



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

**CASE NO: 2021/18447**

|           |                                 |
|-----------|---------------------------------|
| (1)       | REPORTABLE: NO                  |
| (2)       | OF INTEREST TO OTHER JUDGES: NO |
|           | DATE                            |
| SIGNATURE |                                 |

In the matter between:

**JEANETTE DOLLY CHRISTINA** First Applicant  
**MAPHATSOE**

**MOLOBATSI EPHRAIM RAMOKOKA** Second Applicant

**BILLY PATRICK RAMOKOKA** Third Applicant

**PENROSE STEVEN MOKETE RAMOKOKA** Fourth Applicant

**ESLEY LETLHOGONOLO RAMAKOKA** Fifth Applicant

and

|   |                   |
|---|-------------------|
| <b>SUSAN ERASMUS</b>                                  | First Respondent  |
| <b>ESTHÈ MULLER INC. ATTORNEYS</b>                    | Second Respondent |
| <b>LESHOME DAISY MHLONGO</b>                          | Third Respondent  |
| <b>THE MASTER OF THE HIGH COURT:<br/>JOHANNESBURG</b> | Fourth Respondent |
| <b>ESTER PETRONELLA MULLER</b>                        | Fifth Respondent  |

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**JUDGMENT**

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**MOORCROFT AJ:**

*Summary*

*Application proceedings not appropriate when there are foreseeable disputes of fact- no case made out for relief sought – application dismissed*

*Misjoinder – joinder of respondent's attorney – no case made out for*

*Non-joinder – Minister of Home Affairs must be joined in application to seek registration of customary marriage in terms of section 4(7) of the Recognition of Customary Marriages Act, 120 of 1998*

Order

[1] In this matter I make the following order:

1. *The application is dismissed;*
2. *The applicants are ordered to pay the respondents' costs, jointly and severally the one paying the other to be absolved;*
3. *The counter-application by the 3<sup>rd</sup> respondent (counter-applicant) is dismissed;*
4. *No cost order is made in respect of the counter-application.*

[2] The reasons for the order follow below.

### Introduction

[3] The applicants brought an application<sup>1</sup> to compel the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to file the will of the late Mr Ramakoka (“the deceased”) with the Master (the 4<sup>th</sup> respondent), alternatively that the 1<sup>st</sup> respondent be called before the Court to give oral evidence as to the whereabouts of the will. They also sought an order interdicting the 5<sup>th</sup> respondent from administering the estate of the deceased and an order that the Master withdraw the letters of executorship<sup>2</sup> issued to the 3<sup>rd</sup> respondent in respect of the estate of the deceased.

[4] The alternative relief foreshadows a dispute of fact. The 1<sup>st</sup> respondent, against whom the alternative relief is sought, is cited as an employee of the 2<sup>nd</sup> respondent – a firm of attorneys. The 5<sup>th</sup> respondent is the attorney who is the principal of the 2<sup>nd</sup> respondent. The joinder of the 1<sup>st</sup> and 2<sup>nd</sup> respondents constitute a misjoinder: They have no interest in the dispute between other parties to the litigation save for the fact that they represented the 3<sup>rd</sup> respondent (Ms Mhlongo) as her attorneys. Ms Mhlongo is the executor of the deceased estate appointed by the Master.

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<sup>1</sup> CaseLines 001-1.

<sup>2</sup> CaseLines 001-22.

### The affidavits

[5] The applicants are siblings and a nephew (also alleged to be an adopted child) of the deceased. They say that the deceased died intestate and that he was not survived by any parents, spouses or descendants. The deceased nominated<sup>3</sup> them as the beneficiaries of his provident scheme.

[6] In 2013 there were lobola negotiations<sup>4</sup> between the Ramakoka family and the family of Ms Mhlongo. The question whether a customary marriage was concluded between the deceased and Ms Mhlongo is disputed and is the subject of the 3<sup>rd</sup> respondent's counter - application. His marital status was reflected as single at the Provident Fund.<sup>5</sup>

[7] Before he died in 2019 he allegedly told the deponent to the founding affidavit (Ms Maphatsoe) that he had a will that was with the 2<sup>nd</sup> respondent, the firm of attorneys. The applicant say this that this was confirmed by the 2<sup>nd</sup> respondent at a meeting after his funeral.<sup>6</sup> This is disputed in the answering papers.

[8] Early in 2020 the applicants' attorney wrote<sup>7</sup> to the 2<sup>nd</sup> respondent to enquire about the will but the 2<sup>nd</sup> respondent denied that the firm was in possession of a will.<sup>8</sup>

[9] The applicants disputed<sup>9</sup> the Ms Mhlongo's appointment as executrix and also disputed the existence of a customary marriage. In December 2020 a meeting<sup>10</sup> was held with the Master and the Master agreed to hold matters in abeyance until April 2021 to allow an approach to the Department of Home Affairs in connection with the possible existence of a customary marriage.

[10] In their answering affidavit the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondents deny that the firm of attorneys had ever represented to the applicants that the deceased had a will. The firm had never been told of or referred to a will. They never knew the deceased during his

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<sup>3</sup> CaseLines 001-35.

<sup>4</sup> CaseLines 001-37.

<sup>5</sup> CaseLines 001-39.

<sup>6</sup> CaseLines 001-13.

<sup>7</sup> CaseLines 001-44.

<sup>8</sup> CaseLines 003-88.

<sup>9</sup> CaseLines 001-47.

<sup>10</sup> CaseLines 001-49.

lifetime and their source of information was instructions from Ms Mhlongo.

### The application

[11] The 1<sup>st</sup>, 2<sup>nd</sup>, and 5<sup>th</sup> respondents have no legal interest in the application or in the counter application. Their joinder constitutes a misjoinder and this was dealt with above.

[12] The applicants should have known when they brought the application that disputes of fact were bound to arise.<sup>11</sup> They knew that the 1<sup>st</sup>, 2<sup>nd</sup>, and 5<sup>th</sup> respondent who had no legal interest in the application had categorically denied that they were in possession of a will and that their denial were recorded in writing. There were no objectively verifiable facts indicating that the 2<sup>nd</sup> respondent and its officers were in possession of a will. The application must therefore be dismissed with costs.

[13] In respect of the relief sought against the Master I was advised from the Bar an arrangement was in place with the Master in terms of which the matter is being held in abeyance. In any event, no case was made out for relief in terms of section 35(10) of the Administration of Estates Act, 66 of 1965.

### The counter- application by the 3<sup>rd</sup> respondent

[14] Ms Mhlongo filed her own answering affidavit and with it a counter-application. In the counter-application she seeks an order that the Director – General of Home Affairs be joined to the application as a respondent, that the customary marriage between herself and the deceased be declared valid, and that the Director-General be ordered to register the marriage.

[15] Prayer 3 of the notice of motion in the counter – application requires the Director – General, the administrative head of the Department of Home Affairs to register a

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<sup>11</sup> See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1162 to 1168; *Gounder v Top Spec Investments (Pty) Ltd* 2008 (5) SA 151 (SCA) 154B–C.

customary marriage.

[16] The application to join the Director-General was withdrawn at the hearing. The Director – General was in any event not the correct party to be joined as the Minister of Home Affairs, *N O*, is the member of the Cabinet referred to in the Recognition of Customary Marriages Act, 120 of 1998. Section 4(7) of the Act provides that the Court “*may, upon application made to that court and upon investigation instituted by that court, order the registration of a customary marriage.*” The Minister is an interested party and the non-joinder of the Minister is fatal to the counter-application.

[17] I therefore dismiss the counter-application without deciding the merits of the counter - application and whether the dispute between the 3<sup>rd</sup> respondent and the applicants can be adjudicated in an application as opposed to a trial.<sup>12</sup>

[18] For the reasons above I grant the order above.

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**J MOORCROFT**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION**  
**JOHANNESBURG**

***Electronically submitted***

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **10 MARCH 2023**.

ATTORNEY FOR THE

J H GWEBU

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<sup>12</sup> See also *Mamadi and Another v Premier of Limpopo Province and Others* [2022] ZACC 26 par. 22 and *Lombaard v Droprop CC* [2010] ZASCA 86; 2010 (5) SA 1 (SCA) par. 26, last sentence.

APPLICANTS:

INSTRUCTED BY: MADLELA GWEBU MASHAMBA  
INC

COUNSEL FOR 1<sup>st</sup>, 2<sup>nd</sup>, & 5<sup>th</sup>  
RESPONDENTS: W F WANNENBURG

INSTRUCTED BY: ESTHE MULLER INC

COUNSEL FOR 3<sup>rd</sup>  
RESPONDENT: P TSHAVHUNGWE

INSTRUCTED BY: MOLATI ATTORNEYS

DATE OF THE HEARING: 6 MARCH 2023

DATE OF ORDER: 10 MARCH 2023

DATE OF JUDGMENT: 10 MARCH 2023