

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

CASE NO: 2024-021190

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 25 March 2024

SIGNATURE

In the matter between:

MAKHOSI MTHEMBU

Applicant

and

CHARMAINE NTSAGO

First Respondent

KELETSO GLENDAAH NDABA

Second Respondent

THE MASTER OF THE HIGH COURT, PRETORIA

Third Respondent

THE REGISTRAR OF DEEDS, PRETORIA

Fourth Respondent

JUDGMENT

COWEN J

1. The applicant, Makhosi Mthembu, has approached this Court urgently seeking an

interdict against the first and second respondents, Charmaine Ntsako and Keletso Glendah Ndaba, in their capacities as executors of a deceased estate. The applicant alleges that she was married to the respondents' late father under customary law, and that, accordingly, she is entitled to benefit from and claim against his deceased estate. The first and second respondents are the executors of the deceased estate. The third respondent is the Master of the High Court and the fourth respondent is the Registrar of Deeds, neither of whom are participating in the proceedings.

2. I am satisfied that the application is of sufficient urgency to hear it in respect of certain of the relief sought on the urgent roll. It was instituted in circumstances where the applicant is largely in the dark about the estate administration but came to learn, on 14 February 2024, about an apparent imminent sale by auction of her home. She learnt about it when the auctioneers contacted her. A letter of demand was sent on 14 February 2024 threatening an interdict to stop the auction should it proceed. There was no response. She then made enquiries, on 19 February 2024, at the Master's office about the status of the administration of the estate but was informed that the file was missing. The executors submit that the application is not urgent noting that the letter of demand did not reference the specific relief to be sought and pointing out that the auction did not in fact proceed. However, their stance is that the property needs to be sold very soon.
3. The application was instituted on 23 February 2024 and the respondents were afforded until 5 March 2024 to deliver an answering affidavit, with a replying affidavit to be delivered two days thereafter. However, certain confirmatory affidavits to the founding affidavit were only delivered on 6 March 2024 and the answering papers were delivered only on 11 March 2024. This resulted in the matter being removed from the roll of 12 March 2024 with costs of the removal reserved. The matter was then enrolled on the urgent roll the following week when it came before me.
4. I would have preferred to have more time to detail my reasons for my decision and to respond to each of the arguments advanced in writing. However, I detail my main considerations below, although I have considered further submissions

advanced and the content of the affidavits.

5. The executors have persistently denied that the applicant was married to their late father. However, the applicant has produced a marriage certificate from Home Affairs evidencing the marriage and a document evidencing the lobola negotiations. That document is dated 26 October 2019 and states that lobola was paid in part on 26 October 2019 and that a further R40 000 was still outstanding. The letter states that negotiations would continue on 25 July 2020. Home Affairs appears to have issued the marriage certificate on 23 March 2023, which is after the deceased's death on 3 June 2021.
6. The marriage certificate is *prima facie* proof of the marriage under the Recognition of Customary Marriages Act 120 of 1998 (the RCM Act). Section 4(1) of the RCM Act places a duty on the spouses of a customary marriage to ensure that their marriage is registered. Section 4(2) of the RCM Act provides:

‘Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.’

7. Section 4(4)(a) provides:

‘A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobolo agreed to and any other particulars prescribed.’

8. Section 4(8) provides:

‘A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes *prima facie* proof of the existence of the customary marriage and

of the particulars contained in the certificate.'

9. Notwithstanding the production of the marriage certificate, the executors have no intention of recognizing the applicant as a surviving spouse of the deceased. They state their reasons, which amount to a contention that the lobola letter does not prove the marriage was negotiated and entered into in accordance with customary law, as the negotiations were incomplete. They say that she was the deceased's fiancé and produce the funeral pamphlet which records her status in that way. Nevertheless, the respondents accept that if it is found that she is a surviving spouse, then they will administer the estate accordingly. They disavow any duty to recognize the marriage notwithstanding the marriage certificate and say that the applicant must approach a Court for declaratory relief if dissatisfied. In the meantime, they apparently have no intention of administering the estate recognizing any rights she may have as an heir or otherwise.
10. It can be accepted on the affidavits before me that the respondents did and do intend to sell the property in which the applicant resides which was the home she shared with the deceased. They say that they need to do so in order to pay the creditors of the estate. There is no cash in the estate, which is illiquid and creditors must be paid from the sale of assets. They say that if there is no agreement from the heirs regarding the sale, then the Master can approve it. In argument, their counsel submitted that any sale would be subject to the approval of the Master, and thus their conduct is not unlawful but that is not what is said on affidavit. It was further submitted that the applicant well knows that her status as a surviving spouse is in issue and that the executors will not acknowledge her as an heir and that she must in those circumstances approach a Court for declaratory relief.
11. In my view the applicant is entitled to certain of the relief that she seeks with minor modifications. More specifically, she is entitled to:
 - 11.1. An order that restrains the executors from disposing of any asset of the deceased estate without the permission of the Master and complying with all relevant provisions of the Administration of Estates Act 66 of 1965 (the

AE Act).

11.2. An order directing the executors to formally reply to the applicant's claim that she is the surviving spouse of the deceased and, if rejected, to furnish reasons in terms of section 29, 32 and 33 of the AE Act.

12. On the first order, which restrains disposal of assets other than with the Master's approval, the executors' counsel accepted that this is required at least because there is a minor child. In my view it is also required because, in the face of the marriage certificate, which is *prima facie* proof of the marriage, the applicant must – at least for purposes of section 47 of the AE Act – be treated as an heir unless and until the marriage is disproven via proper process. The applicant has claimed half of the joint estate and a child's share. She does not consent to the sale of the immovable property.

13. Section 47 of the AE Act provides, in relevant part:

'Unless it is contrary to the will of the deceased, an executor shall sell property in the manner and subject to the conditions which the heirs who have an interest therein approve in writing: Provided that -

(a) In the case where an absentee, a minor or a person under curatorship is heir to the property; or

(b) If the said heirs are unable to agree on the manner and conditions of the sale, the executor shall sell the property in such manner and subject to such conditions as the Master may approve.'

14. The question as to what is the proper process to deal with the dispute was not adequately canvassed before me and it is not necessary for me to deal with it decisively. Suffice to point out that the legislature has vested the responsibility to enquire into the validity of and register customary marriages with the registering officer referred to in section 4 of the RCM Act and there is a procedure in section 32 of the AE Act to deal with disputed claims. There are also circumstances

where a Court can be approached as the parties indicated during argument.

15. As to the second order, the applicant is entitled to know via the formal processes whether her claims are rejected, in terms of section 33. That may be preceded by the section 32 process to resolve disputed claims which, if not necessary, would may well be prudent in the current circumstances. It would assist both parties and give due recognition to the marriage certificate. It would also limit costs.¹
16. The executors contended that the applicant has not made any claim in the sense contemplated by section 32. But that is not so. She has formally engaged with the respondents, providing them with the lobola letter and the marriage certificate and asserted her right to half of the joint estate² and / or her child's share. That is not seriously disputed.
17. I am not satisfied that the applicant has established any urgency in respect of the remaining relief sought which concerns an alleged duty on the part of the executors to report to the Master and in turn on the Master to report to her regarding the administration of the estate. What is however clear on the affidavits before me is that there are grounds to be concerned about whether the deceased estate is being duly administered in accordance with the AE Act, and in those circumstances, I make provision in my order for a copy of this judgment to be delivered to the office of the Master so that enquiries can duly be made. The application has been served on the Master already. I accordingly decline at this stage to deal with the further relief sought.
18. Regarding costs, both parties sought costs on an attorney client scale.³ I am not satisfied that there is any basis for such an order. In my view the executors must bear the costs of the application as the applicant has been substantially successful and was justified in coming to Court. The only question is whether they should be carried by the estate or personally, as the applicant's counsel

¹ See too section 33(2) on costs.

² See *Van Niekerk v Van Niekerk and another* [2011] 2 All SA 635 (KZP)

³ See *Public Protector v South African Reserve Bank* 2019(6) SA 253 (CC) at para 223.

contended in argument.⁴ In the founding affidavit, it is clear that the executors are cited in their capacities as such, although this is not reflected in the case heading. There was in my view insufficient argument to deal properly with this issue in the urgent Court and accordingly I postpone the question of costs so that the parties can deliver fuller submissions and be afforded an opportunity to settle this issue given the history of the matter.

19. I also deal with the costs of the removal from the roll on 12 March 2024. In that regard, it appears to me that both parties were responsible for this and I accordingly order that each carry their own costs.

20. I make the following order:

20.1. The forms, service and time periods prescribed in terms of the Uniform Rules of Court are dispensed with and the relief sought in paragraphs 2 and 5 of the notice of motion are heard on an urgent basis in terms of rule 6(12) of the Uniform Rules of Court.

20.2. The first and second respondents and any person acting as their agents are interdicted and restrained from disposing of any assets belonging to the estate of the late James Ndaba (Estate Number 0[...]) including the sale and transfer of the immovable property situated at number 3[...] R[...] G[...] Street in Danville Extension 5 without the permission of the Third Respondent and without complying with all the relevant provisions of the Administration of Estates Act 66 of 1965 (the Act).

20.3. After due compliance with section 32 of the Act, the first and second respondents are directed formally to reply to the applicant's claims as surviving spouse of the deceased, the late James Ndaba and, if refused, to furnish reasons therefore in terms of section 33 of the Act.

20.4. The first and second respondents are ordered to pay the costs of this

⁴ See generally LAWSA Costs, Deceased Estates, para 329.

application on a party and party scale.

20.5. The question whether costs should be paid personally or in the estate is postponed for consideration after the parties have engaged in good faith efforts to settle the issue alternatively a request is made to the presiding Judge, through her secretary, to determine the issue, in which event each party must deliver their written submissions within ten days of the request being made.

20.6. Each party must pay their own costs of the removal of 12 March 2024.

20.7. The applicant must deliver a copy of this judgment to the Master's office and draw the Master's attention to paragraph 17.

S J COWEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Date of hearing: 20 March 2024

Date of decision: 25 March 2024

Appearances:

Applicant: Adv H Legoabe instructed by KP Seabi and associates

1st & 2nd Respondents: Adv A Coertze instructed by Arthur Channon Attorneys