



IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 4884/2021

In the matter between:

JUDITH MOLEFE

1st Applicant

GLORIA MOLEFE

2nd Applicant

MMANNINI NOTSI

3rd Applicant

LEHLOHONOLO MOLIKO

4th Applicant

and

THE EXECUTOR: ESTATE LATE EDGAR

MOLEFE

1st Respondent

THANDIWE MOLEFE

2nd Respondent

REGISTRAR OF DEEDS: BLOEMFONTEIN

3rd Respondent

BEFORE:

CHESIWE J

HEARD ON:

12 MAY 2022

DELIVERED ON: 25 AUGUST 2022

[1] The Applicants lodged an application seeking the following relief:

“1. That the title deed to ERF 7804 Maokeng Kroonstad Free State held under Deed of Transfer T9180/1992 be cancelled.

2. That ERF 7804 Maokeng Kroonstad Free State be proportionally registered in the name of the Applicants and Second Respondent as follows;

Judith Molefe – 33,3%

Gloria Molefe – 11,1%

Manini Notsi – 11,1 %

Lehlohono Moliko – 11,1%

Thandiwe Molefe 33,3%

3. That the costs of this application be made payable by any of the Respondents opposing it.”

[2] The application is opposed by the First and Second Respondent.

[3] The Applicants and the First Respondent as well as the Second Respondent are in dispute over a property of the deceased, Edgar Molefe. The First Applicant Judith Molefe, Second Applicant, Sefora Molefe and Edgar Molefe are the children of the deceased, Dikeledi Alina Molefe (Likeli Alina Molefe as per the transferring documents annexed **JM1**). Fourth and Fifth Applicants are the grand children of Dikeledi Alina Molefe. The Second Respondent is the spouse to Edgar Molefe.

[4] Upon the death of Dikeledi Alina Molefe, the property was registered in the name of Edgar Molefe who is also deceased. Edgar Molefe prior to his death was married to Thandiwe Molefe, subsequent to Edgar's divorce with Aletta Molefe. The property was registered in equal share in the names of Edgar and Thandiwe Molefe.

- [5] The Applicants therefore wish to inherit as stated above, from the property that originally belonged to their deceased mother, Dikeledi Alina Molefe.
- [6] The First and Second Respondent filed a condonation application for the late filing of the supplementary affidavit. The said application was granted.
- [7] Counsel on behalf of the Second Respondent raised three *points in limine*, that is, whether the Applicants' claim has prescribed; whether the Applicants can rely on the **Intestate Succession Act**,¹; and whether there is a dispute of fact which cannot be resolved on the papers.
- [8] The First and Second Respondent contends that the **Intestate Succession Act** was not applicable to black people at the time the Applicants' cause of action arose, further that there is a dispute of facts and that the matter be referred for oral evidence. The Applicants' on the other hand contends that the deceased, Edgar Molefe paid Gloria Molefe and Sefora Molefe money that was in proportionate to their inheritance, and that evidence is disputed by the Applicants.
- [9] The first *point in limine* of the **Prescription Act**,² Section 12, reads as follows:
- "When Prescription begins to run
- (1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due;
- (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt;
- (3) Any debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

¹ Act 81 of 1987

² Act 68 of 1969

[10] Section 18 of the **Prescription Act** provides as follows:

"The provisions of this Act shall not affect the provisions of any law prohibiting the acquisition of land or any right in land by prescription."

[11] Section 20 of the **Prescription Act** is not applicable where the Bantu Law applies and it is stated as follows:

"In so far as any right or obligation of any person against the other person is governed by Black law, the provisions of the Act shall not apply."

[12] The First and Second Respondent's contention that the Applicants' cause of action arose 20 years ago and thus the debt has prescribed which claim the Applicants dispute, in terms of section 20 of the **Prescription Act**, with reference to Section 20 of Prescription Act, it appears that it is not applicable in this instance.

[13] In my view and based on what is before me, it cannot be said that the Applicants' claim has prescribed and that the application be dismissed, whereas section 18 of the **Prescription Act**, provides that laws prohibiting acquisition of land or any right in land by prescription are not affected by this provision of the Act.

[14] The Applicants in their papers do not explain whether they were aware of the debt or when prescription commenced its run. The Second Respondent is neither clear except that the deceased had a buyout agreement with the Applicants, but that evidence was not substantiated with any proof.

[15] In the opposing affidavit of the Second Respondent page 123, the following is noted:

"7.2.1 I put it on record that after the death of Dikeledi Alina Molefe, the original owner. (sic) My late husband Edgar Molefe paid his sisters Gloria Molefe and Sefora Moliko equal amounts of money proportionate to their inheritance so as to allow him to be the sole owner of the said property and to register it in his names and those of his ex-wife, Aletta Molefe before they got divorced."

[16] It is therefore unclear on the papers of the parties as to when prescription commenced, nor is it clear if either of the parties had knowledge of who the

creditor is. The Second Respondent makes mention of a payment made by the late Edgar Molefe to his sisters which is an equal amount of money proportionate to their inheritance, but attached no proof of such payment.

- [17] The Deed of Transfer documents reflect that the property was transferred to Likeledi Alina Molefe on 25 March 1992. Then the transfer was effected to Edgar and Aletta Alphonsina Molefe on 29 June 2018. The said property was transferred to Edgar Molefe and Thandiwe Faith Molefe. In **Eskom v Bojanala Platinum District Municipality**³, Moseneke J (as he then was) said the following:

“The essence of this submission is that a claim or debt does not become due when the facts from which it arose are known to the claimant, but only when such claimant has acquired certainty in regard to the law and attendant rights and obligations that might be applicable to such a debt.”

- [18] In my view prescription is therefore misplaced as at the time the cause of action arose, the property was still administered under the **Black Administration**.⁴

- [19] Section 3 and 5 of **Black Administration Act**, pre-constitution was as follows:

“3. All other property of whatsoever kind belongs to a Native shall be capable of being devised by a will. Any such property not so devised, shall devolve and be administered according to Native Law and customs... .”

5. Any claim or dispute in regard to the administration or distribution of any state of a deceased nature, shall unless all the parties are concerned are native, be decided in an ordinary court of competent jurisdiction.”

- [20] Prior the era of our Constitution, the **Black Administration Act** was indeed unconstitutional and parties cannot rely on it based on its male primogeniture. In this regard, the Second Respondent relied on the fact that the deceased, Edgar Molefe was the only male child of the late Dikeledi Molefe, hence the property was registered in his name. Section 9(1) of the **Constitution of the Republic of**

³ 2003 JDR 0498 (T) at paragraph 16

⁴ Act 38 of 1927

South Africa,⁵ is very clear that “everyone is equal before the law and has the right to equal protection and benefit of the law.”

[21] Thus the principle of male primogeniture in the context of inheritance is clearly in conflict with section 39 (2) of the Constitution which provides that “when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

[22] The **Black Administration Act** did not provide these constitutional principles and it is for this reason that the male person was regarded as the one who had a claim in the distribution of the estate of the deceased. Even if Edgar Molefe is the only male child, Judith Molefe and Gloria Molefe have to be considered as the heirs to the immovable property of their deceased mother, Dikeledi Molefe. It is thus fair to all parties that such a dispute be ventilated in oral evidence as it is a factual dispute and cannot be resolved on the papers.

[23] In **Bhe and Others v Magistrate Khayelitsha and Others** ⁶ , the Court held that:

“The rule of male primogeniture may have been consistent with structure and function of the traditional family... .However the circumstances in which the rule applies today are very different.”

[24] Furthermore, it appears in the papers that Edgar Molefe, even if he was the only male child, he was not the only heir to Dikeledi Molefe. The parties are in dispute as to who are the biological children of the deceased, that is Dikeledi Molefe. As the grand children that is, Fourth and Fifth Applicants have also laid a claim to their share of the inheritance. This therefore creates a dispute of fact and such an issue cannot be dealt with in motion proceedings. The dispute also includes the agreement to buy-out the Applicants, an allegation that is denied by the Applicants.

⁵Act 108 of 1996

⁶ (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) at paragraph 221

INTESTATE SUCCESSION ACT

[25] Section 23 of the **Black Administration Act** states as follows:

“(1) All movable property belonging to a Native and allocated to him or accruing under Native Law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Native Law and custom.”

[26] In **Bhe Supra**, this section was declared unconstitutional. It was repealed with retrospective effect to 27 April 1994. As Dikeledi Molefe died in October 1991. Her estate would have been wound up in terms of the **Black Administration Act** and the regulations retrospective effect dates to 27 April 1994.

[27] In this instance, there is clear evidence that the deceased, Edgar Molefe was appointed as an heir on the basis of being the eldest male, at the exclusion of the other children, his sisters. There is a clear dispute between the children and/or heirs of the deceased, being Dikeledi Molefe, including the grand child of namely Gloria Sefora (her mother was the daughter of the late Dikeledi Molefe). In my view, even if the **Black Administration Act** has retrospective effect till 27 April 1994, this subsequently results in a dispute of fact and cannot be dealt with on the papers during motion court proceedings. The issue can best be resolved at trial.

[28] In my view, there are several disputes of facts which cannot be resolved on the papers, that is whether there was a buy-out agreement between the children of the deceased, Dikeledi Molefe, and who are the children/heirs of the deceased, Dikeledi Molefe and/or Edgar Molefe; whether the **Black Administration Act** was applicable when the estate was devolved and whether male primogeniture was applicable to the effect that Dikeledi Molefe passed on before 27 April 1994.

[29] Accordingly, the following order is made:

1. The *points in limine* of the First and Second Respondent are dismissed with no order as to costs.
2. The matter is referred for oral evidence to deal with disputes of facts.

3. Costs to be costs in the trial.

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a horizontal line and a small flourish.

Chesuwe, J

On behalf of the Applicants: Adv K P Mohono
Instructed by: Motlogeloa Attorneys Inc.
BLOEMFONTEIN

On behalf of the First and Second
Respondents: Adv T E Tsoeu
Instructed by: Ngwane Attorneys
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