

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: A199/2009

In the appeal between:

MALITABA REBECCA PHOKONTSI
LIKELELI ELIZABETH SEBOLAI

1st Appellant
2nd Appellant

and

KHATSE EVELYN SEBOLAI

Respondent

CORAM: EBRAHIM, J *et* LEKALE, AJ

JUDGEMENT: LEKALE, AJ

HEARD ON: 31 JANUARY 2011

DELIVERED ON: 24 FEBRUARY 2011

INTRODUCTION

[1] This is an appeal against the judgment of the Kroonstad Magistrate's Court in an application for an interdict *pendente lite*. The parties agreed that the said judgment also disposed of the relevant action.

[2] The appeal proceeds without the benefit of any Heads of

Argument from the respondent party and is, as such, unopposed.

BACKGROUND

[3] The appellants, who are blood sisters, issued summons during 2008 against the respondent, their sister-in-law, for an order directing her to either transfer a certain property to themselves and to register it in their names as well as hers as co-owners or to pay them an amount of R20 000,00 each in respect of the said property.

[4] The appellants, further, simultaneously launched an application for an order, *inter alia*, restraining the respondent from alienating or burdening the said property pending finalisation of the action on the basis that they each have undivided equal shares in the relevant property by virtue of the fact that they, together with the respondent's late husband, inherited the property from their late sister who died intestate on the 23 December 1998.

[5] The respondent, on her part, defended the action and

opposed the application on the basis that:

5.1 the property in question was inherited by and transferred to her late husband, to whom she was married in community of property, on the 8 September 2006 in terms of the provisions of section 23 of the Black Administration Act, no. 38 of 1927 (“the Act”);

5.2 her husband died intestate and she became entitled to the said property by virtue of marriage in community of property and inheritance in terms of the law of intestate succession.

[6] The parties, further, agreed on the facts on which the court below based its decision. The court *a quo*, eventually, issued judgment against the appellants to the effect that they have no right or claim to the relevant property. It is against this decision that the appeal lies.

[7] The question which the court *a quo* had to determine was whether or not the two appellants inherited equal undivided shares in the property together with their late brother when their late sister passed away intestate.

APPELLANTS' CONTENTIONS

[8] The gravamen of the appellants' contentions, both in the Notice of Appeal and the Heads of Argument delivered for and on their behalf, is that the court below erred, in law, in its interpretation of the decision of the Constitutional Court in **BHE AND OTHERS v MAGISTRATE, KHAYELITSHA AND OTHERS AND TWO OTHER CASES** 2005 (1) SA 580 (CC) (the Bhe-decision) with regard to the retrospectivity of an order declaring section 23 of the Act, and the Regulations made thereunder, as well as the rule relating to male *primogeniture* unconstitutional and invalid.

[8] The appellants maintain that according to the said judgment the order declaring the said provisions invalid applies retrospectively to the 27th April 1994 and was, as such, operative as at the 8th September 2006 when the respondent's late husband received transfer of the property.

[9] They, further, contend that ownership in the property had not yet passed to the respondent's late husband when the said order was made by the Constitutional Court during 2005.

THE JUDGMENT OF THE COURT A QUO

[10] The court below found that the argument that the Bhe-decision applies to the present matter because the transfer of the property to the respondent's late husband took place in 2006, did not hold water. The magistrate held that:

“Hierdie argument kan nie reg wees nie, aangesien die vraag nie is, wanneer die oordrag plaasgevind het nie, maar eerder, wanneer die genoemde Queen Phokontsi gesterf het en sodoende ‘n gestorwe boedel sou nalaat.

Die verdeling van die genoemde boedel het reeds ter sprake gekom in 1998 toe die Grondwethof nie beslis het oor die genoemde Regulasies en Artikel 23 nie en dus die genoteerde beginsel *primogeniture*-beginsel steeds van toepassing sover dit die bereddering van die boedel aangaan ...”

AN ORDER OF THE CONSTITUTIONAL COURT

[11] The real legal issue raised by this appeal relates to the proper interpretation of the relevant orders in the Bhe-decision insofar as the appellants do not agree with the construction placed on them by the court *a quo*.

[12] The orders in question read as follows:

“2. Section 23 of the Black-Administration Act, No. 28 of 1927 is declared to be inconsistent with the constitution and invalid.

3. The Regulations for the Administration and Distribution of the Estates of Deceased Blacks (R200) published in Government Gazette No. 10601 dated 6 February 1987, as amended, are declared invalid.

4. The Rule of male *primogeniture* as it applies in customary law to the inheritance of property is declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property.

...

8. In terms of section 172(1)(b) of the Constitution, the orders in paragraphs 2, 3, 4, 5 and 6 of this order, shall not invalidate the transfer of ownership prior to the date of this order of any property pursuant to the distribution of an estate in terms of s 23 of the Black Administration Act 38 of 1927 and its regulations, unless it is established that when such transfer was taken, the transferee was on notice that the property in question was subject to a legal

challenge on the grounds upon which the applicants brought challenges in this case.

9. In terms of section 172(1)(b) of the Constitution, it is declared that any estate that is currently being administered in terms of s 23 of the Black Administration Act 38 of 1927 and its regulations shall continue to be so administered, despite the provisions of paras 2 and 3 of this order, but subject to paragraph 4, 5 and 6 of this order, until it is finally wound up.”

(See Bhe-decision at 633g-j and 634e-g.)

INTERPRETATION OF COURT ORDER

- [13] In its technical legal usage the word “**judgment**” refers to the formal order drawn up by the Registrar of the court and embodied in a separate document signed by him. The court order as embodied in that document gets served by the Sheriff on the respondents and constitutes the substantive order which can be appealed against and not the reasons for the judgment. (See **ADMINISTRATOR, CAPE AND ANOTHER v NTSHWAGELA AND OTHERS** 1990 (1) SA 705 (A).)

- [14] The effect of a court order is ascertained by giving words their

natural and ordinary meaning as the case is when interpreting other documents. (Compare **FIRESTONE SOUTH AFRICA (PTY) LTD v GENTICURO AG** 1977 (4) SA 298 (A) at 304D-H.)

- [15] The order must be read as a whole with reference to its context and objects. (See **SIMON NO AND OTHERS v MITSUI AND COMPANY LTD AND OTHERS** 1997 (2) SA 475 (WLD).

FINDINGS

- [16] In *casu* it is clear from the judgment of the court below and submissions made by Mr Van Rooyen for the appellants that:

16.1 but for the provisions of section 23 of the Act and the application of the rule of male *primogeniture* the appellants would have inherited the property jointly with the respondent's late husband and acquired equal and undivided shares therein in terms of the common law of intestate succession;

16.2 the respondent's late husband received transfer of the

property after the Bhe-decision had been made, viz in 2007. The said decision was reported in 2005;

16.3 the relevant property had already been sold for R60 000,00 to a third party at the time of the judgment of the court *a quo* with the proceeds being kept in an interest-bearing trust account held by an attorney;

16.4 the decision of the court *a quo* is based on the Magistrate's understanding of the retrospectivity of the relevant order of the Constitutional Court;

16.5 in the understanding of the Court below the determinative date for the application of the Bhe-decision is the date on which the deceased, whose estate is in issue, passed away and not the date on which the transfer of the property passed to the heir;

16.6 in the Magistrate's view, when the Bhe-decision was made, the defendant's husband had already inherited the relevant property on the basis of the Rule of male *primogeniture* and section 23 of the Act;

16.7 the Magistrate, further, understands the relevant order in the Bhe-decision as being prospective and not retrospective insofar as the court *a quo* found as follows:

“Selfs die Grondwet hof tydens die 2005 Bhe-saak, het moontlike probleme in die vooruitsig bespuur en in terme van Artikel 172(1)(b) van die Grondwet beslis dat hierdie uitspraak nie terugwerkend sal wees nie en sal alle swart intestate boedels voor hierdie saak en wat nog nie ten volle beredder is nie, ingevolge die ou bedeling voltooi moet word.”

(See p 56 – 57, record.)

16.8 The Magistrate, further, specifically found that the Bhe-decision was not applicable to the matter before the court *a quo*.

[17] The court *a quo*, with respect, appears not to have read the judgment in the Bhe-decision as a whole in order to appreciate its effect and application.

[18] In our view a proper construction of the relevant order requires one to look at, *inter alia*, the reasoning of the Constitutional Court and its findings on, at least, the retrospective application of the specific orders.

[19] In paragraph [126] of the relevant decision the Constitutional Court found that:

“... 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.”

(See p 630H-I of the Bhe-decision.)

[20] As correctly submitted by Mr Van Rooyen the Constitutional Court, further, summarised the position with regard to retrospectivity as follows:

“[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 the manner inconsistent with this judgment, shall not be invalidated by the order of invalidity in respect of s 23 of the Act and its Regulations.”

(See p 631G-H of the Bhe-decision.)

[21] Having made the above findings on, *inter alia*, retrospectivity, the court proceeded to make the orders set out in paragraph [12] of this judgment.

[22] It is clear from the Bhe-decision that the court *a quo* misdirected itself and erred on the question of law in, *inter alia*, finding that the Bhe-decision was not applicable in the present matter and that it does not apply retrospectively.

[23] The court in the Bhe-decision only qualified the retrospectivity of the orders so as to ensure that the orders of invalidity were just and equitable as contemplated by Section 172(1) of the Constitution.

[24] A proper interpretation of the relevant orders show, in our view, that the date of transfer of property and not the date on which the deceased, whose estate is in issue, passed away is the determining factor for the application of the Bhe-decision. The foregoing is borne out by the following findings in the

judgment of the Constitutional Court:

24.1 the relevant orders of invalidity do not invalidate a transfer of property which took place prior to the Bhe-decision where the primogeniture heir took transfer without knowledge that the property in question was the subject of a constitutional challenge in the context of the *primogeniture* rule and the provisions of Section 23 of the Act;

24.2 estates which were being administered in terms of Section 23 of the Act and its Regulations as at the date of the Bhe-decision remain immune from the effect of the invalidation of that section and its regulations until they are finally wound up;

24.3 the invalidation of the *primogeniture* rule, however, affects such estates only to the extent to which that rule excludes or hinders women and children of the deceased born out of wedlock from inheriting property with the result that:

(a) women and children of the deceased born out of wedlock are not excluded from inheriting property from such estates;

(b) although the administration and distribution of such estates continue to take place in terms of the Act and its regulations, women and children of the deceased born out of wedlock are not prejudiced and may be identified as heirs in accordance with the Intestate Succession Act 81 of 1987 read with orders 5 and 7 in the Bhe-decision.

[25] The Bhe-decision is applicable to the dispute between the parties in this appeal because the respondent's late husband took transfer of the property after the date of that decision. The appellants thus inherited equal undivided shares in the property together with the respondent's late husband in terms of the law of intestate succession when their sister died intestate.

[26] Mr Van Rooyen asked for an order for payment, to each appellant, of *a pro rata* share of the interest which accrued to the proceeds of the sale of the property invested in the interest-bearing trust account as at the date of final payment. Details of the name of the account, its number as well as the

bank at which it is held are, however, not before the court.

[27] It is, thus, not possible for the court to identify the relevant account for the purposes of making an appropriate order. The relief sought in the summons includes interest at the rate of 15,5% per annum from the date of summons to the date of payment.

(See page 6 of the record.)

[28] The foregoing was the relief sought when the court below made the impugned decision. It is, thus, the prayer which was properly before the court *a quo* and, ergo, which is before this court.

ORDER

[29] In the result the appeal succeeds with costs.

[30] The judgment of the Court *a quo* is set aside and, in its place and stead, is substituted the following order:

“1. Plaintiffs’ claim succeeds;

2. The defendant shall pay the plaintiffs R20 000,00 each together with interest at the rate of 15,5% per annum from the date of summons to the date of final payment;
3. The defendant shall pay plaintiffs' costs in respect of the action under case no. 2966/2008 and the interlocutory application on a scale as between party and party."

L. J. LEKALE, AJ

I concur.

S. EBRAHIM, J

On behalf of the appellants:

Mr. B. C. van Rooyen
 Instructed by:
 Quinton Grimbeek Attorneys
 BLOEMFONTEIN

On behalf of the respondents: No appearance

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