

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

Case number: 1591/2020

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

RETHABILE ELIZABETH PHOKA

Applicant

And

DIMAKATSO CHAKA

1st Respondent

**MASTER OF THE HIGH COURT
BLOEMFONTEIN**

2nd Respondent

**MACHINI ISMAEL MOTLOUNG N.O.
LEGAL AID SOUTH AFRICA**

3rd Respondent

HEARD ON:

09 JUNE 2022

JUDGMENT

DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 4 October 2022.

- [1] The late Mr. Madoko Moses Phoka (“the deceased”) was the father of the applicant who was born from his previous marriage. He died intestate on 7 May 2021. At the time of his demise he was involved in an intimate relationship with the first respondent, they lived together at his family home with the first respondent’s child (“the minor child”) who was born during the subsistence of their relationship.
- [2] During his lifetime the deceased was employed as a Chef by the South African Defence Force. Approximately a month after his death, the applicant was contacted by the deceased’s employer to submit a claim for the deceased’s death benefits held by the Government Employees Pension Fund (“the GEPF”) a pension fund registered in terms of section 4 of the Pension Funds Act.¹ Upon submitting her claim, the applicant discovered that the first respondent had also lodged a claim for the deceased’s death benefits in her personal capacity and on behalf of the minor child. The applicant objected to the first respondent’s claim alleging that the minor child was not the deceased’s biological child as a result, the GEPF suspended the processing of the claims pending the ascertainment of the minor child’s paternity. The parties were also directed to submit a letter of authority duly issued by the second respondent.
- [3] On 24 June 2020 the applicant launched an application in this court comprising of Part A in terms of which she sought an order compelling the first respondent: to hand over the deceased’s personal documents including his original identity document; to subject the minor child to a paternity (DNA) test to determine whether the deceased is the biological father of the minor child and; in the event that the DNA test establishes that the deceased was not the biological father of the minor child, the applicant seeks an order in Part B on the following terms:

¹ Act 24 of 1956.

- “1. a declaration that the minor child is not entitled to the death/pension benefits and/or the deceased estate of the late Madoko Moses Phoka.*
- 2. that the Second Respondent issue a letter of authority granting the Applicant the authority to take control of the assets of the deceased estate as the sole beneficiary of the deceased estate within 30 days of this order.*
- 3. that First, Second and Third Respondents are ordered to pay the costs of this application jointly and severally, the one paying, the other to be absolved in the event of opposition of this application.*
- 4. further and/or alternative relief.”*

[4] The order sought in Part A was granted by Raikane, AJ on 10 December 2020 then on 24 February 2022 Daffue, J amplified the order to include the following provisions:

- “6. The applicant shall ensure that the DNA tests results relied upon by applicant are properly confirmed under oath, which affidavit shall be filed not later 10 March 2022.*
- 7. The first respondent shall subject the applicant, her child and any willing blood relative of the deceased to DNA testing which should be done not later than 17 March 2022.”*

[5] It is the applicant’s case that pursuant to the court order, the minor child underwent DNA testing on 14 September 2021 and on 28 March 2022.² The results have confirmed that the deceased was not the biological father of the

² Pages 84 and 116 to 120 (“Annexure “D) of the indexed bundle are copies of the “DNA results.”

minor child and since the deceased never maintained the minor child during his lifetime, the minor child is not entitled to the estate of the deceased.

- [6] The applicant states that the first respondent was never married to the deceased, her allegations pertaining to a customary marriage she entered into with the deceased and that he maintained her and the minor child should be disregarded as they were only raised in her replying affidavit to Part B. No such allegations were stated in the replying affidavit to Part A, in fact the first respondent admitted that after the minor child was born DNA test were carried out on the minor child when the first respondent sued the deceased for child maintenance. Except to allege the DNA tests proved that the deceased was the biological father of the minor child, the first respondent has since failed to provide the results as proof in that regard. The applicant is thus entitled to the relief she seeks in Part B, except for the order directed at the second respondent in prayer 2 of the applicant's notice of motion.
- [7] The application is opposed by the first respondent³ on the grounds that the DNA results do not prove that the deceased was not the minor child's biological father they merely prove that the applicant and the minor child are not blood related which can be expected in the absence of a blood relative of the deceased from whom blood samples were taken for the determination of the minor child's paternity. The DNA results are for that reason inconclusive and this outcome was in fact anticipated by the first respondent hence she had requested that the minor child's DNA be tested against a member of the deceased's paternal family, her request was rebuffed by the applicant. It must also be borne in mind that the basis on which the applicant seeks the relief is that she is the only child of the deceased based on the fact that she was born during the subsistence of the erstwhile marriage of her mother and the deceased, nowhere in her founding affidavit does she allude to the fact that she is the biological child of the deceased. In that regard, it is highly probable that the deceased was not the biological father of the applicant which would

³ The second and third respondents abide the decision of this court.

explain why the applicant has been found not to be blood related to the minor child.

- [8] The first respondent contends that the applicant's actions herein are simply motivated by malice, to strip the first respondent and the minor child of all and any benefits of the deceased estate that they are entitled to and this is evidenced by the fact that despite having hauled the first respondent to court the applicant ignored the terms of the court order granted in her favour, that the minor child's DNA be tested against that of the blood relative of the deceased. The applicant instead, tested her own DNA against that of the minor child and when the results returned inconclusive, the applicant swiftly evicted the first respondent and the minor child from their home.
- [9] The first respondent admits that when the minor child was born on 15 August 2012 she was not married to the deceased. She however states that at that time she had been in an intimate relationship with the deceased since 2009. On 27 August 2012 the deceased paid Lobola to her family to formalize their relationship. Annexure "A" attached to her replying affidavit is a copy of the Lobola agreement concluded and signed by the family members of both the deceased and the first respondent. The first respondent further states that at the time of his death, the deceased was solely responsible for maintaining her and the minor child as she had stopped working in order to care for the deceased when he fell ill.
- [10] It is the first respondent's case that by virtue of her customary marriage to the deceased and that he also provided financial support to her and the minor child, both the first respondent and the minor child are entitled to be regarded as beneficiaries of maintenance and inheritance from the deceased's estate. The application must accordingly fail.
- [11] I agree with the first respondent's contentions. This application is fundamentally flawed in many respects. On the available facts, the trigger of these tenuous proceedings is the GEPP's decision to suspend the processing

of the claims for the deceased's death benefits pending the determination of the minor child's paternity.

- [12] The applicant's reliance on the presented DNA results is unsound. These particular results do not constitute proof that the deceased was not the biological father of the minor child, they merely allude to the kinship between the applicant and the minor child namely that: the applicant and the minor child do not have the same biological father. See on the analysis conclusion, page 1 of the Annexure "D".
- [13] There is no merit to the applicant's criticism of the applicant's failure to present the DNA results she referred to in her replying affidavit to Part A for the reason that, it is the applicant who failed to present evidence that the minor child was nominated as a beneficiary of the deceased's deaths benefits on the basis of being the biological child of the deceased.
- [14] Schedule 1 of the Government Pension Fund Rules contains the Rules of the Government Employees Pension Fund. Section 1 thereof defines a beneficiary as a dependant which is any person, not only a biological child, in respect of whom the member is legally liable for maintenance including a person whom a member is not legally liable for maintenance, if such a person was at the time of the death of the member dependent to the member for maintenance.⁴ The fact that at the time of his demise, the deceased lived with the first respondent and the minor child and also provided for them is indisputable.
- [15] At the time the applicant launched these proceedings she was well aware that a material dispute of facts might arise in relation to the status of the deceased and the first respondent's relationship and/or living arrangements yet she insisted on proceeding on motion proceedings. In argument, counsel for the applicant was adamant that the order sought by the applicant is obtainable on the papers alone. I disagree.

⁴ See also section 1 of the Pension Funds Act.

[16] The first respondent's averments pertaining to the deceased having been a party to a customary marriage, the alleged financial support dependency of the first respondent and the minor child on the deceased during his lifetime are not farfetched or improbable. These allegations constitute real, genuine and bona fide disputed facts and their veracity cannot in my view, be determined without being supplemented by oral evidence. As succinctly pointed out by Harms DP in *National Director of Public Prosecutions v Zuma* **[2009] ZASCA 1; 2009 (2) SA 277** (SCA) at para 25 that:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of facts arise on the affidavits, a final order can only be granted only if the facts averred in the applicant's (Mr Zuma) affidavits, which have been admitted by the respondent (NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bold or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.”

[17] There is nothing peculiar about the second respondent having raised these issues in her replying affidavit to Part B, they are clearly intended to respond to the relief sought in Part B.

[18] In conclusion, having regard to the available facts, I'm not persuaded that the applicant has made out a case for the relief she seeks. The appropriate remedy under these circumstances would be to dismiss this application.

[19] In the premises, I make the following order:

1. The applicant's application, Part B is dismissed with costs.

APPEARANCES:

Counsel on behalf of Applicant:

Instructed by:

Mr. Modisenyane

Modisenyane Attorneys

MrModisenyane@gmail.com

law@modisenyaneinc.co.za

BLOEMFONTEIN

Counsel on behalf first Respondent:

Instructed by:

Adv. Nyezi

Lengau Attorneys

C/O Mpobole & Ismail

lengauatt@gmail.com

BLOEMFONTEIN