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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no: 2092/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

MASE MINAH MBALI

Applicant

and

TLALENG ALINA MHLEKWA N.O

1st Respondent

**MASTER OF THE HIGH COURT, FREE STATE PROVINCE,
BLOEMFONTEIN**

2nd Respondent

JUDGEMENT BY: MOLITSOANE, J

HEARD ON: 25 AUGUST 2022

DELIVERED ON:

15 SEPTEMBER 2022

[1] The respondent seeks certain declaratory orders set out as follows. In the Notice of Motion:

- "1. That the applicant was involved in a permanent heterosexual life partnership with the late JOHN MAHAMBA MALULEKE ("the deceased");
2. That the applicant is entitled to benefit from the estate of the deceased in terms of the Intestate Succession Act;
3. That the application is entitled to claim maintenance from the estate of the deceased in terms of the Maintenance of Surviving Spouse Act;
4. That the finalization of the administration of the estate of the deceased by the first respondent be held in abeyance ending the finalization of this application;
5. Cost to be paid out of the proceeds of the estate;"

[2] The application is opposed by the First Respondent only. The opposition is based on the special pleas:

- "1. That the respondent failed to join the biological children of the deceased; and
2. that the relief sought was either bad in law and/or premature.

[3] The facts of this matter are largely common cause or are not seriously in dispute. One John Mahamba Maluleke was married to one Irene Maluleke. They had one child Kgomotso Gordon Maluleke, born on 02 February 2003. Irene passed away during 2004. It is the case for the applicant that following the passing on of Irene, she began a romantic relationship with the deceased. It is the case of the

applicant that around October 2004 she moved in with the deceased.

[4] On 16 November 2005 the deceased and the applicant were blessed with a child, Kamogelo Mbali. The deceased passed away on 09 July 2021. The First Respondent was appointed the executrix by the Master of the High Court by virtue of Letters of Executorship No 9086/2021.

[5] According to the applicants, prior to the deceased marriage to Irene, the deceased had a child, K[....] C[....] M[....], although he never married the latter's mother.

[6] It is the case of the applicant that she was in a permanent marriage relationship with the deceased. The First respondent refused to accept that fact and this prompted this application.

[7] It is the contention of the First Respondent that the biological children of the deceased have a direct and substantial interest in the relief sought and that failure to join them will affect them prejudicially.

[8] Uniform Rule 10(3) provides for the joining of multiple defendants as follows:

"(3) Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action."

[9] It is settled that the interest's parties must be joined in an application for a declaration of rights. What concludes a direct and substantial interest is the legal interest in the subject matter. The court in *Standard Bank of SA Ltd v Swartland Municipality and Others*¹ said the following:

¹ 2011(5) SA 257 (SCA).

"[9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject matter of the case which could be prejudicially affected by the order of the court. This means that the application must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage on intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.

[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[11] Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene. In Greyvenouw CC this principle was formulated in these terms:

"In addition, when, as in this matter, the applicant base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interest."

[10] The applicant contends that the assertion that the biological children of the deceased have a direct and substantial interest in the outcome of the relief sought is unsustainable. It is contended that 'there are at least five prayers in the Notice of Motion excluding the costs and any other relief which the court might consider.

[11] While the nub of this application is the declaration whether the applicant was in a permanent heterosexual life partnership with the deceased during his life time. The other prayers follow from the determination of the declaration of the heterosexual life partnership. The interests that biological children of the deceased have in the

outcome of this case relate to the right to inherit from the estate of their father. It cannot simply be said that such a right is financial in nature. The right to inherit is a legal interest in the subject matter of the litigation which interest may be prejudicially affected by the judgment this court may hand down.² Should this court find that the applicant was in a heterosexual life partnership with the applicant, it follows that whatever the biological children were to inherit from the estate of their father may be affected. The relief sought clearly affects their right to succession. It is axiomatic that they ought to have been joined in these proceedings. In my view failure to join them is fatal to the applicant's case. It is unnecessary to deal with other issues raised in this application in view of the order I make. I accordingly make the following orders:

ORDER:

1. The matter is stayed for a period of three months calculated from the date of this order to enable the applicant to join the biological children of the Late JOHN MAHAMBAMALULEKE in the main application, whose rights may be affected by the relief sought by the applicant;
2. Cost shall be costs in the main application.
3. In the event of the joinder referred to in 1 above not being effected, the respondents may approach this court on the same papers duly amplified for the dismissal of the main application with costs.

P. MOLITSOANE, J

² Henri Viljoen(Pty) Ltd v Awerburch Bros 1953(2) SA 151(0).

For the Applicant:

Instructed by:

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