

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2021/56132

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

18 AUGUST 2023

.....
DATE
SIGNATURE

In the matter between:

MOKGWALE NELSON PHASHA

Applicant

And

CAROLINE MPINE PHASHA

First Respondent

MASTER OF THE HIGH COURT JOHANNESBURG Second Respondent

JUDGMENT

MIA, J

[1] The applicant brings an application seeking an order in the following terms:

- “1. Interdicting the first Respondent from being appointed as the sole executor of the Estate late,

2. Ordering the Applicant to be appointed as the co-executor of the estate of the late Mr. Fredis Phasha,
3. Declaring that the letter of executor/executrix issued by the Second Respondent to the First Respondent be invalidated and that the First Respondent has no legal right to control the estate of the deceased alone,
4. In event the First Respondent proves that there existed [a] valid marriage between herself and the Deceased, direct the Second Respondent to appoint the Applicant as the Co executor of the Estate late Fredis Phasha,
5. To order that the Second Respondent issue the Applicant with the necessary letter of executor,
6. First respondent to be interdicted from sub dividing, alienating in anyway or encumbering the immovable properties pending the finalisation of this application,
7. The first respondent to be interdicted from subdividing, alienating or encumbering the movable properties described as follows:
 - 7.1 Private cars described in the founding affidavit,
 - 7.2 livestock to the value of R99,000.00 as described in the inventory,
8. Ordering the First Respondent to account to the applicant and the second respondent in respect of the following:
 - 8.1 any bank account opened in the name of the estate,
 - 8.2 any amount paid into such bank accounts
 - 8.3 any claim launched against the estate
 - 8.4 any Liquidation and Distribution Accounts submitted by her to the Master of the High Court as prescribed by section 35 of the Administration of Estate Act,
 - 8.5 any funds or income received by the First Respondent relating to any estate or any property forming part of the estate,

8.6 any other issues relating to the estate or any property forming part of the estate.”

The first respondent opposed the application. No response or opposition was received from the second respondent.

[2] The applicant is an adult male and the son of Mr Fredis Phasha (the deceased) and Mrs Merriam Mathebela Phasha (the applicant's mother), who died shortly after the deceased passed on. The first respondent is Mrs Mpine Caroline Phasha an adult female residing at 138 Lancelot Street Boksburg. The second respondent is the Master of the High Court, Johannesburg.

[3] It is necessary to furnish some background to the matter prior to considering the issues in dispute. The applicant is the son of the deceased. The deceased was married to the applicant's mother, Mrs Merriam Phasha. They had four children during their marriage. The applicant's mother became ill during the marriage. Her family determined she would not be in a position to fulfil her duties as a mother and wife. They thus requested her sister Caroline to step into the role of the wife of Mr Fredis Phasha. The first respondent thus married the deceased to take over the applicant's mother's responsibilities as was the Sepedi custom. Both marriages were concluded in terms of customary law. The first respondent's marriage to the deceased was not registered in terms of the Recognition of Customary Law Act (the Act) as the Act was not assented to and had not commenced.

[4] When the deceased, Mr Fredis Phasha died, on 21 February 2021, the elders in the Phasha family determined that the applicant should be appointed as the executor of the estate of Mr Fredis Phasha as the adult male child of the deceased. At that stage the deceased had been married to both the applicant's mother and the first respondent and had been blessed in both marriages with children.

- [5] On 28 June 2021, the applicant's mother passed on. The deceased's estate had not been wound up. The applicant discovered in November 2021 that the first respondent was appointed as the executor of the estate of the deceased. This prompted the applicant to launch the present application to ensure the executor was appointed in accordance with the Phasha family elders wishes.
- [6] In view of the above facts, the parties require the following issues to be determined:
- 6.1. Whether the respondent is entitled to condonation as required in terms of the Rules of Court?
 - 6.2. Whether there was a customary marriage between Mrs Merriam Phasha and the deceased?
 - 6.3. Whether Mrs Merriam Phasha is entitled to a spouses share of the deceased's estate?
 - 6.4. If the applicant's mother is entitled to claim a spouses half share of the deceased estate, whether the applicant is entitled to lodge a claim on behalf of his mother?

Condonation

- [7] The first question is whether the respondent is entitled to condonation as required in terms of the Rules of Court. The applicant served the application on 2 December 2021. The first respondent served a notice to oppose the application on 14 December 2021 and was expected to file her answering affidavit on 3 February 2022 whereafter the applicant would file their reply within ten days upon receipt. This did not occur. The first respondent failed to file their answering affidavit until the applicant enrolled the matter on the unopposed roll on 8 September 2022. The first respondent filed her answering affidavit on 25 August 2022, eight months out of time. No application for condonation was lodged and no explanation furnished for the late filing of the answering affidavit. The applicant however filed a reply dealing with the aspects raised by the first respondent.

- [8] On behalf of the first respondent, it was argued that the applicant did not deliver a notice in terms of Rule 30, causing the irregular step to be set aside. In addition, the applicant took a further step by responding to the answering affidavit and then delivering heads of argument with knowledge of the first respondent's irregularity. The first respondent's reliance is placed on the *Ardnamurchan Estates (Pty) Limited v Renewables Cookhouse Wind Farms 1(RF) (Pty) Ltd and Other*¹ where the court dealt with similar circumstances and expressed the view that the delivery of the replying affidavit constituted a further step.
- [9] In the present matter not only has the applicant delivered its replying affidavit but it has delivered heads of argument as well. A further consideration that I must consider is that it is in the interests of justice to consider all factors rather than only the technical points raised. In this regard, I can condone the late filing of the first respondent's answering affidavit. It is in the interests of justice to consider all factors and thus, I condone the late filing of the answering affidavit.

Existence of customary marriage

- [10] I deal with the applicant's application before dealing with the respondent's answering affidavit and the related procedural issues. The historical background indicates that the applicant's mother married the deceased in 1976 in terms of customary law. The couple had four children during the course of their marriage. The eldest son was born in 1977 and later passed away. In 1980 the applicant's mother became ill and could not care for the children. She consulted doctors as well as traditional healers during this time. Given her illness, her family were concerned that she could not care for the children and fulfil her role as a wife due to the nature of her illness. Her family requested the first respondent to assume the applicant's mother's position and become the deceased's second wife. The marriage was concluded and the first respondent took over the role and responsibilities of her sister as a wife. It follows that the deceased was thus married to the applicant's

¹ [2021] 1 All SA 829 (ECG)

mother and the first respondent. For the purposes of the present matter, a marriage existed between the deceased and the applicant's mother which remained in existence.

[11] Both marriages were concluded before the accession and commencement of the Recognition of Customary Marriages Act, 120 of 1998 (the Act). The first respondent's marriage was not registered, in fact neither marriage was registered in terms of the Act once it came into operation on 15 November 2000. When the matter appeared before me, no marriage certificate was available despite the first respondent averring that a civil marriage was concluded with the deceased. To the extent that reference is made to the Act and its application it appears in retrospect that the Act was not assented to and the applicant's mother and the first respondent and the deceased did not seek to have either of the marriages registered in terms of the Act. The provision of section 7(6) does not assist as the marriages had been concluded already. An application to court would only bring the factual position in line with the legal position for the purpose of clarity and certainty. This did not occur. This second marriage did not invalidate the first marriage and the applicant's mother remained a spouse. On the first respondent's version there existed a marriage between the applicant's mother and the deceased and she assumed the position as the second wife.

Spouses claim

[12] The next issue for determination is whether the applicant can lodge a claim against the deceased's estate for a spouses share of the estate. I have already determined that the applicant's mother remained a spouse of the deceased notwithstanding that he married the first respondent after his marriage to the applicant's mother. The facts of this matter reflect the Court's observation in *Gumede v President v Republic of South Africa and Others*² that:

²*Gumede v President v Republic of South Africa and Others* 2009 (3) SA 152 (CC)

In our pre-colonial past, marriage was always a bond between families and not between individual spouses. Whilst the two parties to the marriage were not unimportant, their marriage relationship had a collective or communal substance. Procreation and survival were important goals of this type of marriage and indispensable for the wellbeing of the larger group. This imposed peer pressure and a culture of consultation in resolving marital disputes. Women, who had a great influence in the family, held a place of pride and respect within the family. Their influence was subtle although not lightly overridden. Their consent was indispensable to all crucial family decisions. Ownership of family property was never exclusive but resided in the collective and was meant to serve the familial good.

- [13] The Court notes that even then the position was not idyllic and community and group interests were often informed by male interests and framed by men which often disadvantaged women and children. Thus both the applicant's mother's marriage as well as the first respondent's marriage concluded in terms of customary law must enjoy the same dignity and equality if the act is applied to each of the marriages. It follows that both spouses are entitled to a spouses share in the estate. If the applicant is the executor of his mother's estate he is entitled to lodge a claim for a spouses portion of the deceased's estate. Even if the first respondent argues that she is the surviving spouse and was properly appointed as the executor of the deceased's estate the determination with regard to the spouse's portion is no longer a simple calculation as the first respondent would contend that she is the only spouse. On her own version she is the second spouse. She can not elevate her status as a spouse merely because she married the deceased in terms of customary law as well as in terms of a civil union. The Act was promulgated precisely to eradicate such injustices and difficulties that arise with dual systems so as no to prejudice women married in terms of customary law.

Grounds for an interdict: Prima facie right

- [14] Having considered all the issues in dispute I consider whether the applicant is entitled to the relief sought. In order for the applicant to obtain the relief sought, the applicant must show that there is a *prima facie* right for the relief sought, a well-grounded apprehension of harm and that the balance of convenience favours the granting of the relief sought.
- [15] In considering all the factors placed before me, and having condoned the late filing of the first respondent's answering affidavit, the first respondent's submission is that the applicant ought to have issued an application wherein he sought that the marriage between the applicant's mother and the deceased is declared valid and in turn declaring the civil marriage between the first respondent and the deceased null and void. On this basis, the first respondent submitted that the applicant failed to indicate that there was a *prima facie* right.
- [16] Having regard to the recognition of customary marriages and the equality of spouses, both the applicant's mother and the first respondent would be accorded equal recognition in terms of the law. There is no basis on which to discriminate between the two spouses. Having regard to the purpose of the marriage when the unions were concluded, which the first respondent did not dispute, as well as the recognised communal and collective basis recognised in *Gumede*, there is no reason why the first respondent would hold a more superior position than the applicant's mother in the marriage. Where the first respondent suggests that she is the spouse of the deceased and thus is entitled to a child's portion in the intestate estate, this ignores that upon the death of the deceased, there were two spouses surviving the deceased. Given the circumstances, the spouses' portion could not be allocated to one spouse alone. This would relegate the applicants' mother's union to a status less than a marriage solemnised in accordance with civil rites. This would be contrary to the Constitution and the purpose of the Act. The first respondent's purported civil marriage certificate was not available at the time of hearing the matter.

A marriage certificate was produced and filed on caselines after the parties had finalised submissions. No leave was sought to receive the marriage certificate as evidence. The applicant objected to the reliance placed on the marriage certificate. This highlights the problems and the extent to which the first respondent stretches the matter to lean in her favour notwithstanding the legality of the position.

[17] Whilst the first respondent does not dispute that the deceased paid lobola for the applicant's mother in order for them to be married and notes that they had four children, she indicates she was required to marry the deceased when the applicant's mother fell ill. She notes that it was "not an uncommon practice in the Sepedi culture" and that the marriage took place with her consent. She too bore four children. She states that she later married the deceased in terms of a civil union in about 1999. But could not produce the marriage certificate. This was filed on caselines much later. The marriage certificate is not relevant as the civil marriage does not raise the status of the first respondent above that of the applicant's mother and the deceased.

[18] Having regard to the what I have indicated above, the applicant has made out a case that there is a *prima facie* right. This is so in that the applicant's mother will be deprived of her benefit as a spouse in view of the position adopted by the first respondent and is indicative of a well grounded apprehension of harm. Not only has the first respondent marginalised the applicant's mother but she has completely discounted her in the estate as though she did not exist and indicates that she had wound up the estate with herself, the first respondent, being the sole surviving spouse entitled to a child's portion. There were two spouses entitled to share in the spouse's portion if it was a child's portion. The first respondent's submission is that the estate is wound up and it is a *fait accompli* and nothing more can be done. Alternately she submits that the issue is to be dealt with by lodging an objection with the Master of the High Court. The Master of the High Court was joined in the matter and has not indicated any interest herein.

- [19] The issues herein relate not only to the estate but crucially encompass an aspect of gender equality of spouses married under different marital regimes. There does not appear to be any valid basis on which the applicant's mother could derive a lesser position as a spouse in marriage by virtue of her marriage in terms of customary law than the first respondent's marriage in terms of both customary law and a later civil union.
- [20] Section 50(1)(a)(v) of the Administration of Estates Act provides that an executor may be removed from office : "*(v) if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned; and*". It is evident that the first respondent having indicated that she displays the particular position she holds that she is the only spouse of the deceased, is not in a position to hold the position of the executor where there are conflicts of interest. It is thus appropriate for her to be removed or that a coexecutor be appointed as requested by the applicant.
- [21] The usual order is that costs follow the cause and in this matter it is appropriate where the applicant has conducted an opposition in the manner that is unbecoming of a litigant. The answering affidavit was filed later. The ground on which the defence is based was unsubstantiated and self-serving and the evidence which the first respondent relied upon was not available. The first respondent defence was conducted as one of entitlement throughout.
- [22] For the reasons above, I grant the following order:
1. The second respondent shall reconsider the first respondent as the sole executor of the Estate late,

2. the second respondent shall consider the Applicant or a suitable alternative person be appointed as the co-executor of the estate of the late Mr. Fredis Pasha,
3. The Second Respondent consider the Applicant as co-executor,
4. First respondent is hereby interdicted from sub dividing alienating in anyway or encumbering the immovable properties pending the finalization of this application,
5. The first respondent is hereby interdicted from subdividing alienating or encumbering the movable properties described as follows:
 - 5.1 Private cars described in the founding affidavit,
 - 5.2 livestock to the value of R99,000.00 as described in the inventory,
6. The First Respondent shall to account to the applicant and the second respondent in respect of the following:
 - 6.1 any bank account opened in the name of the estate,
 - 6.2 any amount paid into such bank accounts
 - 6.3 any claim launched against the estate
 - 6.4 any Liquidation and Distribution Accounts submitted by her to the Master of the High Court as prescribed by section 35 of the Administration of Estate Act,
 - 6.5 any funds or income received by the First Respondent relating to any estate or any property forming part of the estate,
 - 6.6 any other issues relating to the estate or any property forming part of the estate.
7. The first respondent shall pay the costs of the application.

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JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant : Adv. T Mahafha
Instructed by : Mulisa Mahafha Attorneys

On behalf of the respondent : Mr T Thobela
Instructed by : Nkosi Nkosana Inc

Date of hearing : 30 November 2022
Date of judgment : 18 August 2023