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REPUBLIC OF SOUTH AFRICA



**IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE NO: 16595/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

NTSUKUNYANE ROSEMARY PALESA N.O.

First Applicant

NTSUKUNYANE ROSEMARY PALESA

Second Applicant

and

**NINI MAEMA MOLEKO
(ID NO.)**

First Respondent

MILLICENT GUGU MGOMEZULU

Second Respondent

THABO PAULOS MOSIA

Third Respondent

**THE MASTER OF THE HIGH COURT,
SOUTH GAUTENG**

Fourth Respondent

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] The applicants herein launched this application on an urgent basis in terms of or subject to Rule 6(12)(a) of the Uniform Rules of Court, for an order:

- 1.1 Declaring the first applicant the executrix of the estate of the late Mr Nchoba Azakiel Moleko (*“the deceased”*), namely, Estate No. 6234/2013; to collect or take into possession all the vehicles referred to in prayer 1.2 herein below; which vehicles belong to the aforesaid estate; and take all incidental steps necessary to perform and discharge the duties attendant on her duties as representatives of the said deceased estate.
- 1.2 Declaring as *null and void* all or any transfer(s) of ownership of the deceased’s motor vehicles, them being

1.2.1 Mercedes Benz Sprinter 413 cdi, Registration Number NVV 535 GP.

1.2.2 Mercedes Benz Sprinter 413 cdi, Registration Number BWY 943 GP.

1.2.3 Volkswagen LT, Registration Number VDD 463 GP, from his name into the names of the first and second respondents or any other person or body;

1.3 Directing the first respondent to immediately, upon the granting of this order, deliver to the first applicant (in so far as she is in possession or control of same), Mercedes Benz Sprinter 413 cdi, Registration Number NVV 535 GP.

1.4 Directing second respondent to immediately, upon the granting of this order, to re-register Mercedes Benz Sprinter, 413 cdi, Registration Number BWJ 943 GP into the names of the deceased or the deceased estate of the late Moleko Nchoba AzaKiel. ("Sprinter BWJ 943")

1.5 Directing the third respondent to immediately upon the granting of this order, deliver to the first applicant through the second applicant (in so far as he is in possession or control of same) the

Mercedes Benz Sprinter 413 cdi, Registration Number BWY 943 GP (*"Sprinter BWY 943 GP"*).

- 1.6 Directing and compelling the first respondent to immediately upon the granting of this order, re-register the Mercedes Benz Sprinter 413 cdi, Registration Number NVV 535 GP (*"Sprinter NVV 535 GP"*) and Volkswagen LT, Registration Number VDD 463 GP (*"Volkswagen LT VDD 463 GP"*) into the deceased estate of the late Azakiel Nchoba Moleko.

Alternatively

- 1.7 In the event that the first respondent and second respondent fails or refuses to comply with the provisions of paragraphs 1.1 to 1.6 above (in so far as they relate to them) within 7 (seven) days of date of the granting of this order, the Sheriff of this Court be authorised and directed to enter the premises of the first and second respondents (or wherever the motor vehicles might be found) to attach and remove same and to then deliver same to the second applicant, to be stored by or on behalf of the first applicant at a safe place pending the administration and/or finalisation of the estate of the deceased, subject thereto that all costs relative to the Sheriff's intervention as well as those attendant on the re-registration of ownership of the vehicles

shall be borne jointly and severally by the first and second respondents.

1.8 Directing the fourth and fifth respondents to note and give effect to the order sought above.

1.9 Ordering the first and/or second respondents, jointly and severally, the one paying, the other being absolved, to pay the costs of this application.

1.10 For further and/or alternative relief.

[2] The application is opposed by the first and second respondents only. The latter also filed a counter-application for the cancellation of the second applicant's letters of executorship, among others.

THE PARTIES

[3] The first applicant is the appointed executrix of the estate of the late Nchoba Azakiel Moleko ("*the deceased*") who passed away on 17 February 2013, in terms of letters of executorship issued by the Master of the High Court under Estate No. 6234/2013 on 11 March 2013.

[4] The second applicant is the first applicant's representative in her personal capacity. She is ordinarily resident at House No. 2942 Lusaka Section, Ladybrand, Free State Province.

[5] The first respondent, Nini Welhemina Moleko, is an adult female person with National Identity No., ordinarily resident presently at Number 742 Paper Corner Street, Zakaria Park, Lenasia, Johannesburg, Gauteng Province.

[6] The second respondent, Gugu Millicent Momezulu, is an adult female person with Identity No. , and ordinarily resident at Number 1496 Slovoville South Roodepoort, Gauteng.

[7] The third respondent, Thabo Palos Mucia, is an adult male person using business address Thokoza Coal Yard situated at No. 5 Thokoza Gardens, Thokoza, Gauteng as his address of service.

[8] The fourth respondent, The Master of the High Court, Johannesburg, is an organ of state responsible for the administration of estates pursuant to or in terms of the Administration of Estates Act 1965 (Act 66 of 1965) as amended and which has issued the letters of executorship alluded to in this application; cited herein in its official capacity as such and whose principal place of business or office is situated at 66 Marshall Street, Hollard Building, Corner Sauer and Marshall Streets, Johannesburg.

[9] The fifth respondent is an organ of state. It is not clear why this respondent was cited. It appears that it is the authority that transferred the taxi licences in issue here to the respondents.

PURPOSE OF THE APPLICATION

[10] The purpose of this application is for a declaratory order confirming the applicants' appointment as representatives of the deceased estate for purposes of its finalisation, as well as orders directing the various respondents to restore possession of the motor vehicles of the deceased and/or the restoration of their registration numbers or particulars to the state they were as at the date of the death of the deceased; and orders to the fourth and fifth respondents to do what they are expected to do in compliance with what the court would have ordered, if need be, i.e. administration of the deceased estate and the processes relative to the transfer of taxi licences to whoever the court would have ordered they should be transferred to.

POINT *IN LIMINE* RAISED BY SECOND RESPONDENT

[11] The second respondent raised the following point *in limine*: that the applicants have known or should have reasonably foreseen that disputes of fact would be present. That they ought to have gone the route of action proceedings and not by motion proceedings. That this application should be dismissed with costs as the dispute herein cannot be resolved on the papers filed of record.

THE RESPONDENTS' OPPOSITION

[12] The first respondent is disputing the validity of the civil marriage allegedly subsisting between the second applicant and the deceased when the latter passed away. She contends that she is a valid customary marriage spouse of the deceased who has the right to represent the deceased estate. Furthermore, that she is entitled to keep the taxi(s) left with her by the deceased for sustenance and maintenance.

[13] The second respondent also claims to be a valid customary law spouse of the deceased who has children born of her union with the deceased, thus being entitled to be in possession of the assets of the deceased.

BACKGROUND FACTS AS GIVEN BY EACH PARTY

[14] The applicants, as well as the first and second respondents gave background and factual matrix that need to be set out separately.

14.1 The applicants' background facts

14.1.1 According to the second applicant she got married to the deceased in community of property (by civil rites) on 8 February 1996, which marriage was still subsisting as on the date of the death of the deceased on 17 February 2013. She annexed to

the papers hereto a copy of a marriage certificate confirming the above.

14.1.2 Two children, an 18 year old boy and a 6 year old girl were born of the marriage.

14.1.3 During his life-time the deceased was a taxi owner and operator and an affiliate of the Johannesburg Free State Long Distance Taxi Association (“*JOFELDTA*”). His taxis operated between Johannesburg and Lesotho, the latter country being his home country. As a result of his business operations the deceased purchased, among others, a house situated at Erf 742, Paper Corner Street, Zakaria Park, Extension 1, Lenasia, Johannesburg.

14.1.4 The taxis forming part of these applications were still registered in the names of the deceased when he passed away, on 17 February 2013. However, it emerged that two of them, the Sprinter BWY 987 GP and the Volkswagen LT VDD 463 GP had their registration particulars changed into the names of the first respondent on 6 March 2013, i.e. 17 (seventeen) days after the deceased’s death. The

second applicant was not consulted about this, was not party to those transactions and the changes of ownership were effected without her consent or knowledge.

14.1.5 The second applicant and her children are currently staying in Lesotho, which is where the deceased was buried. She contends that the three taxis contributed approximately R70 000,00 a week into the joint estate. The deceased, according to her further, was the primary caregiver and provider for the family and he would visit his family at Ladybrand, Free State Province regularly as well as attend to business affairs in Lesotho and South Africa.

14.1.6 As stated above, the second applicant was appointed as the executrix of the deceased estate on 11 March 2013.

14.1.7 As regards the status of the three taxis

14.1.7.1 As stated above, the Sprinter BWY 987 GP was according to the second applicant improperly or fraudulently

registered into the names of the first respondent on 6 March 2013. So was the Volkswagen LT VDD 463 GP.

14.1.7.2 The Sprinter NVV 535 GP was purchased by the deceased from one Daryl Franke on 21 January 2013 for the amount of R130 000,00. As it was not in a good mechanical or operating condition, it was handed to the third respondent, Thabo Paulos Mocia for repairs. Before the deceased could have this vehicle registered in his names he passed away. Despite the fact that this vehicle is still at the third respondent's workshop and is not yet operational, somehow the second respondent had it registered into her names on 18 March 2013, i.e. 28 days after the deceased's death without the second applicant's knowledge or consent.

14.1.7.3 When the second applicant confronted the third respondent about this vehicle, the latter told her that he was indeed still working on it but that he had received a letter of demand from the second respondent's attorneys demanding possession of same.

14.1.8 Road Transportation (Taxi) Permits

14.1.8.1 The permits for the taxis were in the names of the deceased when he passed away. However, somehow and without her knowledge or consent, somebody or some people have contrived to have them transferred into the names of the first and second respondents *in tandem*, i.e. each in respect of those vehicles unlawfully transferred into their names.

14.1.8.2 The second applicant further avers that she has already paid around

R12 000,00 to the third respondent to cover the repairs being effected.

14.2 First respondent's story

14.2.1 According to the first respondent, she has been living with the deceased in a customary relationship from 1996 until he passed away on 17 February 2013. According to her, as far as she knew, (my underlining), the deceased and the second applicant were mere lovers involved in a relationship, which relationship ended allegedly when she and the deceased entered into the customary marriage. She is even aware of the fact that the two have a child together whom the deceased was maintaining during his life time. According to her further, the second applicant was aware of her relationship with the deceased and she used to phone her with requests for her to intervene whenever the deceased did not pay the child maintenance.

[15] She further contended that she and the deceased did not know that there was a civil marriage entered into between him and the second applicant until he went to Home Affairs in Bloemfontein in December 2012 where he

was informed of its existence. According to her further, this information made him very distraught and he suffered a stroke in January 2013 which culminated in his death at a hospital in Bloemfontein on 17 February 2013.

[16] She further added that the deceased and her were, up to immediately before he was indisposed and ultimately died, contemplating –

“... to consecrate our marriage also into civil processes ...”,

to which end the deceased paid a dowry of 11 cows to validate their customary union.

[17] She states further that the house in Lenasia was purchased to be the matrimonial home between the deceased and her and they both serviced its bond. In substantiation of the above contention the first respondent annexed 18 deposit slips into an FNB Bank Account No. 6028 011 7330 held at the Ladybrand branch made at varying dates, between January 1999 and 2003.

[18] The payments were made in cash. For reasons that will emerge hereunder, I set out the dates and amounts of the deposit herein:

18.1	28 January 1999	-	R 300,00
18.2	25 March 1999	-	R2 000,00
18.3	24 May 1999	-	R 500,00
18.4	16 July 1999	-	R2 400,00

18.5	3 February 2000	-	R1 420,00
18.6	20 July 2000	-	R 200,00
18.7	29 November 2000	-	R 350,00
18.8	3 July 2000	-	R1 000,00
18.9	31 January 2001	-	R3 000,00
18.10	19 February 2001	-	R 800,00
18.11	3 March 2001	-	R 900,00
18.12	13 March 2001	-	R2 500,00
18.13	5 March 2001	-	R2 000,00
18.14	28 August 2001	-	R 200,00
18.15	9 July 2001	-	R2 000,00
18.16	2 February 2001	-	R1 700,00
18.17	18 April 2001	-	R2 000,00
18.18	13 April 2001	-	R 700,00

[19] As regards the taxis and their licences; her story is that the deceased purchased various taxis at varying times and they operated under the umbrella of JOFELDTA. It is her story further that as a result of past incidents where beneficiaries used to quarrel over assets and inheritances of deceased members, the taxi association decreed that the various owner members should declare, under oath, on a form, who they (the members) they were nominating to run their taxi businesses after they had passed on. She avers that the deceased nominated her as that person on a form annexed to the papers herein as Annexure "NM2" to her answering affidavit.

[20] This document is not a commissioned document. IT is thus not a statement under oath. The vehicles in issue mentioned in the documents are a Toyota registration JFM 924 GP, Isuzu registration MSC 561 GP and Isuzu registration KZN 565 GP. None of the taxis in issue here are part of that document.

[21] In a document marked Annexure "NM3" JOFELDTA is purporting to nominate and appoint the second respondent as the person who should and would from the date mentioned therein, being 30 May 2013, take over and run the deceased taxi business through it.

[22] This purported directive occurred when this matter was already with the Urgent Court. That makes one think! Is JOFELDTA taking sides in this matter? The facts, circumstances and probabilities will tell. Are they allowed to by-pass the Master's office!!

[23] Shortly after the death of the deceased the first (correc) was summoned to JOFELDTA offices where she found the second respondent as well as the deceased's brother, one Sello Moleko. The latter had purportedly come to demand all of the deceased's entitlements which included business documents, funeral benefits and his taxis.

[24] The deceased was entitled to a benefit of R40 000,00 from the JOFELDTA Funeral Benefit Scheme. In the interests of peace, she consented to this money being paid out to the deceased family in Lesotho to take care of funeral expenses as the burial was to take place there.

[25] As regards the Sprinter NVV 535 GP, she stated that a relative of the deceased, one Rethabile Moleko living in Lesotho phoned while she was at the JOFELDTA offices with Sello Moleko and asked her to allow the latter to drive back with this motor vehicle to Lesotho as it was needed for funeral arrangements errands. She agreed in good faith as she believed it would be returned. When, after the funeral it was not returned, she went to Lesotho. The matter regarding this vehicle became complicated and the Lesotho police impounded and parked it at the police station pending the finalisation of the dispute relating to it, i.e. pending the final administration of the deceased estate.

[26] As regards the second respondent, the first respondent avers that she is not aware of any co-habitation or consortium between her and the deceased, save for the fact that she knows they have a child together. She consequently is demanding that the taxi now transferred into her names be returned to her full use and enjoyment.

URGENCY

[27] The respondents contended that the applicants have not made out a case for urgency. I caused the parties to also argue urgency.

[28] After perusing the papers filed herein and considering the arguments and the matter in general, I find that the matter was sufficiently urgent to be entertained. The assets of the deceased estate were being transferred to different people left, right and centre and all these were done in flagrant disregard of the laws, rules and regulations governing administration of deceased estates. It is also apparent that a possibility looms large that some of the parties herein may protract some kind of litigation. It is every litigant's right to engage in litigation. However, it is my view and finding that the issues in dispute in this application are crisp and defined. They can and should be dealt with now. The parties can engage each other on other aspects to their hearts' delight.

THE SECOND RESPONDENT'S FACTUAL MATRIX

[29] Apart from the point *in limine* raised on her behalf, the second respondent's story is the following:

29.1 She stated that she and the deceased were cohabiting and in love since 11 July 2005. Their relationship developed to such a level that lobolo negotiations for her hand in marriage took place at her parental home at Mahlabathini, New Castle, KwaZulu-Natal on 3 April 2010 where the families agreed on R35 000,00

as lobolo. Same was paid in two instalments of R25 000,00 on 3 April 2010 and R10 000,00 on 26 September 2010. Traditional gifts referred to as “*isibizo*” in Zulu culture in the form of one bed, a refrigerator and a kitchen unit set were also exchanged.

For the record, Mahlabathini is not near Newcastle, but near Ulundi, or Melmoth or Vryheid inKwazulu Natal.

29.2 She also averred that two children were born of this union, namely, a girl born 3 April 2010, i.e. date of customary marriage negotiations; and a boy born on 15 August 2012.

29.3 She thus regards herself as the deceased’s wife in terms of customary law. She further contended that she had a better right and claim to that of the second applicant as she has complied with the provisions of the Recognition of Customary Marriages Act 1998 (Act 120 of 1998) (as amended) (“*the Customary Marriages Act*”).

29.4 She does not mention the status of the first respondent or her claims. She is counterclaiming for an order –

29.4.1 Declaring that the second respondent is a lawful customary wife of the late Azakiel Nchoba Moleko (“*the deceased*”).

- 29.4.2 Declaring the alleged marriage between the second applicant and the deceased invalid.

- 29.4.3 Directing the removal of the second applicant as the executrix in the estate of the deceased.

- 29.4.4 Directing that the second respondent be appointed as the executrix of the deceased's estate.

- 29.4.5 Ordering the second respondent, alternatively, the estate of the deceased to pay the costs of this application and counter-application.

THE LEGAL FRAMEWORK AND PRESCRIPTS

[30] Section 7(a) of the Administration of Estates Act provides as follows:

“... whenever any person dies within the Republic leaving any property, the surviving spouse of such person, or if there is no surviving spouse, his nearest relative or connection residing spouse, his nearest relative or connection residing in the district in which the death has taken place, shall within fourteen days thereafter give a notice of death substantially in the prescribed form, or cause such a notice to be given to the Master.”

[31] Section 13 of the above Act provides as follows:

“No person shall liquidate or distribute the estate of a deceased person, except under the letters of executorship granted or signed and sealed under this Act.

[32] Section 11(1) provides that –

“... Any person who at immediately after the death of any person has possession or custody of any property, book or document, which belonged to or was in the possession or custody of the deceased person at the time of death –

- (a) shall, immediately after the death, report the particulars of such property, book or document to the Master and may open such document which is closed for the purpose of ascertaining whether it is or purports to be a will;*
- (b) shall, unless the Court or the Master otherwise directs, retain the possession or custody of such property or book or document, other than a document being or purporting to be a will, until an interim curator or an executor of the estate has been appointed or the Master has directed any person to liquidate and distribute the estate : Provided that, the provisions of this paragraph shall not prevent the disposal of any such property for the bona fide purpose of providing for the subsistence of his family or household or the safe custody or preservation of any part of such property;*
- (c) shall, upon written demand by the interim curator, executor or person directed to liquidate and distribute the estate, surrender any such property, book or document in his possession or custody when the demand is made, into the custody or control of such executor, curator or person ...”*

[33] The issue to be resolved immediately is whether or not the letters of executorship issued by the fourth respondent in favour of the second applicant should be allowed to stand. If they are to remain in force, the applicants would be on their way to making out a case for the limited prayers sought in this application.

[34] The next issue that is also causally linked to a decision in this application is whether or not the first and second respondents had valid and/or subsisting customary marriages or unions with the deceased at the time of his death. The answer to this question would also determine the second respondent's counter-application.

[35] This makes it imperative that I set out the law relating to customary marriages as governed by the Recognition of Customary Marriages Act 120 of 1998. That will be a general overview, however it will also be targeted at the second respondent who is specifically asking for an order declaring her "*marriage*" by custom valid.

CUSTOMARY MARRIAGE vs CIVIL MARRIAGE

[36] Section 10(4) of the Recognition of Customary Marriages Act, 1998 states the following:

"(4) Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage."

[37] Subsection (1) of section 10 of the above Act allows a man and a woman married to each other by custom to convert their marriage or enter into

a civil marriage under the Marriage Act 25 of 1961, as amended provided it is the only customary union existing in respect of those spouses.

[38] In this application the second applicant averred a subsisting civil marriage between her and the deceased. She substantiated this assertion by producing a marriage certificate.

[39] The first respondent came up with hearsay evidence that this civil marriage is a fraud. It is my view and finding that the parties should be allowed to interrogate issues in that regard in the ordinary way. I nevertheless find that the first respondent's contention that the fact that the copy of the marriage certificate annexed to the papers herein is having a date of 18 March 2013 as date of issue being an indication that it is fraudulent is misguided. This date of issue is only the date on which the copy was issued by the Department of Home Affairs, not the original date of first issue of the certificate.

[40] It is my considered view and finding that the civil marriage certificate forming part of the papers herein is *prima facie* regular and valid. However, I will leave this aspect open-ended so that whichever of the parties who can come up with evidence to the contrary, can produce same to court and have the matter looked at. To avoid this matter open-ended indefinitely will in itself be an injustice. I will thus allow a specified period within which any of the parties may challenge the validity and/or authenticity of the marriage certificate. Should that period elapse without any litigation having been

proceeded with in relation to this aspect, then the second applicant's civil marriage to the deceased would have been confirmed. The marriage certificate Annexure "NRP2" to the papers herein would then become a permanent memorial of the existence of a valid civil marriage between the deceased and the second applicant.

[41] It is common cause that none of the customary unions alleged by both the first and second respondents have been registered as required by section 4 of the Recognition of Customary Marriages Act, 1998.

[42] Section 4(1) of the above Act states as follows:

"(1) The spouses of a customary marriage have a duty to ensure that their marriage is registered."

[43] Such a registration may be effected by any of the parties to that customary marriage in terms of section 4(2) of the Act.

[44] Section 4(3) reads as follows:

"(3) A customary marriage –

- (a) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the Gazette; or*
- (b) entered into after the commencement of this Act, must be registered within a period of three (3) months after the conclusion of the marriage or within such longer period as*

the Minister may from time to time prescribe by notice in the Gazette ...”

[45] It is also common cause that none of the first and/or second respondents having complied with the above quoted prescripts relating to the regularisation of a customary union by registration.

[46] The basic principle remains the following: If there was an existing civil marriage between the deceased and the second applicant when any of the respondents purportedly entered into customary marriages, such customary marriage(s) would be *null and void, ab initio* or *pro non scripto*.

[47] On the other hand if this Court thought away the civil marriage between the second applicant and the deceased, substituting, for argument sake, a customary marriage or union for it the following scenario would obtain:

47.1 When a man wishes to take a second customary union spouse, he should obtain the express consent of the first wife. Section 8 of the Recognition of the Customary Marriages Act reads as follows:

“(8) All persons having a sufficient interest in the matter, and in particular the applicant’s existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of sub-section (6).”

[48] Section 6 of the Act reads as follows:

“(6) A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriage.”

[49] This issue was decided recently by the Constitutional Court (on 30 May 2013) in *Modjadj Florah Mayelane v Mphephu Maria Ngwenyama & The Minister of Home Affairs and 3 Amici Curiae* where the central question was:

“[12] ...

- (a) *Should the consent issue have been determined by the Supreme Court of Appeal?*
- (b) *Is the consent of a first wife necessary for the validity of her husband’s subsequent customary marriage? This entails considering –*
 - (i) *whether the Recognition Act directly prescribes the first wife’s consent as a requirement for validity; and*
 - (ii) *whether living ... custom makes such a prescription?”*

The Constitutional Court answered the above questions in the affirmative, categorically stating that any subsequent customary marriage entered into by a husband without the express consent of the wife/wives is invalid and of no force and effect.

[50] Even if, for argument's sake all the three women involved in this application were all married by customary law to the deceased, their marriages would still be susceptible to being nullified, especially the last two of them, for want of compliance with the Act.

CONCLUSION

[51] In terms of the Marriage Act, 1961 production of a civil marriage certificate by any person shall be *prima facie* proof of the valid existence of a marriage relationship between the parties therein mentioned. Consequently, until such time that there is cogent and acceptable and credible evidence to the contrary, this Court accepts that the second respondent was married to the deceased by civil rites in community of property.

[52] The above pre-supposes that any subsequent customary union purportedly entered into after the date of that marriage, being 8 February 1996, is invalid and of no legal consequence.

[53] It should be noted that the invalidity of any marriage have no bearing or influence on the right of children born of the parties thereto to claim maintenance.

[54] In respect of the second respondent, it is clear that she is facing a double-edged sword: Either her union with the deceased is invalid because a valid civil marriage existed at the time it was entered into or if the civil marriage had any difficulties affecting its validity and a customary cohabitation

union or marriage was in place, her customary union would still fall by the way side because the consent of the other spouse or spouses was or were not obtained as required by section 7 of the Recognition of Customary Marriages Act, 1998, as amended.

[55] In the circumstances, her (second respondent's) counter-application stands to fail.

[56] When it comes to the first respondent, she came up with the above stated unsubstantiated allegations of her and the deceased starting their relationship during 1995 from which period the deceased "*dumped*" the second applicant. What is surprising is that the deceased's bank account or bond account is held at an FNB Bank at Ladybrand, where the second applicant resides and says is the matrimonial home. The deceased's real home is in Lesotho. He has another house at Lenasia, Johannesburg. The second applicant states that this home was acquired as the deceased had business affairs to take care of in Johannesburg. The first respondent stated that the Lenasia house was purchased as the matrimonial home for her and the deceased. If the relationship between the deceased and the second applicant ended in 1995 or 1996, why then would the deceased still be linked to Ladybrand, which is causally.

[57] The parties can pursue those disputes in the normal way in the ordinary court, be it through action proceedings or motion proceedings.

TRANSFER OF TAXIS AND LICENCES

[58] As stated above, after the death of a property or asset owner, those assets that he/she owned cannot be transferred in any other way other than through duly issued and authorised letters of executorship issued by the Master of the High Court.

[59] None of the two respondents herein produced any by-the-Master-issued letters of executorship. Consequently, any transfers of ownership of any of the vehicles of the deceased and the appropriate taxi licences cannot be valid or authorised.

[60] Consequently, the transfers of the taxi motor vehicles registration particulars into the names of the two first named respondents stand to be set aside. So should transfer of any of the taxi permits into their names. Such transfers should be reversed. The vehicles and the permits should be transferred back into the names of the first applicant, pending the Master's finalisation of the estate of the deceased. Any interested party, including the first and second respondents can participate in the deliberation forming part of the administration of the estate.

[61] The respondents have asked this Court to order that the two first named respondents retain control and custody of the taxis and permits. That cannot be done. That would be tantamount to meddling in the administration of the deceased estate. The second applicant, by her appointment as the

executrix of the deceased's estate, has the prerogative to accumulate and bring to one common point all the assets in this estate. She is the one to retain control and custody of the assets. The other parties are at liberty to engage with her over issues like interim maintenance. It is the second applicant who should liaise with JOFELDTA over the re-drafting into service of the deceased's taxis.

[62] The first respondent contended that the documents marked "NM2" and "NM3" and annexed to the papers (as referred to in paragraphs 17 and 18 of this judgment) should be regarded as the deceased's will.

[63] That submission has no substance. A valid will should comply with specific requirements. Those documents do not.

[64] It is thus my finding that the applicants have made out a case for the grant of the substantial order they sought.

ORDER

[65] The following order is made:

1. The second applicant is declared as the duly appointed executrix of the estate of the late Nchoba Azakiel Moleko, viz. Estate No. 6234/2013.

2. The second applicant is authorised and mandated to collect and take into possession all the assets of the deceased which includes the following vehicle:

- 2.1 Mercedes Benz Sprinter 413 cdi Registration Number NVV 535 GP.

- 2.2 Mercedes Benz Sprinter 413 cdi Registration Number BWY 943 GP.

- 2.3 Volkswagen LT Registration Number VDD 463 GP

as well as all taxi licences and/or permits issued and all other assets, for purposes of administration under the auspices of the Master of the High Court.

3. The transfers of ownership of the motor vehicles mentioned in paragraphs 2.1 to 2.3 of this order as well as any taxi licence or permit issued in the names of the deceased into the names of any of the first and/or second respondents is declared *null and void* and set aside.
4. Any of the first or second respondents or any person or institution or agency that participated in the above unlawful and

invalid transfers are hereby ordered and directed to re-transfer same back into the names of the first applicant forthwith.

5. Should the people or instances mentioned in paragraph 4 above neglect or fail to act as ordered and directed within 20 (twenty) days of date of this order, the fourth and/or fifth respondents are hereby ordered and directed to effect such re-transfers into the names of the first applicant.
6. Any costs incurred due to the failure or neglect or refusal of the first and/or second respondent to act in accordance with the above directive shall be borne by those respondents failing, neglecting or refusing to so act.
7. The first, second and third respondents are ordered and directed to deliver any of the mentioned motor vehicles or taxis as well as taxi licences to the second applicant forthwith.
8. Should the abovementioned taxis and their commensurate taxi licences or permits as well as any other taxi permits in the names of the deceased not be handed back to the second applicant within 20 (twenty) days of date of this order, the Sheriff of the High Court within the area of jurisdiction where such assets may be is hereby authorised, ordered and mandated to attach and remove such assets and then deliver same to the

Second Applicant for storage and for which purpose this shall be his warrant or authority.

9. In the event of the Sheriff having to act in terms of paragraph 8 above, whosoever of the respondents who would be responsible for the invocation of the Sheriff's intervention shall be liable for all the costs incurred by the latter.
10. The fourth and fifth respondents are ordered and directed to give effect to the orders herein set insofar as they relate to them.
11. The first and second respondents are ordered to pay the costs of this application jointly and severally, the one paying, the other being absolved.
12. The second respondent's counter-application is dismissed with costs.
13. The issue relating to the validity of the marriage (and authenticity of the marriage certificate) between the deceased and the second applicant is postponed *sine die*.
14. Any of the parties in this application are at liberty to approach the court on the same papers, duly supplemented if need be, for the determination of the issue of the validity of the civil marriage or customary marriage(s) alluded to in this application within 30

(thirty) calendar days from the date of handing down of this order.

15. Should no such challenge to the validity of the civil and/or customary marriages be pending in court or finalised by the end of the 30th calendar day from the date of the handing down of this order, which is 11 June 2013, the civil marriage between the deceased and the second applicant would be declared valid and subsisting between 8 February 1996 (date of solemnisation of marriage) and the date of death of the deceased on 17 February 2013.

N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

FOR THE APPLICANTS

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**FOR THE SECOND
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DATE OF ARGUMENT	07 JUNE 2013
DATE OF JUDGMENT	11 JUNE 2013