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REPUBLIC OF SOUTHAFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3) REVISED

COURT A QUO CASE NO: 935/2015

APPEAL CASE NO: HCAA13/2019

In the matter between:

**KANAKANA LENGTON MUOFHE
NDIVHUWO MARTHA MUOFHE
THINAVHUYO SANDRA MUOFHE**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT**

and

LUCIA MPOSI, NO

RESPONDENT

JUDGMENT

NAUDE AJ:

[1] This is a full court appeal against the Judgment of Semenya AJ (as she

then was) handed down on 29 April 2016 in the Limpopo Local Division, Thohoyandou.

- [2] The Appellants in this matter were the Respondents in the Court a *quo* and the Respondent herein was the Applicant. The parties herein are referred to as in the *court a quo* in order to maintain harmony with the record before this court.

Background:

- [3] Masilu Ben Mposi ("*the deceased*"), was married to Ndivhuhu Martha Muofhe (2nd Respondent) in accordance with customary law. From the customary marriage relationship between the deceased and the 2nd Respondent, two children were born, namely, Kanakana Lengton Muofhe (1st Respondent) and Thinavhuyo Sandra Muofhe (3rd Respondent). The customary marriage between the deceased and the 2nd Respondent was dissolved during the period 1986/1987.
- [4] The deceased entered into a relationship with Azwindini Lisbeth Rasikhanya and later married her in accordance with customary law. From the customary marriage between the deceased and Azwindini Lisbeth Rasikhanya ("*the deceased 's wife*"), one child was born, Lucia Mposi (the Applicant.)
- [5] The deceased passed away on 17 July 2002 intestate. On or about 16 September 2002 the deceased's family, including the deceased's wife appeared at the Magistrate's Office, Thohoyandou to report the deceased's estate.
- [6] In terms of Regulation 4(1) of the Regulations published under GK R200 of 6 February 1987, and on 4 October 2002, the deceased's wife was appointed to represent the estate of the deceased, to assume responsibility for the collection of the assets, to pay all claims to the value of the assets in the estate and to award the balance of the estate,

including the immovable property to the rightful heir(s).

[7] On 27 December 2002, the Magistrate who supervised the deceased estate ordered the division of the proceeds of the estate in the amount of R6878.22 as follows:-

- a) the deceased's wife (widow), to be paid an amount of R4484,11.
- b) the balance to be paid to the mother of the three children with the deceased namely, Mpho, Kanakana and Thinavhuyo Mposi.

[8] The Magistrate bequeathed a child's share to a third child, Mpho, who is not a party to the proceedings and does not seem from the affidavit deposited to by Maria Mposi, the sister of the deceased, to be one of the deceased's children.

[9] From Maria Mposi's affidavit the deceased only had three children, namely:-

- a) Lucia Mposi
- b) Kanakana Lengton Muofhe, and
- c) Thinavhuyo Sandra Muofhe.

[10] As already stated here above, Mpho is not a party to the proceedings and except for the order of the Magistrate Thohoyandou on 27 December 2002, does not appear anywhere in any of the documents before this court. It seems the Magistrate erred in this regard.

[11] The winding up of the estate of the deceased was only partially done as the issue of devolution of the immovable property situated at [...] ("the property"), which formed part of the estate was still pending.

[12] Prior to the finalization of the estate of the deceased, the deceased's wife, passed away intestate on 5 January 2013. The Applicant reported the deceased's wife estate at the Master of the High Court, Thohoyandou on 15 January 2013 and was the Applicant appointed and authorised to take

control of the assets of the Estate of the late Azwindini Lisbeth Rasikhanya.

[13] The estate of the deceased's wife consisted to the knowledge of the Applicant of the following assets:-

- a) Proceeds of a Standard Bank Account No [....];
- b) Proceeds of a Nedbank Account No [....];
- c) Proceeds of a FNB Account No. [....];
- d) Household and Furniture;
- e) Nissan Motor Vehicle.

Only during May 2015 was the Applicant informed that the property, House No [....], was to be included as part of the deceased's wife estate. It was only then discovered by the Applicant that the immovable property was not dealt with whilst the deceased's wife was still alive in the distribution of the deceased's estate.

[14] The Applicant whilst in the process of transferring the immovable property into her name, discovered that the 1st Respondent purportedly acquired ownership of the immovable property through inheritance. It is this registration and ownership of the immovable property that gave rise to the Applicant's application in the *court a quo* before Semenya AJ. The Applicant avers that the immovable property belongs to her as she is the sole heir of the deceased's wife estate.

[15] The Respondents aver that the immovable property does not belong to the Applicant as she is not the deceased's daughter, but to the family of the deceased and in terms of a redistribution agreement was awarded and registered into the name of the 1st Respondent.

[16] It is common cause between the parties that the Magistrate's Office Thohoyandou never dealt with the immovable property during the distribution of the cash assets.

- [17] Whilst the estate of the deceased was not finalized by the Magistrate Thohoyandou, the 1st Respondent proceeded to report the estate to the Master of the High Court, Thohoyandou (4th Respondent in the court *a quo*) and was the 1st Respondent appointed as executor of the estate of the deceased.
- [18] The 1st Respondent in his capacity as executor of the deceased estate as appointed by the 4th Respondent, prepared a liquidation and distribution account which was accepted by the 4th Respondent and was the transfer of the immovable property to the 1st Respondent done with the approval of the 4th Respondent.
- [19] The 4th Respondent, the Master of the High Court, acknowledged the contravention of the Constitutional Court Order in **Bhe v Magistrate, Khayelitsha 2005 (1) SA 580 CC** and regret to have administered the estate of the deceased.

Facts and Case Law:

- [20] The deceased and the deceased's wife entered into a monogamous customary marriage. This is so because by that time the customary marriage between the deceased and the 2nd Respondent had already been terminated.
- [21] In **Gumede v President of the Republic of South Africa and Others 2009 (3) BCLR 243 (CC)** it was held that a monogamous customary marriage will automatically be in community of property unless it is stipulated otherwise in an ante-nuptial contract whether or not the marriage was registered and whether or not the marriage was entered into before or after the Recognition of Customary Marriages Act, 120 of 1998, came into existence.
- [22] The deceased and the deceased's wife were thus married in community of property. Half of the deceased's estate belonged to the deceased's wife by

virtue of the marriage in community of property and the other half to the deceased, which half could be bequeathed to the heirs of the deceased.

[23] This court is not going to deal with the division of the estate as same has already been dealt with by the Magistrate Thohoyandou despite this court being of the view that the Magistrate erred in her award and furthermore in awarding a child's share to Mpho. This court is of the view that the full estate of the deceased should have been devolved to the deceased wife. This court does however not sit as a review court of the order of the Magistrate granted on 27 December 2002 and this is a remark in obiter.

[24] It is common cause that the deceased passed away intestate on 17 July 2002. In terms of **Section 1(1)(c)(i) of the Intestate Succession Act**, if a person dies intestate and is survived by a spouse and descendants, the spouse will inherit a child's share of the intestate estate or so much of the estate as does not exceed R250 000.00 (two hundred and fifty thousand rand}, whichever is the greater. The amount of R250 000.00 was amended from the previous R125 000.00 on 14 November 2014. For purposes of the deceased estate, the applicable amount is still R125 000.00 (One Hundred Twenty Five Thousand Rand).

[25] The amount to which the surviving spouse is entitled in terms of the applicable matrimonial property regime is deducted first. The balance of the intestate estate after liabilities were settled, is divided.

[26] At date of death of the deceased, the immovable property was valued at R200 000.00 (Two Hundred Thousand Rand). The deceased's wife should have received 50% (fifty percent), in other words R100 000.00 (One Hundred Thousand Rand) of the value of the immovable property by virtue of the marriage as in community of property and the remaining 50% (i.e R100 000.00) was to devolve to the surviving spouse and the descendants in terms of **Section 1(1)(c)(i) of the Intestate Succession Act 81 of 1987**. As the remaining 50% of the estate of the deceased was less than R125 000.00 the full 50% share should have devolved to the deceased's

wife.

- [27] This court is therefore of the view that had the estate of the deceased been finalized by the Magistrate Thohoyandou, the immovable property would have devolved to the deceased's wife and the property was no longer the deceased's property at the time the 1st Respondent opened an estate with the 4th Respondent in 2014.
- [28] The Applicant as sole heir of the deceased's wife, who has since also passed away intestate, is the rightful owner of the immovable property known as [...] in terms of **Section 1(1)(b) of the Intestate Succession Act, 81 of 1987**.
- [29] This court will now deal with the question whether the matter should be referred back to the Magistrate's Court Thohoyandou to finalize the estate of the late Mailu Ben Mposi or to the Master of the High Court, Thohoyandou.
- [30] In **Moseneke and Others v The Masters and Another 2001 (2) SA 18 CC** the Constitutional Court in paragraph 24 declared section 23(7)(a) and regulation 3(1) of the The Black Administration Act inconsistent with the Constitution and invalid.
- [31] In paragraph 27 of the **Moseneke-case** *supra* the Constitutional Court held as follows:-
- "It was common cause that transactions already completed under the regulation and section should not be disturbed. It was also agreed that a period of two years would be appropriate to enable parliament to review the whole field of succession and administration of deceased estates in an harmonious and effective manner which would fully respect the rights entrenched in the Constitution. The difficulty was how to protect rights in the interim period. To subject the families of black people who die intestate to the continuing indignity of racist treatment would not be acceptable. The order that this Court makes as a temporary measure gives all African families a choice in circumstances where a member of the family dies*

intestate and the estate is not governed by the principles of customary law. They can require the Master to administer the deceased estate as provided for in the Administration of Estates Act, or else opt for the cheaper and more accessible process under the control of the local magistrate, as regulated by the Black Administration Act. This choice is achieved by giving immediate effect to the invalidation of section 23(7)(a), but suspending the declaration of invalidity in respect of regulation 3(1) for two years. In short, the Master is empowered to administer black intestate estates immediately, while the special empowerment of magistrates will continue under the Black Administration Act for not longer than two years. In order to make it clear that there is a choice, the word "shall" in regulation 3 must be read for the period of the suspension to mean "may". The magistrates' jurisdiction is therefore not exclusive and obligatory, but concurrent and permissive."

[32] The deceased's family elected to report the estate before the Magistrate Thohoyandou in whose district the deceased lived and the office of the Magistrate Thohoyandou opened and administered the deceased estate under file no 7/1/2 (387/2002).

[33] In **Bhe v Magistrate Khayelitsha 2005 (1) SA 580 CC** the Constitutional Court dealt with the question of the retrospective effect of the declaration of invalidity in paragraphs 126 to 129 of the Constitutional Court Judgment as follows:-

"[126] Section 172(1) of the Constitution empowers this Court, upon a declaration of invalidity to make any order that is just and equitable, including an order to limit the retrospective effect of that invalidity. The statutory provisions and customary law rules that have been found to be inconsistent with the Constitution are so egregious that an order that renders the declaration fully prospective cannot be justified. On the other hand, it seems to me that unqualified retrospectivity would be unfair because it could result in all transfers of ownership that have taken place

over a considerably long time being reconsidered. However, an order which exempts all completed transfers from the provisions of the Constitution would also not accord with justice or equity. It would make it impossible to re-open a transaction even where the heir who received transfer knew at the time that the provisions which purport to benefit him or her were to be challenged in a court. That was the position in the Shibi case.

[127] To limit the order of retrospectivity to cases in which transfer of ownership has not yet been completed would enable an heir to avoid the consequences of any declaration of invalidity by going ahead with transfer as speedily as possible. What will accordingly be just and equitable is to limit the retrospectivity of the order so that the declaration of invalidity does not apply to any completed transfer to an heir who is bona fide in the sense of not being aware that the constitutional validity of the provision in question was being challenged. It is fair and just that all transfers of ownership obtained by an heir who was on notice ought not to be exempted.

[128] The next issue to be decided is whether it is just and equitable that the order of invalidity should date back to 4 February 1997 when the Constitution became operative. The question is relevant because the deceased in Shibi died during 1995, while the interim Constitution was in force. The impugned provisions in this case became inconsistent with the interim Constitution in 1994 when it came into force. It would accordingly be neither just nor equitable for affected women and extra-marital children to benefit from a declaration of invalidity only if the deceased had died after 4 February 1997, but not if the deceased had died after the interim Constitution had come into force but before the final Constitution was operative. I am accordingly of the view that the declaration of invalidity must be retrospective to 27 April 1994 in order to avoid patent injustice.

[129] To sum up, the declaration of invalidity must be made retrospective to 27 April 1994. It must however not apply to any completed transfer of ownership to an heir who had no notice of a challenge to the legal validity of the statutory provisions and the customary law rule in question. Furthermore, anything done pursuant to the winding up of an estate in terms of the Act, other than the identification of heirs in a manner inconsistent with this judgment, shall not be invalidated by the order of invalidity in respect of section 23 of the Act and its regulations."

- [34] This court is of the view that there exists no confusion which needs clarification as to the procedure which should be applied in the administration of estates of black people who were under the now repealed Black Administration Act 1927 as the Constitutional Court in the She-matter *supra* already gave clear guidelines as to the procedure to be applied in the administration of estates of black people and in paragraph 133 of the She-matter held as follows:-

"[133] It will be necessary, however, that estates that are currently being wound up under section 23 of the Act and its regulations, continue to be so administered to avoid dislocation. The order will accordingly provide that the provisions of the Act and its regulations shall continue to be applied to those estates in the process of being wound up. All estates that fall to be wound up after the date of this judgment shall be dealt with in terms of the provisions of the Administration of Estates Act."

- [35] *In casu*, it was therefore improper for the First Respondent to report the deceased estate to the Master of the High Court, Thohoyandou and to have the estate administered through that office while the administration of the same estate was still pending in the Magistrate's Court, Thohoyandou. This is in contravention of the Constitutional Court order/decision in the She-matter. This much was acknowledged by the Master in his Report,

paragraphs 7 and 8 thereof. The Master regrets having issued letters of executorship to the First Respondent and administered the deceased estate.

- [36] In light of the above this court is of the view that the *court a quo* correctly referred the administration of the deceased estate back to the Magistrate's Court, Thohoyandou and directing that the estate of the deceased is to be wound up and finalized by the Magistrate, Thohoyandou.
- In the result this appeal should not succeed.

Order

[37] The following order is made:-

1. The appeal is dismissed.
2. The order of the court *a quo* handed down on 29 April 2016 is confirmed.
3. The Appellants to pay the costs of this appeal.

M. NAUDE
ACTING JUDGE OF
THE HIGH COURT

I AGREE:

E.M. MAKGOBA

**JUDGE PRESIDENT
LIMPOPO DIVISION**

I AGREE:

M.F. KGANYAGO

JUDGE OF THE

HIGH COURT

APPEARANCES:

HEARD ON: 14 AUGUST 2020

JUDGMENT DELIVERED ON: 19 AUGUST 2020

For the Appellants: Adv. M.S. Sikhwari

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