



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 1296/2021

In the matter between:

NYAMUKAMADI MUKUMELA DENG (MABIRIMISA)

(born MUDAU)

MATIDZA KUTAMA

MABIRIMISA RUDZANI POLINAH

MABIRIMISA NDITSHENI OZIOUS

MABIRIMISA MASINDI CONSTANCE

MABIRIMISA MAWIHANGWISI ELSINA

MABIRIMISA MUVHULAWA

FIRST APPELLANT

SECOND APPELLANT

THIRD APPELLANT

FOURTH APPELLANT

FIFTH APPELLANT

SIXTH APPELLANT

SEVENTH APPELLANT

and

MABIRIMISA TSHILO ANORLD N N O

ESTATE OF THE LATE DENG (MABIRIMISA)

MUDZIELWANA JOSIA

MABIRIMISA BUS SERVICES (Pty) Ltd

MABIRIMISA NDIVHUDZANNYI SILAS

DENG DENG

MATSHEKETSHEKE MUNYADZIWA GLORIA

RAPHALALANI TSHILO SALPHINA

RAMUSWANA ANNA

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

FOURTH RESPONDENT

FIFTH RESPONDENT

SIXTH RESPONDENT

SEVENTH RESPONDENT

EIGHTH RESPONDENT

MABIRIMISA FRANS
 ESTATE OFFICER, DZANANI MAGISTRATE'S
 COURT
 MAGISTRATE DZANANI
 MINISTER OF JUSTICE & CONSTITUTIONAL
 DEVELOPMENT N O
 MASTER OF THE HIGH COURT OF SOUTH
 AFRICA, LIMPOPO DIVISION,
 THOHOYANDOU N O
 REGISTRAR OF COMPANIES

NINTH RESPONDENT

TENTH RESPONDENT

ELEVENTH RESPONDENT

TWELFTH RESPONDENT

THIRTEENTH RESPONDENT

FOURTEENTH RESPONDENT

Neutral Citation: *Nyamukamadi Mukumela Denga (Mabirimisa) & Others v Mabirimisa Tshililo Arnold N N O & Others* (1296/2021) [2022] ZASCA 148 (31 October 2022)

Coram: VAN DER MERWE; MOLEMELA, HUGHES JJA and DAFFUE and CHETTY AJJA

Heard: 15 August 2022

Delivered: 31 October 2022

Summary: Deceased estate – whether the administration of deceased had been finalised – administration of the estate finalised in terms of the Black Administration Act 38 of 1927 read with regulations framed in terms of s 23(10) – appeal dismissed.

ORDER

On appeal from: The Limpopo Division of the High Court, Thohoyandou (Makgoba JP sitting as court of first instance):

The appeal is dismissed and there is no order as to costs.

JUDGMENT

Molemela JA (Van der Merwe and Hughes JJA and Daffue and Chetty AJJA concurring):

[1] This appeal arises from proceedings instituted by the appellants in the Limpopo Division of the High Court, Thohoyandou (the high court) in October 2019, seeking an order declaring that the estate of the late Mudzielwana Josiah Denga Mabirimisa (the deceased) be administered in terms of the Administration of Estates Act 66 of 1965 (the Administration of Estates Act), and that the appellants be declared the heirs in the deceased estate.¹ The basis of the opposition of the application was that the relief sought was impermissible as the estate of the deceased had already been administered and finalised in terms of the Black Administration Act 38 of 1927 (the Black Administration Act). The application was

¹ The order sought, in relevant parts, was couched as follows:

‘4.1. That it be and is hereby declared that the 1st, 2nd, 3rd 4th, 5th, 6th, and 7th Applicants are the heirs in the deceased estate of the late, Denga (Mabirimisa) Mudzielwana Josiah, registered at Dzanani Magistrate under estate file no.44/98, forthwith;

4.2. That it be and is hereby declared that the estate of the late, Denga (Mabirimisa) Mudzielwana Josiah, registered at Dzanani Magistrate under estate file no.44/98 was not administered and wound-up under Black Administration Act, forthwith;

4.3. That it be and is hereby declared that the estate of the late, Denga (Mabirimisa) Mudzielwane Josiah, registered at Dzanani Magistrate under estate file no.44/98 falls to be wound-up and administered by the Master(13th Respondent) under the provisions of the Administration of Estates Act, forthwith;

4.4. An order directing the Master (13th Respondent) to summon and conduct an enquiry with the beneficiaries (family) of the late, Denga (Mabirimisa) Mudzielwane Josiah for the purpose of appointing an executor for the administration and finalization of the deceased estate, forthwith;

4.5. An order directing the 1st Respondent to handover/deliver all the deceased estate properties, including the shares in Mabirimisa Bus Services (Pty) Ltd to the executor to be appointed in the estate late, Denga (Mabirimisa) Mudzielwane Josiah, for the purpose of administering and winding-up the deceased estate.’

heard on 30 March 2021. In a judgment delivered on 12 May 2021, the high court held that it was impermissible to grant the relief sought as the administration of the estate in question had already been finalised in terms of the provisions of the Black Administration Act, which had since been repealed.² This appeal is with the leave of the high court.

[2] It is common cause that the deceased died intestate on 19 April 1998. The deceased had, during his lifetime, concluded three customary marriages, thus constituting three houses, in terms of custom. The deceased first wife was Denga Denga (the fifth respondent). Two children were born from that marriage, namely the first and sixth respondents, respectively. The first appellant was the deceased second wife. Seven children were born out of the second marriage. They were cited as the second to the seventh appellant, as well as the fourth respondent. Three children were born from the deceased third marriage, and they were cited as the seventh, eighth and ninth respondents, respectively. The third wife, Alilali Denga predeceased the deceased. The deceased was a businessman and owned a 50 per cent shareholding in Mabirimisa Bus Service (Pty) Ltd (the bus company), which was operated in the Vhembe District of Limpopo Province. The bus company was cited as the third respondent in this matter.

[3] On 29 April 1998, a firm of attorneys acting on behalf of the first respondent reported the estate to the estates department at the Magistrate's Court of Dzanani (Magistrate). The estate was registered under estate number 44/98 (the deceased estate). The estate officer was cited as the tenth respondent, while the Magistrate was cited as the eleventh respondent. On 30 April 1998, the Magistrate appointed the first respondent as the representative of the deceased estate in terms of s 23(10) of the Black Administration Act. The first respondent was the first-born son of the deceased. His appointment as the representative of the estate appears to have been based on the application of the principle of male primogeniture.³

² The Black Administration Act 38 of 1927 was repealed on 30 September 2007.

³ The general rule of primogeniture provided that only a male who was related to the deceased qualified as an intestate heir. In terms of that rule, women did not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head was his heir. In the event that the deceased was not survived by any male descendants, his father would succeed him. In the event that the deceased father did not survive him, an heir was sought among the father's male descendants related to him through the male line. See *Bhe and Others v Khayelitsha*

[4] Following his appointment as the representative of the estate, the first respondent compiled an inventory of the estate and submitted it to the Magistrate. The items listed in the inventory were as follows:

- '5.6.1. Cattle (5) valued at R5 000-00
- 5.6.2. Goats (10), valued at R3 000-00
- 5.6.3. Orchard, valued at R20 000-00
- 5.6.4. 1983 model, Mercedes Bens Motor Car, valued at R10 000-00
- 5.6.5. 1982 model, Massy Ferguson tractor, valued at R5 000-00
- 5.6.6. 2 x Transport Certificates, valued at R10 000-00
- 5.6.7. Household furniture, valued at R3 000-00
- 5.6.8 Standard Bank Current Account with R9 000-00
- 5.6.9. 50% share interest in Mabirimisa Bus Service (Pty) Ltd, valued at R10-00.'

[5] The first appellant averred that she did not benefit anything from the estate and was struggling financially, as she was a pensioner. She contended that instead of finalising the administration of the estate, the first respondent collected all the assets of the estate for the benefit of himself and members of the first house, with no regard for the appellants as the members of the second house. She alleged that up to the day on which she deposed to the founding affidavit; she did not know what had become of the deceased estate.

[6] Although the state respondents (ie the tenth to the thirteenth respondents) and the first, third, fifth and sixth respondents were represented by different legal representatives, the defence raised by all the respondents was basically the same. It amounted to this: that the relief sought by the appellants was impermissible in law in the light of the fact that the administration of the deceased estate had been finalised in terms of section 23 of the now repealed Black Administration Act; that the finalisation of the estate was in terms of a settlement agreement which was made an order of court made by the Magistrate on or about 7 March 2006; and that the order granted by the Magistrate on 7 March 2006 was never challenged by the appellants and remains valid and effective until set aside or rescinded. The high court essentially found for the respondents on this basis.

Magistrate and Others 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) para 77.

[7] The appellants contended on appeal that the deceased estate had not been finalised under the Black Administration Act. They also asserted that given the fact that the Black Administration Act had been repealed in 2007, the estate ought to be placed under the control of the Master of the High Court, so that it could be wound up in terms of the provisions of the Administration of Estates Act. The crisp issue for determination is whether the estate of the deceased, reported at the Magistrate Court under file number 44/98 was finalised. Should the answer be in the affirmative, then *cadit quaestio*. However, should the answer be in the negative, the ancillary question is whether the estate should be administered by the Master (the thirteenth respondent) in terms of the Administration of Estates Act or be finalised by the Magistrate.

[8] This matter turns on the facts. It is self-evident from the correspondence emanating from the office of the Magistrate that the process of administering the deceased estate started soon after the first respondent's appointment as the representative of the deceased estate. A letter authored by the Magistrate dated 30 April 1998 and addressed to First National Bank, notified the bank that the first respondent had been appointed as the representative of the estate and directed the bank to allow the first respondent to sign cheques on behalf of the bus company (third respondent). It is undisputed that following the deceased passing, the bus company was *de facto* in the first respondent's control.

[9] In her founding affidavit, the first appellant *inter alia* asserted as follows:
'I am a pensioner and I am depending on pension for survival . . . I submit that I have not received any maintenance from the 1st Respondent or from the estate. . . What I heard was that the widows were to receive maintenance monthly, but that never happened.'

[10] The first respondent put up a comprehensive version in response thereto. He said that the Magistrate had authorised the transfer of the Mercedes Benz motor vehicle to him on 24 August 1999. This took place in terms of reg 3(1) of the regulations that had been promulgated under the Black Administration Act. This regulation provided that the estate shall be administered under the supervision of the

relevant magistrate, who was empowered to give directions as seen fit. The first respondent explained that the orchard had by mutual agreement been divided into three equal portions of 1,6 hectares and that each house was placed in possession of a portion.

[11] In respect of the remainder of the estate assets, particularly the shares in the bus company, the first respondent said the following. At the time of the death of the deceased, the business of the bus company was virtually worthless. He invited members of the second and third houses to become involved in the business, but they declined. As a result of his own efforts, the first respondent turned the business around, so that it flourished. During 2006, however, a settlement agreement was entered into between the first respondent and the appellants. The fourth respondent, who had appointed attorney SO Ravele, represented the appellants. In terms of the settlement agreement the total amount of R1,4 million was paid to the Madzielwana Trust created by the appellants or a bank account in that name operated by them. It was a necessary implication of the first respondent's evidence that the settlement agreement was in full and final settlement of all remaining issues in respect of the deceased estate. The Magistrate had made the settlement agreement an order of court at the instance of SO Ravele acting for the appellants.

[12] This evidence was not only corroborated by the affidavits of the State respondents but supported by contemporaneous documents. The court order was produced. It read as follows:

'Having heard legal representative on behalf of the Applicant, submission by the Respondent representative and having read the papers the following order is made:-

1. That the respondent to pay an amount of R1.4 million to the applicant [deceased first and second house] as follows:
 - 1.1. Deposit of R 50 000-00 payable on or before the 7th March 2006;
 - 1.2. Thereafter; monthly instalment of R15 000-00 payable to the applicant attorneys of record until the applicant furnish the respondent with written confirmation of their account.
2. That the respondent to pay applicant representative cost on attorneys own client scale as from 21st November 2005 to date of judgment including cost of drafting this Court Order.

3. Parties agree that the aforesaid amount will be interest free unless the defendant breached the agreement, wherein the applicant may approach court to enforce their claim for amount due.'

[13] That the Magistrate may in the absence of a *lis* not have had the power to make the settlement agreement an order of court is, in my view, of no moment; its mere existence is strongly supportive of the first respondent's version. As I have said, the first respondent averred that he had fully complied with his obligations under the settlement agreement. Proof of cheque payments was attached to the answering affidavit. Also attached was the following letter authored by the Magistrate:

'RE: ESTATE LATE MUDZIELWANA JOSIA DENG (ID NO
OUR CLIENT MR S MABIRIMISA

1. *Your letter dated 1/6/18 has reference.*
2. *After having drawn the record I concluded that the estate has been finalized due to the fact that a settlement agreement by the parties was made a Court order in terms of which Mr S Mabirimisa and those who sided with him were to receive R 1.4 Million payable in instalments. The first instalment being R 50 000 on monthly basis.*
3. *The record does not have a final liquidation and distribution account and there is no proof of payment to all the beneficiaries.*
4. *If your client is not satisfied with the manner in which the estate was dealt with I will suggest that you cause the decision of the magistrate who dealt with the matter to be reviewed by the Master of the High Court.*
5. *Hoping that you will find this to be in order.'*

[14] In her replying affidavit, the first appellant for the first time acknowledged that a Trust was formed on the appellants' behalf. She stated that an amount of R15 000 was to be paid monthly from 7 March 2006. She however denied that the appellants were parties to the Deed of Settlement. Curiously, she went on to mention that the rest of the averments were 'neither admitted nor denied' and put the respondent to the proof thereof. Having done so, she proceeded to explain that the amount of R15 000 represented maintenance 'pending the administration and finalisation of the estate'. She further mentioned that '[t]he aforesaid contribution was only made

sixteen (16) times and since then, nothing was ever received from the 1st Respondent, let alone the administration of the estate which the [appellants] maintain that it was not maintained and finalised'. The appellants averred that the cheque counterfoils showed that only an amount of R240 000 was paid and not R1.4 million. They challenged the first respondent to prove that the amount of R1.4 million had been paid.

[15] It is evident that there is a dispute of fact pertaining to the issue of finalisation of the winding up of the deceased estate. The appellants contend that the deceased estate was merely reported to the Magistrate but was never administered by the first respondent, as the representative of the deceased estate. Had the estate been wound up, documents like the liquidation and distribution account, all vouchers of payments made, proof of claims lodged, and proof of estate account opened would have been furnished, so it was argued. On the other hand, the respondents contended that the estate had been finalised in terms of a settlement agreement, which was made an order of court. The estate was therefore wound up in accordance with the provisions of the Black Administration Act, which did not require the drawing of a liquidation and distribution account in the estate.

[16] The approach to the resolution of a dispute of facts on the papers was laid down in the well-known judgment of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.⁴ That approach (the so-called *Plascon-Evans* principle) was aptly summarised by this Court as follows in *Wightman t/a JW Construction v Headfour & Another*:⁵

' . . . [T]he courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers . . . '

⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A) at 634E-635C.

⁵ *Wightman t/a JW Construction v Headfour (Pty) Ltd & Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA); [2008] 2 All SA 512 (SCA) para 12.

[17] The respondents' version was canvassed earlier in the judgment. In my view, the respondents' detailed version cannot be described as far-fetched or untenable. It was a detailed version supported by correspondence issued by the Magistrate. Moreover, it was supported by a court order which reflected the settlement agreement. There was also a letter sent to Le Roux Attorneys, attaching the last cheque payment. This letter's reference number is the same as that of the deceased estate.

[18] The appellants laid much emphasis on the fact that on 15 October 2004, the Black Administration Act was declared unconstitutional in the seminal judgment of *Bhe and Others v Khayelitsha Magistrate and Others (Bhe)*.⁶ Section 23 of the Black Administration Act was declared to be inconsistent with the Constitution and invalid, and the Regulations for the Administration and Distribution of the Estates of Deceased Blacks (R200), published in *Government Gazette* No. 10601 dated 6 February 1987, as amended, were declared to be invalid. Furthermore, the principle of male primogeniture, which was central to the customary law of succession, was declared inconsistent with the Constitution and invalid to the extent that it excluded or hindered women and extra-marital children from inheriting property. It must be borne in mind that the orders granted did not summarily halt the administration of deceased estates which had not yet been finalised on the date of the granting of the orders. The following passage of that judgment is apposite:

'It will be necessary, however, that estates that are currently being wound up under section 23 of the Act and its regulations, continue to be so administered to avoid dislocation. The order will accordingly provide that the provisions of the Act and its regulations shall continue to be applied to those estates in the process of being wound up. All estates that fall to be wound up after the date of this judgment shall be dealt with in terms of the provisions of the Administration of Estates Act.'⁷

It is clear from this passage that nothing precluded the finalisation of this matter in terms of the Black Administration Act, as it was reported and registered in the Magistrate's Court in 1998.

⁶ *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

⁷ *Ibid* para 133.

[19] Importantly, in *Bhe*, the Constitutional Court said the following regarding the conclusion of settlement agreements in relation to deceased estates:

‘The order made in this case must not be understood to mean that the relevant provisions of the Intestate Succession Act are fixed rules that must be applied regardless of any agreement by all interested parties that the estate should devolve in a different way. The spontaneous development of customary law could continue to be hampered if this were to happen. The Intestate Succession Act does not preclude an estate devolving in accordance with an agreement reached among all interested parties but in a way that is consistent with its provisions. There is, for example, nothing to prevent an agreement being concluded between both surviving wives to the effect that one of them would inherit all the deceased immovable property, provided that the children’s interests are not affected by the agreement. Having regard to the vulnerable position in which some of the surviving family members may find themselves, care must be taken that such agreements are genuine and not the result of the exploitation of the weaker members of the family by the strong. In this regard, a special duty rests on the Master of the High Court, the magistrates and other officials responsible for the administration of estates to ensure that no one is prejudiced in the discussions leading to the purported agreements.’⁸

It suffices to say that on the first respondent’s version, which, as I have said, must be accepted for the purpose of the determination of the appeal, an agreement as envisaged in this passage had been entered into.

[20] I agree with the respondents’ submission that, the estate in question was administered and wound up under the Black Administration Act in 1998 and cannot be administered anew in terms of the Administration of Estates Act. To the extent that the appellants hold the view that the first respondent breached his fiduciary duties while administering the estate, it is open to them to institute the relevant action against the first respondent, should they be so advised.

[21] For all the reasons mentioned above, I find that the high court’s judgment is unassailable. It follows that the appeal falls to be dismissed. The high court ordered that there should be no order of costs. The general rule is that costs must follow the result. Having considered all the circumstances of this case, I am of the view that it

⁸ Ibid para 130.

would not be in the interests of justice to make an adverse order of costs in this appeal.

[22] In the result, the following order is made:

The appeal is dismissed and there is no order as to costs.

M B MOLEMELA
JUDGE OF APPEAL

Appearances

Counsel for appellants:	M. Coetsee (with him S. Neuland)
Instructed by:	Mulovhedzi & Nelamvi Attorneys Inc, Thohoyandou EG Cooper Majiedt Inc, Bloemfontein
Counsel for first, third, fifth and sixth respondents:	AM Mahafha (with him B Matlhape)
Instructed by:	T N Ramashia Attorneys, Thohoyandou Molefi Thoabala Attorneys, Bloemfontein