

IN THE HIGH COURT OF SOUTH AFRICA  
(TRANSVAAL PROVINCIAL DIVISION)

Date: 14/05/2008  
Case No: 5242/06

UNREPORTABLE

In the matter between:

KOOS SHIKOANE

PLAINTIFF

And

BRYANE SHIKOANE  
KGOMOTSO SHIKOANE  
REGISTRAR OF DEEDS

FIRST DEFENDANT  
SECOND DEFENDANT  
THIRD DEFENDANT

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JUDGMENT

TLHAPI V V, AJ

[1] I shall refer to the respondent in these proceedings as the plaintiff and the applicants as first and second defendants, ("the defendants")

The plaintiff instituted an action for an order declaring him to be entitled to ownership of Site 4958, Unit S, District Odi, Mabopane. He seeks a further order directing the the third defendant to transfer the said site in his name.

The defendants who are resident within the jurisdiction of this court except on the ground that the particulars of claim do not sustain a cause of action. The defendants advanced fresh grounds of exception

and it is upon these that this matter is determined.

[2] The particulars of claim state:

"5.

5.1 On 15 September 2004 the immovable property known as site 4958, Unit S, District Odi, Mabopane ('the property') was transferred into the name of the First Defendant under TG122750/04.

5.2 A copy of the Deed of Grant is attached hereto as Annexure "A".

6. Prior to the transfer, the property formed part of the estate of the late Petrus Moabi Sikoana ("the deceased"). The transfer into the name of the First Defendant emanated from a distribution agreement between the First and Defendants acting in their capacity as heirs in the estate of the deceased.

7. The First Defendant fraudulently caused the property to be registered into his name, by virtue of the following facts:

- 7.1 the deceased died intestate;
  - 7.2 the deceased had no children;
  - 7.3 the First Defendant falsely represented to be the son of the deceased whilst he knew that the deceased was not his biological father and/or had no other legal relationship to the First Defendant;
  - 7.4 the aforesaid false representation by the First Defendant was made with the sole intention of obtaining the property of the deceased, whilst being aware that he is not entitled thereto;
8. The Plaintiff being the elder brother of the deceased, is in terms of the law of succession entitled to ownership of the property."

[3] The defendants' grounds of exception are based on the following:

- (a) failure to disclose the executor responsible for the administration of the estate of Late Petrus Moabi Sikoana;

- (b) the fact that the executor or Master of the High Court (Bophuthatswana Provincial Division) have not been joined to the action; neither has plaintiff mentioned other persons who may be entitled to inherit according to the Laws of Intestacy and; upon which grounds he is entitled to inherit;
- (c) that the plaintiff has not established a cause of action as envisaged by sections 50 of the Administration of Estates Act, 66 of 1965 read together with section 35 thereof;
- (d) that the plaintiff has not stated whether a liquidation and distribution account has lain for inspection and whether the executor has been discharged in terms of section 56 of the Administration of Estates Act, 66 of 1965.

[4] Although this was not raised in the exception, the importance of making an allegation relating to the date of death was raised during argument. I consider this to be pertinent and choose to deal with it first.

The deceased having died intestate, it is from the date of death from which the plaintiff could determine whether as alleged by him, he had a right to inherit as elder brother in accordance with the Laws of Succession. It is therefore necessary to establish when such right

alleged by the plaintiff vested, the property being situated in the North West Province (in the erstwhile Bophuthatswana area) and having been acquired by the deceased during 1984, as appears from the annexed Deed of Grant issued by the Registrar of Deeds, Bophuthatswana.

[5] As far back as 1982, the erstwhile Bophuthatswana Government repealed section 23 of the Black Administration Act 38 of 1927 and the regulations promulgated in terms of Government Notice, No. R 34. of 7 January 1966. The former provided for instances in which succession could be determined in accordance with the laws of primogeniture and, the latter regulated the procedure for administration of intestate estates amongst Blacks. The Succession Act 23 of 1982, as amended by, the Intestate Succession Law Restatement Act 13 of 1990 was as a consequence promulgated. The Administration of Estates Act 66 of 1965 was applicable to the administration of all intestate estates in Bophuthatswana under the supervision of the Master of the High Court, (Bophuthatswana Provincial Division).

[6] Although the Bophuthatswana Succession Act 23 of 1982 as amended was repealed after 1994 by the Justice Laws Rationalization Act 18 of 1996, the Master of the High Court in Mmabatho continued to supervise the administration of all intestate estates subject to the

administration of estates Act supra and, the Intestate Succession Act No. 81 of 1987 was applied. This continued to be the case even when the procedure for administering the estate of a deceased Black person who had died intestate came under the scrutiny of the Constitutional Court in *Moseneke and Others v The Master and Another* 2001 (2) SA 18 CC. This occurred because before 1994 the Master's Offices in the Republic of South Africa only supervised the administration of estates of black people who died testate and the administration of intestate estates was supervised by the Magistrates subject to the Black Administration Act, supra.

In the matters of *Bhe v The Magistrate, Khayelitsha* and, *Shibi v Sithole and Others* 2005 (1) SA 580 (CC), the court looked into the constitutional validity of the laws of primogeniture, which provided for the right to inherit of one elder male person to the exclusion of any other person who may have had a right to inherit under the ordinary laws of succession of the country.

The failure to mention the date of death could, in my view, render the action excipiable in that the right to inherit as elder brother is subject to the law as propounded above. Further, the administration of the estate is subject of the Administration of Estates Act 66 of 1965.

- [7] Section 13 of the Administration of Estates Act, *supra*, provides that no deceased estate may be liquidated or distributed except under letters of executorship. In this instance no transfer could have taken place without the participation of the Executor. The particulars of claim mention a distribution agreement (redistribution agreement) entered into between the "first and second defendants in their capacities as heirs in the estate of the deceased". Distribution in deceased estates can only occur in accordance with the testamentary provisions in a will or through the laws of intestate succession. Where the heirs enter into a redistribution agreement the executor is party thereto and where a minor heir is involved, is sanctioned by the Master of the High Court, see Meyerowitz on Administration of Estates and Estate Duty at paragraphs 12.31 and 13.17, 2007 Edition:

"Section 14 (1) of the Deeds Registry Act sets out that transfer must follow the sequence of the successive transactions involving the property and ordinarily, therefore transfer must be passed to the heirs of the property awarded to them in terms of the will or on intestacy. If however, during the course of administration of the estate a redistribution of the whole or any portion of the assets takes place among the heirs ... the executor or the trustee may transfer the land ... in terms of such redistribution"

The transfer of the property in this matter, by the Registrar of Deeds in Pretoria could, in my view only have occurred if assented to by an executor during the course of his/her administration of the deceased estate. Having regard to the above, it then does not become necessary to join the Master of the High Court as defendant, save to say that it would have been prudent to serve the summons on his office so that he is given opportunity to report to the court regarding the administration of the estate. Further, it is not necessary to deal with sections 34, 35, 50 and 56 of the Administration of Estates Act, because I have already indicated that the Act is applicable to the administration of this estate and any dereliction of duty by the executor, which adversely affects the plaintiff can be dealt with accordingly.

- [8] It is correctly submitted for the plaintiff that he does not rely on the executor making a wrong award, but on the fact that the action is based on the alleged fraudulent conduct of the first defendant during the administration of the estate. In *Mvusi v Mvusi NO and Others* 1995 (4) SA (1) 994, the plaintiff's claim was also based on a fraudulent misrepresentation by one of the heirs "Jotham Mvusi" who was appointed as representative of the estate in accordance with the regulations in terms of the Black Administration Act, *supra*. The action was preceded by his removal as representative and because he died



before action was instituted, his estate was sued and the claim was based on the *conditio indebiti*. However, to be entitled to sue under the *conditio indebiti*, the plaintiff must allege and prove an enforceable claim. There were sufficient facts before the court in the Mvusi case, alleged in the particulars of claim, upon which the right to inherit by the plaintiff could be determined. This right was derived from the fact that the parents to the heirs were married in community of property and that in terms of section 23 of the Black Administration Act, *supra*, the estate had to devolve according to the common law "as if their parents were European". In this matter as already discussed above, if the date of death is subsequent to the year 1982, then the plaintiffs right to inherit according to primogeniture is questionable, unless he alleges that he is the sole heir.

- [9] It is for the above reasons that the exception is upheld with costs. Leave is therefore granted to the Plaintiff to amend his particulars of claim within 14 days of this order.

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V V TLHAPI  
(ACTING JUDGE OF THE HIGH COURT)

HEARD ON THE:	6 MAY 2008
DATE OF JUDGMENT:	14 MAY 2008
PLAINTIFF'S ATTORNEY:	MTHIMKHULU KHWINANA
PLAINTIFF'S ADVOCATE:	N JANSE van NIEUWENHUIZEN
DEFENDANT'S ATTORNEY:	MOLEFE ATTORNEYS
DEFENDANT'S ADVOCATE:	M SNYMAN