

Not Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – MTHAHTA**

Case No: 3129/2017

Date Heard: 23 March 2018

Date Delivered: 14 August 2018

In the matter between:

SIYABULELA MBABA

First Appellant

PUMLA NOTHOZAMILE MBABA

Second Appellant

ZANELE MAYEKISO

Third Appellant

SIPHOKAZI MAYEKISO

Fourth Appellant

SIPHIWO MAYEKISO

Fifth Appellant

and

EXECUTOR: ESTATE LATE NGQELE

EDWIN MBABA

First Respondent

**MASTER OF THE HIGH COURT:
MTHATHA**

Second Respondent

MDA MNCEDANE INC.

Third Respondent

NKULULEKO MEHLO

Fourth Respondent

LUSANDA NOMPANDANA

Fifth Respondent

KHOLEKILE NDAMASE

Sixth Respondent

**MZIWOTHANDO JIVASI
(A MINOR DULY ASSISTED BY
HER/HIS MOTHER)**

Seventh Respondent

SOLAM MBADA

Eights Respondent

AZAZOLE MBABA

Ninth Respondent

MDA MNCEDANE INCORPORATED

Tenth Respondent

STANDARD BANK: MTHATHA WEST

Eleventh Respondent

JUDGMENT

MAKAULA J:

[1] The genesis of this matter is the death of Ngqele Edwin Mbaba who died testate. As can be gleaned from the papers, the second appellant purports to be the sole surviving spouse of the deceased and sought an order declaring her as such. Nobelisi Mbaba (born Ndamase) on the other hand disputes that the deceased was married to the second appellant and claims to be the sole surviving spouse of the deceased. The issues in this matter are compounded and confused by the various applications which were launched by the second appellant. Needless to mention that all those applications were dismissed with costs.

[2] On the 27th March 2015 the appellants (applicants in the court *a quo*) brought an application against the respondents herein for the following order:

- "1. That, the FINAL LIQUIDATION AND DISTRIBUTION ACCOUNT relating to the LATE NGQELE EDWIN MBABA (hereinafter referred to as "THE DECEASED") dated 15

JANUARY 2014 and signed by one VUYOKAZI MNCEDANE an attorney a partner of the ATTORNEYS MDA MNCEDANE INCORPORATED (TENTH RESPONDENT) be and is hereby set aside and declared of no legal valid effect.(Sic)

2. Directing the First Respondent to approach the SOUTH AFRICAN REVENUE SERVICE for tax directives/liabilities of the said deceased for incorporation of that liability in the future drafting of a fresh FINAL LIQUIDATION AND DISTRIBUTION ACCOUNT of the said deceased.
3. The FIRST and SECOND RESPONDENTS be and are hereby directed to consider the claims lodged against the said estate by SECOND, THIRD, FOURTH and FIFTH APPLICANTS within a period of 30 (THIRTY) DAYS from the date of finalization of these proceedings. **ALTERNATIVELY**, to hold an enquiry giving them an opportunity to be heard before they could come to a conclusion dismissing their claims.
4. The SECOND RESPONDENT be and is hereby directed to consider the written objections that were lodged with him by the FIRST APPLICANT during the month of JULY 2015.

ALTERNATIVELY, to hold an inquiry giving her an opportunity to be heard before they could come to a conclusion dismissing her claim.
5. The FIRST RESPONDENT and/or the TENTH RESPONDENTS be and are hereby directed not to draw any cheques from the said estate banking account number – 061046523 kept by ELEVENTH RESPONDENT until such time the present proceedings are finalized.
6. The FIRST RESPONDENT be ordered to pay the costs only if she opposes this application which costs should be *DE BONIS PROPRIIS* on an attorney and client scale only if she opposes this application.
7. Any other Respondent who opposes this application should be directed to pay the costs thereof on an attorney and own client scale.

8. Granting other alternative relief”.

[3] The first, third and tenth respondent's opposed the application and raised the following points:

“7.1 The application is vexatious. It is the 5th Application against me. It is an abuse of the court process.

7.2 As against the 1st and the 2nd Applicants the application is *res judicata*. As against the 2nd Applicant it was disposed under **Case No. 2655/14** per **Mey AJ**. It appears on **page 6 paragraph 12** of his judgment. Find attached same marked **NM'6'**. As against the 1st Applicant it was disposed of by **Mgxaji AJ**. Find attached a copy of the order marked **NM'7'**.

7.3 The 2nd, 3rd, 4th and 5th Respondent lack the legal standing to make the application as they are not heirs of the deceased.

7.4 The 1st and 2nd Applicants have failed to pay taxed costs on demand. This application should be stayed pending payment of those costs. Find attached allocator for both marked **NM'8'** and **'9'** respectively.

7.5 The estate of Ngqele Edwin Mbaba has already been finalized and all beneficiaries have been paid except the 1st Applicant whose payment has been delayed by his refusal to submit his banking details and the taxed costs he is refusing to pay.

Whatever order can be granted it will have no effect as the estate has been wound up. The application has been overtaken by events known to the applicants. It is vexatious and frivolous.

7.6 The orders sought in 1, 2, 3, 4, and 5 are simply not competent as the estate has been wound up. They are academic. On these points alone this applications ought and should be dismissed with costs as prayed.

8. This application as a whole is academic. This fact is known to the applicants and their attorney. It is now time that the attorney of the applicants be ordered to pay *de bonis propriis* on an attorney and client scale. The deponent is made to pay attorneys for applications that have no merit. The 1st and 2nd Applicants have lost all cases against the deponent. The question is when will they stop this unfounded and expensive litigation. They are badly advised by their attorney who knows that they will not be able to pay costs and the deponent will suffer by continuously paying costs. It is for this reason that I ask that their attorney should be saddled with costs. In all the previous cases **Messrs A.F. Noxaka** was the attorneys of record and they know the facts very well". (*Sic*)

[4] The matter was argued before the court *a quo*. The court *a quo* made the following order:

"In this matter I have just listened to points *in limine* to the application by the first, third and fourth applicants. Yes, and with regard to *res iudicata*, the issue that I have to determine is whether the same parties have been before Court on the same issues. It has been held over a number of times in our courts that disputes have to – the determination of dispute has to come to some finality at some point and no litigation can continue perpetually. It is common cause that these issues – some of the issues have been before the same Court up to the fifth time now. But I am also of the view that the respondents' legal representative is correct, that all that happening is that the parties come in and out, changing terminology and changing the appearances or the parties. But centrally they seek to set aside the same liquidation and distribution

account and also centrally to determine whether the third and fourth and fifth applicants should be declared to have benefits under the estate of the deceased. My view is that those issues have been ventilated quite a number of times before and the matter is indeed *res iudicata* and I would dismiss the applications for the first, third, fourth and fifth applicants with them to pay the costs of the application". (*Sic*)

[5] The appeal is premised against the above order. The grounds of appeal are couched in the following terms:

- "1. That, the learned Honourable Judge misdirected herself on the question how the doctrine of RES JUDICATA could be applied in a situation where one of the four Appellants was never been to court before on any matter against the ESTATE LATE EDWIN NGQELE MBABA on one hand and on the other hand one of the Appellants had previously been before court against the said Estate but on a different matter as opposed to the matter from which this appeal arises. (*Sic*)
2. That, the learned Honourable Judge erred in dismissing the Appellants' case only on that point of RES JUDICATA that was raised by the Respondents even though it was the first time for other Appellants before court for the first time (without even hearing the merits of their case at all).
3. That, the learned Honourable Judge should have found that the main principle of RES JUDICATA is that, in order for that principle to find application, the parties and the issues before court in the case presently before court should be same as in the previous case". (*Sic*)

[6] The appeal is with the leave of the court *a quo*. The matter appeared before us for the first time on 9 February 2018. However, it was postponed to 23 March 2018 because the file was not in order.

[7] Before anything else, I shall deal with the various applications and in particular the parties and the orders sought and granted. In Case Number 1192/09, the applicant is the second appellant herein. The orders sought in that matter are different to the current orders sought. Summarily, the orders sought by the second appellant in that matter were:

- (a) that the respondents should handover/surrender the letter of Executorship to the applicant;
- (b) stopping the respondents from finalising the winding up of the estate;
- (c) not to pay out money to the beneficiaries;
- (d) delivery to the applicant of the original Identity document, original Death Certificate and all the deceased property for safe keeping; and
- (e) the respondents are directed to expunge from the registers the purported customary married believe Nobelusi Mbaba and the deceased. The court dismisses the application with costs. (*Sic*)

[8] On 12 June 2014 the second appellant launched another application under Case Number 2462/2013 against Nobelusi Mbaba wherein she sought an order

that she be declared the only surviving spouse of the deceased. Mey AJ dismissed the application on the basis that there was a factual dispute as to whether the applicant or respondent were married or not to the deceased. Furthermore, Mey AJ found that the very issue was referred to the hearing of oral evidence in a previous judgment.

[9] Again on 4 April 2014, the second appellant launched an *ex parte* application against Estate late Ngqele Edwin Mbaba, the Master of the High Court and Mda Mncedane Attorneys Incorporated as respondents, interdicting them from:

- (a) continuing with the administration and distribution and paying out of any money to any would be beneficiaries;
- (b) directing Mda Mncedane Attorneys to deposit any money collected into their Trust Account pending finalization of Case Number 2462/13; and
- (c) the Master of the High Court to take back and keep the original Letters of Executorship pending the finalization of the estate.

[10] The interim relief sought by the second appellant was denied on 13 March 2014 by Msizi AJ.

[11] The last order was issued by Mgxaji AJ on 6 May 2015 under Case Number 2655/14. The applicant was Siyabulela Mbaba and the respondent Nobelusi Ndamase and the Master of the High Court. The order reads:

“It is ordered:

1. That the Master of the High Court is directed to ensure finalization of the Estate of Late Ngqele Edwin Mbaba in terms of section 18 of the Administration of Estates Act 66 of 1965 as amended.
2. That the applicant pays costs of the application on a party and party scale”.

[12] The origin and requirements of the doctrine of *res judicata* were traced and dealt with by Muller JA¹, as follows:

“Because SHEARER, J., found in favour of the club by applying the doctrine of *res judicata*, it is necessary to restate briefly the requirements for the application of that doctrine. *Voet*, 44.2.3 (*Gane’s* trans., vol. 6, p. 554) states as follows:

“There is nevertheless no room for this exception unless a suit which had been brought to an end is set in motion afresh between the same persons about the same matter and on the same cause for claiming, so that the exception falls away if one of these three things is lacking”.

And in *Custom Credit Corporation (Pty.) Ltd. v Shembe*, 1972 (3) S.A. 462 (A.D.), Van WINSEN, A.J.A., stated, at p. 472A:

“The law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause. This is the *ratio* underlying the rule that, if a cause of action has previously been finally litigated

¹ *African Wanderers F.C. v Wanderers F.C.* 1977 (2) SA page 38 at 45 E – G.

between the parties, then a subsequent attempt by one to proceed against the other on the same cause for the same relief can be met by an *exceptio rei judicatae vel litis finitae*”.

[13] Except for the second appellant and the first respondent, the parties in all three applications and the orders sought are not the same. Therefore the defence of *res iudicata* is not applicable and the court *a quo* erred in this regard.

[14] Furthermore, the Liquidation and Distribution Account (L&D) referred to in paragraph 1 of the order sought by the appellants in this matter is not the same as the one referred to under Case No. 2655/14. The latter Liquidation and Distribution Account is dated 10 February 2014 and was signed by the Executrix. In the present application the Liquidation and Distribution Account dated 15 January 2014 and is signed by Ms Vuyokazi Mncedane in her capacity as an attorney assisting the Executrix. Therefore, the relief sought in paragraph 1 of the current matter has not been dealt with nor decided before.

[15] Consequently, the appeal succeeds.

It is ordered:

1. The appeal is upheld.
2. The first and third respondent are to pay the wasted costs jointly and severally one paying the other to be absolved.

M MAKAULA
Judge of the High Court

Brooks J: I agree.

RWN BROOKS
Judge of the High Court

Bodlani AJ: I agree.

AM BODLANI
Acting Judge of the High Court

For the Appellants:

Mr Peko & Mr AF Noxaka

Instructed by:

AF Noxaka & CO
Mthatha

For the Respondents:

Mr Mantyi

Instructed by:

Mantyi Attorneys

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