'S ARGUMENT

- [15] The 1st respondent objects to the application and argues that the applicant was not adopted by the deceased and fails to prove whether his adoption is in terms of Children's Act or African Customary law. It is argued that looking after someone does not create adoption.

REASONS FOR JUDGEMENT

- [16] Adoption in South Africa is achieved statutorily through the Children's Act or by African Customary law. The applicant seeks this court to

² 38 of 2005 (the Children's Act).

declare that he is the son of the deceased due to the fact that he lived with the deceased and the deceased treated him like his own son.

- [17] It is clear from the facts of the case that the applicant was not adopted in terms of the Children's Act since he failed to produce any documentary evidence to that effect. Such documentary evidence would have been readily available if it existed. It is therefore unnecessary to deal with the requirements for such adoption.
- [18] The only possible way that the applicant could have been adopted is through customary law. If indeed the applicant's adoption is based on customary law, the court must first establish the requirements of an adoption in African customary law. The requirements for adoption under customary law are found in Makgoka J's (as he then was) judgment of *Maswangaye v Baloyi N.O and Another*.³ According to the judgement the element of publicity is central to the process of customary adoption. The publicity takes the form of a small, symbolic ceremony to mark the occasion. Adoption is a significant and life-altering development for all concerned, the child, the natural parent(s) as well as the adoptive parent(s).
- [19] In the case of *Kewana v Santam Insurance Co. Ltd*⁴ the child was adopted after his father died and his mother became mentally ill. He was cared for by relatives, who decided that the deceased should adopt the child. The deceased agreed. A traditional ceremony was held, attended by the deceased's family, the local chief and neighbours. A male relative was present as the 'eye' of the family, and he informed the gathering that the purpose of the ceremony was that the child was accepted and recognised as the child of the deceased. A sheep was slaughtered for the enjoyment of the guests and a goat was slaughtered 'to give the occasion the significance and solemnity of an act being done in accordance with tribal customs.' The deceased was present at the ceremony.

³ 62122/2014) [2015]ZAGPPHC917 para 18.

⁴ 1993 (4) SA 771 (TkA)772 (I-J).

- [20] In an article written by Professor Maithufi⁵, a widely acknowledged expert in African law the process of adoption in terms of customary law is outlined as follows:- The relatives are called to a meeting where the envisaged adoption is to take place. After this meeting, the adoption has to be reported to the traditional leader of the area or his or her representative. The formalities relating to the agreement between the families of the adopted child and the adoptive parent(s), as well as the report to the traditional leader or his or her representative are aimed at indicating that the adopted child has been formally transferred from one family to another. Even in cases where adoption was not reported to the traditional leader, the adoption would still be valid if due publicity was given to the process and there was agreement between the families of the adopted child and the adoptive parent(s). The validity of an act of adoption in terms of customary law largely depends upon the agreement between these families. A traditional ceremony which may involve the slaughtering of small livestock is normally held to mark the adoption.'
- [21] Courts do not easily infer adoption especially where the biological parent(s) of a child are alive. It is recommended that a court should take it's time to conclude that there has been an informal, *de facto* adoption. In the case of *Flynn v Farr*⁶ the child's parents were divorced when he was very young. His mother married another man, who raised him like his own son. From the evidence before court, it was clear that the step-father was part of the child's life from the time he was five years old and they enjoyed a good and healthy relationship. He was raised by his mother and his step-father and resided with them in the family house. His step-father afforded him the support and affection

⁵ Maithufi, I "Adoption according to customary law - *Kewana v Santam Insurance Co.* Ltd 1993 (4) SA 771 (Tk) Followed." (2001) 34 *De Jure* 390 at 391 - 392.

⁶ 2009 (I) SA 584 (C).

which any father would have for his own son. However, the child was never legally adopted by his step-father, ostensibly because his biological father would not grant his consent for such adoption to take place. After his step-father's death, the executrix applied to the court for a declaratory that the child, then an adult, had been *de facto* adopted by the deceased. The court declined to grant the relief sought.

- [22] I agree with the above and add that adoption is like the second birth of an adopted child. The publicity surrounding the adoption is to let everyone know that a child is going to be nurtured according to the customs, norms and values of the adoptive parents. The adoptive parents are welcoming a new member to their family and they let this fact be known to all and sundry.
- [23] The Applicant does not suggest that there was any ceremony to formalise his adoption. Therefore the publicity aspect which is an essential element in a customary adoption is lacking.
- [24] Furthermore, the applicant's mother is still alive and lives in the United States of America. There is no averment that she had given her consent for such an adoption. There is also no averment that she was unable and unwilling to take care of the applicant.
- [25] The deceased and the applicant's mother share a surname and thus it is not surprising the deceased and applicant share the Sukati surname.
- [26] The Applicant suggests that the deceased was his guardian and in an attempt to prove this averment he attached a receipt from the department of home affairs dated 20 February 2018. He avers that he will receive confirmation of guardianship after three months. On the hearing of this application no such confirmation was provided and no explanation was provided as to the absence of such confirmation.
- [27] The deceased is survived by his own 4 children who are beneficiaries to his estate.
- [28] No concrete evidence of adoption is brought before the court. This application is replete with averments which fail to substantiate the averment that the applicant was the son of the deceased.

- [29] It is my opinion that the applicant avers adoption as a means of claiming ownership over the assets of the deceased.
- [30] I conclude that the applicant was not adopted by the deceased neither in terms of statute or customary law. He is also not declared the deceased's son and is therefore not entitled to share in the estate of the deceased.

Wherefore prayers 1,2,3,4 are dismissed.

- [31] The next issue is whether the applicant is entitled to an order compelling the Master of the High Court to re-open an enquiry into the finalisation and distribution of the deceased estate; alternatively, the Master be directed to suspend all determinations and finalisation of the deceased estate pending the outcome of this application. This appears to me to be nothing more than an objection to the validity of the process of the liquidation which resulted in the liquidation and distribution account. The account is still lying for inspection and has not been confirmed by the Master at the time of this application.
- [32] The Administration of Estates Act consolidates the laws regarding the liquidation and distribution accounts pertaining to deceased estates. Amongst other purposes the Act serves is the provision of a procedure to be followed in raising any objection to the liquidation and distribution account.
- [33] Any person interested in the estate may lodge with the Master any objection with the reasons therefor. The objection must be lodged in duplicate. The objection must be lodged at any time before the expiry of the period allowed for inspection of the liquidation and distribution account. After receiving such objection, the Master shall deliver or transmit by registered post to the executor a copy of any such objection together with copies of any documents which such person may have submitted to the Master in support thereof.⁷

⁷ Section 35(7).

- [34] The executor shall, within fourteen days after receipt by him of the copy of the objection, transmit two copies of his comments thereon to the Master.⁸
- [35] If, after consideration of such objection, the comments of the executor and such further particulars as the Master may require, the Master is of opinion that such objection is well-founded or if, apart from any objection, he is of opinion that the account is in any respect incorrect and should be amended, he may direct the executor to amend the account or may give such other direction in connection therewith as he may think fit.⁹
- [36] Any person aggrieved by any such direction of the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit.¹⁰
- [37] If any such direction affects the interests of a person who has not lodged an objection and the account is amended, the account as so amended shall, unless the said person consents in writing to the account being acted upon, again lie open for inspection in the manner and with the notice and subject to the remedies hereinbefore provided.¹¹
- [38] Meyerowitz¹² emphasizes that the objection must be lodged in duplicate with the related reasons. The objector may submit any documents which he or she sees fit in support of his or her objection.
- [39] For the objection to be compliant, it must be in a proper form.

⁸ Section 35(8).

⁹ Section 35(9).

¹⁰ Section 35(10).

¹¹ Section 35(11).

¹² D. Meyerowitz *The Law and Practice of Administration of Estates and their Taxation* (2010) at 16.14 - 16.18

The Master's ruling thereon will, however, only be given after the account has lain open for inspection and after the procedure laid down has been followed.¹³

- [40] *In casu* the only averment made regarding objecting to the administration of the deceased's estate is that applicant and the deceased's ex-wife went to the Master's offices several times but they were given a short shrift. The applicant avers that the Master says he does not have *locus standi* in the liquidation and distribution of the estate of the deceased Sabelo Sukati, and thus this application. I have no evidence before me that indicates that the applicant followed procedure as prescribed by the Administration of Estates Act. I have no authority to order the Master to act as requested by the applicant in the absence of any indication to a proper approach to the Master. The procedure as laid down by the Administration of Estates Act has to be complied with before the court can be approached for any relief.

Wherefore prayers 5, 6, 7, 8, are dismissed.

- [41] The applicant must pay the first respondent's costs. The only issue that remains is the scale of costs. Applicant's conduct has led to the diminishing of the deceased estate. This will cause financial prejudice to the heirs who are the real children of the deceased. The executor has to be paid from the estate in defending this application.
- [42] I conclude that this is a vexatious application. This is also illustrated by the fact that no proper service was effected through the Sheriff against the other respondents as required by the Uniforms Rules of court.
- [43] The Applicant is ordered to pay costs on the attorney and own client scale.

¹³ *Götz v The Master and others* NNO 1986 (1) SA 499 (N) page 504.

[44] **Wherefore I make the following order:-**

1. The application is dismissed.
2. The Applicant is ordered to pay costs on attorney and own client scale.

N.E. RAMAPUPUTLA

Acting Judge of the High Court,
Johannesburg Local Division

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