

IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION: MTHATHA]

CASE NO. 1279/2015

Date heard: 24 November 2015

Date delivered: 26 November 2015

In the matter between:

THOZAMA KHONZAPHI NDAMASE & 3 OTHERS

Applicants

and

MASTER OF THE HIGH COURT, MTHATHA & 3 OTHERS

Respondents

JUDGMENT

BROOKS AJ:

[1] The four applicants are sisters. Their late mother died on 24 December 1989 and their brother, the late NDOYISILE MAJOR KONZAPI (the deceased) was appointed as executor to her estate. That appointment was challenged by the applicants in this court under case no 21/2011. The challenge was unsuccessful and the applicants attach to the founding affidavit in this matter a copy of the judgment issued by the

late DUKADA J. In due course, on 22 May 1991 the deceased took transfer of certain immovable property from his late mother's estate.

[2] The deceased died intestate on 20 November 2014 and his wife, the third respondent herein, as his surviving spouse, appears to have been appointed as executor to his deceased estate, the second respondent herein, estate no 000717/2015.

[3] The first and the fourth respondents have been cited *nomine officio*. The first respondent has filed a notice to abide by the court's decision. No response to the application has been made by the fourth respondent.

[4] The applicants seek an order in the following terms:

- "1. Directing the first, second and third respondents to join the applicants in the Estate 000717/2015 as the co-heirs;
2. That the refusal to join the applicants in the deceased Estate no 000717/2015 be declared wrongful and unlawful;
3. That any document disinheriting the applicants be declared unlawful and with no legal force;

4. That the respondents be ordered to pay costs of this application only in the event of opposing this application.”(sic)

[5] The application is opposed by the second and the third respondents. No answering affidavit has been filed. As they are entitled to do, the second and the third respondents have filed a notice in terms of rule 6 (5) (d) (iii) of the Uniform Rules of Court in which they raise a point of law which they contend is dispositive of the application. The point of law raised is to the effect that the applicants have failed to establish “a cause of action”. Accordingly, the issue to be determined is whether, on their own papers, the applicants have established an entitlement to relief.

[6] In essence, the relief sought by the applicants amounts to a final mandatory interdict. The availability of such relief in appropriate circumstances is well established in our law.¹

[7] The requirements for a final interdict are similarly well established.² The applicants must demonstrate:

- a clear right;
- an injury committed or reasonably apprehended;

¹ TRANSNET BPK h/a COACH EXPRESS EN ‘N ANDER v VOORSITTER, NASIONALE VERVOERKOMMISSIE , EN ANDERE 1995 (3) SA 844 (T) 847F.

² VAN DEVENTER v IVORY SUN TRADING 77 (PTY) LTD 2015 (3) SA 532 (SCA) 540 C.

- the absence of any satisfactory alternative remedy.

[8] It is plain from a reading of the founding affidavit that the applicants remain discontent about the devolution of their late mother's estate. The background to the application which they brought under case no 21/2011 is repeated in the founding affidavit filed in this matter. The cornerstone of the present application appears to be expressed in the following paragraph³ contained in the founding affidavit:

“I am advised that in terms of the law of succession Act 81 of 1987 the third Respondent is legally bound to consult us winding up of this Estate as we are the biological children of Nonkululeko Franscina Mto.” (sic).

It is clear from the remaining portions of the founding affidavit that “this Estate” refers to the second respondent and that “Nonkululeko Franscina Mto” was the applicants' late mother.

[9] The judgment of the late DUKADA J delivered in case No 21/2011 stands. The estate of the applicants' late mother was distributed to the deceased pursuant thereto. The applicants contend that the legislation upon which that judgment was determined is discriminatory and unconstitutional. These contentions appear to have been raised by the applicants under case No. 21/2011 and were dealt with by the late DUKADA J in his judgment.

³ Paragraph 16 of the founding affidavit.

[10] Section 1 (1) (a) of the Intestate Succession Act 81 of 1987 (the Act) provides:

“1. **Intestate succession.** – (1) If after the commencement of this Act a person (hereinafter referred to as the “deceased”) dies intestate, either wholly or part, and-
(a) is survived by a spouse, but not by a descendant, such spouse shall inherit the
intestate estate;”

[11] It is common cause that the third respondent is the surviving spouse of the deceased. As sisters of the deceased, the applicants do not qualify as “descendents” of the deceased. The entitlement of the third respondent as surviving spouse to inherit the estate of the deceased is prescribed and protected by the provisions of s1 of the Act. No factual or legal basis exists for the claim made by the applicants in paragraph 16 of the founding affidavit.

[12] In my view, the applicants have failed to demonstrate a clear right to the relief sought.

[13] In the circumstances, there is merit in the point of law raised by the second and the third respondents in opposition to the application. On their own papers, the applicants cannot succeed and the application falls to be dismissed. There is no reason why costs should not follow the result.

[14] The following order is issued:

“The application is dismissed with costs.”

RWN BROOKS

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the applicants: MR H N MHONGOZELI
of H N MKHONGOZELI ATTORNEYS,
MTHATHA

For the second and

third respondents: ADV. AM BODLANI
instructed by VV MSINDO &
ASSOCIATES, MTHATHA