

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 3339/2001

In the matter between:

MMAMOLELEKI ANNA LEBOEA

Plaintiff

and

MOEKETSI HAGGAI LEBOEA

First Defendant

DUNCAN THINYANE LEBOEA

Second Defendant

MOTSELISO ROSE MOGOTSI

(born LEBOEA)

Third Defendant

THE MAGISTRATE LADYBRAND N.O.

Fourth Defendant

JUDGMENT: KRUGER J

HEARD ON: 31 AUGUST, 1 & 3 SEPTEMBER 2004

DELIVERED ON: 23 SEPTEMBER 2004

[1] Plaintiff claims payment of R764 996,90 and R226 628,46 from second defendant, together with interest on those amounts from 7 December 1998.

[2] Plaintiff's claim flows from her entitlement to share in the joint estate between her and first defendant, (her former husband) and in particular, to share in an inheritance.

[3] Plaintiff was married to first defendant in community of property and they were divorced in this Court on 23 February 1999. The divorce order reads as follows:

“1. Dat die huweliksband tussen eiser en verweerderes hierby ontbind word.

2. Dat die gemeenskaplike boedel van die partye verdeel word met dienverstande dat verweerder se regte voorbehou word met betrekking tot enige erflating of erflatings voortspruitend uit die dood van wyle Matsebiso Dinah Leboea en wyle Nathan Sellalane Leboea welke eiser en/of die gemeenskaplike boedel mag toekom of toegekom het en sal hierdie bevel in geen opsigte 'n beperking wees op verweerderes se regte en/of locus standi nie rakende enige aansoek of aksies wat sy in hierdie verband mag beoog en/of instel, ten einde haar aandeel hieromtrent te vorder.

3. Dat elke party sy of haar eie koste betaal.”

[4] The court order contemplates the inheritances from Matseliso Dinah Leboea (“Matseliso”) and Nathan Sellalane Leboea, (“Sellalane”) who were the parents of the first three defendants, who were their only children, the second defendant being the eldest son. The fourth defendant does not oppose the relief sought and filed no pleadings. I refer to the first to third defendants as the defendants. Matseliso and Sellalane were married on 11 July 1959 at Senekal and under “remarks” their marriage certificate contains the following:

“In community of property and of profit and loss in terms of section 22(6) of Act no. 38 of 1927.”

above the signature of the Methodist Reverend.

[5] Matseliso died on 15 September 1996, and Sellalane on 24 July 1997.

- [6] On 15 August 1997 the fourth defendant, the magistrate, Ladybrand, appointed the second defendant as representative of the estate of Sellalane in terms of regulation 4 (1) of the regulations under section 23 (10) of the Black Administration Act 38 of 1927. Regulation 4(1) reads as follows:

“For the administration and distribution of any property in the estate of a deceased Black referred to in regulation 2 the appointment of an executor shall not be necessary; provided that whenever the magistrate in whose area of jurisdiction the deceased Black ordinarily resided considers it desirable, he may issue a certificate to any person whom he may deem suitable, appointing him to represent the estate and to assume responsibility for the payment of debts, the collection of assets and the general administration and distribution of property. Such a certificate shall be issued in any case where it is necessary to pass transfer to any person of immovable property, not being land in a location held under quitrent conditions, registered in the name of the deceased.”

- [7] The minutes of the investigation conducted by the fourth defendant are attached to the particulars of claim. The

second defendant reported the estate. On the form he states:

“Ek maak aanspraak as regmatige erfgenaam omrede: ek die oudste seun is.”

[8] The second defendant caused first and final distribution accounts to be drawn.

[9] Sellalane died prior to the winding up of the estate of his wife, Matseliso, but First National Bank, who drew the accounts, simply listed all assets.

ESTATE OF MATSELISO & SELLALANE

[10] Annexure “E” gives details of the estate of Matseliso. It states at p. 5 thereof (p. 27 pleadings):

“Balance for distribution: R6 375 975.19.”

[11] That amount is then distributed amongst the first three

defendants in terms of a redistribution agreement signed on 2 June 1998 as follows:

- (i) Second Defendant: Fixed property and a motor vehicle valued at R4 028 300.00
- (ii) First Defendant: BMW motor vehicle valued at R64 000,00.
- (iii) Third Defendant: Household furniture and effects valued at R200 000,00.
- (iv) Second Defendant: Residue of assets in the estate of Matseliso: R2 086 675,19

[12] The plaintiff says that, but for the redistribution agreement, the communal estate of Matseliso and Sellalane would have devolved upon the first, second and third defendants and the surviving spouse in equal shares in terms of the provisions of section 1(1)(c) of the Intestate Succession Act, 81 of 1987.

[13] There is no evidence that anyone – nor one of the defendants, nor the magistrate to whom the estate was reported, nor First National Bank who drew the estate accounts, ever contemplated that the Intestate Succession Act applied. The third defendant testified that she was satisfied with her inheritance. Firstly because the second defendant was always active in the business of their parents and managed everything there. Secondly she said, according to “our Sotho custom” the eldest son gets everything after the death of the parents.

WAS THE MARRIAGE OF SELLALANE AND MATSELISO IN COMMUNITY OF PROPERTY?

[14] The defendants allege that Matseliso and Sellalane were not married in community of property as the marriage certificate purports to state. The defendants say that it is a mandatory requirement of section 22(6) that in order for a marriage of Black persons under Act 38 of 1927 to be one in community of property there must be a joint declaration before a

magistrate, commissioner or marriage officer that it was the intention and desire that community of property and profit and loss shall result from the marriage. They say in their plea:

“No such formal declaration took place at least one month prior to the marriage ceremony. Defendants plead that the marriage ceremony in the church was done because of the parties’ adherence to the Christian faith, but that all the customary principles of lobolo agreement and traditional ceremony were adhered to.”

[15] Section 22(9) upon which the defendants rely in this respect reads as follows:

“Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between a husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, commissioner or marriage officer (who is hereby authorised attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall resolve from their marriage except as regards any

land in a location held under quitrent such land shall be excluded from such community.”

[16] The plaintiff says that one must accept what is stated on the certificate and that the marriage was one in community of property.

[17] The defendants fundamentally misread section 29(6). It does not say that the declaration should take place at least a month before the marriage, it says within a month before the marriage. This means that at any moment prior to the marriage such declaration can be made before the marriage officer who is appointed for such purpose in terms of section 22(6). “Within” according to the Shorter Oxford English Dictionary means: “before the end of (a period); between the beginning and end of (a period)”. The Afrikaans text makes this even clearer, which states: “te enige tyd binne een maand voor die bevestiging van daardie huwelik”. Thus this point has no merit and it must be accepted that the parties were married in community of property.

**DOES THE FACT THAT MATSELISO AND SELLALANE ALSO
ENTERED INTO A CUSTOMARY MARRIAGE HAVE A
BEARING ON THE CIVIL LAW MARRIAGE?**

[18] The next issue is the fact that Matseliso and Sellalane also entered into a traditional marriage. By making the declaration before the marriage officer in terms of section 22(6) of Act 38 of 1927 that it is “their intention and desire that community of property and profit and loss shall result from the marriage” the intending spouses expressly departed from the consequences of the customary marriage. As Seymour puts it:

“By contracting a marriage by civil rites, the spouses thereby irrevocably assumed a nuptial status under the law of the land, and all matters of status arising out of the marriage were dealt with under that law, namely the consequences and dissolutions; ... and the property rights both of the spouses and the children ...”

(Seymour, **Customary Law in Southern Africa**, 5th Edition (1989) by J.C. Bekker at 251)

[19] Seymour also says that “even after the death of both parents, the children of a civil marriage continued to enjoy a status under the law of the land, and all matters pertaining to their status were dealt with under this system.” (*loc.cit*).

[20] As a matter of interest, reference can be made to the Recognition of Customary Marriages, Act 120 of 1998, which came into operation on 15 November 2000, after the relevant events in this case had taken place. Section 10(1) of Act 120 of 1998 provides that parties to a customary marriage may enter into a civil marriage (under the Marriage Act 25 of 1961) and such marriage is then in community of property, unless the parties stipulate otherwise.

[21] By deciding to get married under civil rights, Matseliso and Sellalane accepted the consequences of a marriage in community of property, and their marriage was governed by

principles of the civil law, not customary law, which they had expressly decided to depart from by contracting the civil marriage and particularly by making the declaration under section 22 (9).

WHAT DID THE DEFENDANTS INHERIT?

[22] Mr Heymans, for plaintiff, submits that the three defendants inherited equally as intestate heirs. He says because the ultimate division was unequal, there was a donation (with reference to the unreported judgment of Hattingh, J in COETZER N.O. vs DIE MEESTER VAN DIE HOOGGEREGSHOF (VRYSTAATSE PROVINSIALE AFDELING) case no. 3083/2001 and 3344/2001 dated 29 November 2001, at pages 9 -10).

[23] Mr Heymans says that repudiation of an inheritance must be express, otherwise there is acceptance. There are, however, cases in which the courts have rescinded adiation due to adiation having taken place in ignorance of the rights

conveyed, nullifying the adiation. (**VAN DER MERWE v DIE MEESTER** 1967(2) SA 714 (SWA); **HITZEROTH v BROOKS** 1965 (3) SA 444 (A), Shrand, **The Administration of Deceased Estates in South Africa**, 3rd Edition (1973)

211. There is no evidence that the three defendants at any time believed, contemplated or were told that the estate devolved in three equal portions upon them. In her evidence under cross-examination the plaintiff *inter alia* said the following:

“Can you just explain to me or give me a reason why you are just claiming against one of the person who inherited from this estate and not from the other two? --- Because everything was inherited by him.”

“I put to you that this is a contradiction to what you have just gave evidence about that indeed the other two, the other sister and the other brother, also received some inheritance. --- Yes, it is because Duncan did give some of the inheritance to them because he is the old one.”

“MR CLAASEN: I also do not have clarity in my mind exactly what

is your answer now that you are only claiming against the second defendant, is your answer that he received the whole estate and then he donated some of that which he inherited or received to his brother and sister? --- Yes, that is correct, that is what happened; he inherited everything and after that he gave something to the defendant and also to the third defendant.”

[24] The plaintiff never says that all three the defendants each inherited an equal portion. Her evidence seems to be that the second defendant, the eldest son, had to distribute the assets among the three of them. This was in fact done in terms of the redistribution agreement.

The only other witness who testified – save for formal evidence – was the third defendant who also testified that all three defendant (heirs) were content with the redistribution agreement.

SECTION 15(3) OF THE MATRIMONIAL PROPERTY ACT 88 OF 1984

[25] Plaintiff’s case is that first defendant’s entitlement to one third of the estate of Matseliso and Sellalane was an asset in the joint estate of the plaintiff and first defendant and that the

redistribution agreement was a donation of that asset to the second defendant prohibited by section 15(3)(c) which the plaintiff is now claiming from the second defendant.

[26] Mr Heymans argued that each of the three defendants got one-third and the redistribution agreement constituted an agreement of donation by the first defendant in contravention of section 15(3) of the Matrimonial Property Act, Act 88 of 1984.

[27] Mr Claasen submits that it is now an accepted principle that the Executor receives the assets from the deceased. It is the Executor who distributes these assets and delivers these assets to the heirs. Before delivery or registration, there are no assets in the estate of the heirs. They only have a *ius in personam*, i.e. a right to claim delivery of an inheritance. See **ESTATE SMITH v ESTATE FOLLETT**, 1942 AD 364 at 383; **CIR v ESTATE CREWE AND ANOTHER**, 1943 AD 656 at 692; **GREENBERG v ESTATE GREENBERG**, 1955 (3) SA 361 (A) at 364 G - H.

[28] An intestate inheritance is only a competence (entitlement) and not a right. A beneficiary only acquires a right if he accepts the benefit. See **WESSELS N.O. v DE JAGER EN 'n ANDER NNO** 2000 (4) SA 924 (SCA) par. 6

[29] There is no evidence that the first defendant accepted the right (to a third of the intestate of his parents). Thus, so Mr Claasen argues, section 15(3) does not become relevant, because it deals with assets. He says that a mere competence to accept a right is not even a personal right, let alone an asset.

[30] Mr Heymans, on the other hand, says that section 15 of the Matrimonial Property Act is aimed at protecting the interests of the parties and in particular the wife in a marriage in community of property (with reference to Schäfer, **Family Law Service**, Part B, Matrimonial Property pp. 19 – 20.

[31] Mr Heymans says that section 15(3)(c) deals with any asset

of the joint estate whether immovable, movable, corporal or incorporeal. Mr Heymans says an inheritance that can be claimed has value and it should therefore, in terms of the Matrimonial Property Act be interpreted as an asset. Mr Heymans refers to section 15(3)(b)(ii) which refers to an inheritance bequeathed to the other spouse. The other spouse may in terms of section 15(3)(b)(ii) receive any money due to or accruing to the other spouse by way of such inheritance. However, section 15(3)(c), upon which the plaintiff relies says that no asset in the estate may be donated to another person.

- [32] It is plaintiff's case that a spouse who did not give consent for any donation or alienation as required by section 15 has the right to reclaim such donation even against third parties. Plaintiff relies on the *dictum* of Maritz J in **BOPAPE AND ANOTHER v MOLOTO** 2000 (1) SA 383 (T) at 387 A:

"To accomplish a lawful donation or an alienation without value, the consent of both spouses is required. When it is clear that

such consent is absent, the alienation cannot be lawful. In my view it follows of necessity that such alienation is void.”

And at 388 F – G:

“The moment the *causa* for the acquisition falls away, it follows of necessity in my view that the particular asset or assets must return whence it or they came, being the joint estate.”

[33] It should be noted that in the **BOPAPE** case the two spouses jointly claimed the asset from the defendant being money of the joint estate spent by the second plaintiff on his paramour (the defendant).

[34] Mr Heymans takes that argument further and submits that plaintiff, as former spouse in the community of property, by virtue of her rights reserved in the decree of divorce she obtained against the first defendant, can now ask the Court to declare the donation which the first defendant made to the second defendant void and that the money be returned to her.

**WAS THE MONEY CLAIMED BY PLAINTIFF EVER AN ASSET
IN THE JOINT ESTATE OF PLAINTIFF AND FIRST
DEFENDANT?**

[35] The central question appears to be whether the money which the plaintiff claims was ever an asset in the joint estate. Once that question is answered one can consider the question whether she is entitled to claim it from the second defendant.

[36] Although Matseliso and Sellalane were married in community of property their estates were reported to the magistrate, who dealt with them under Act 38 of 1927. This appears from the appointment of the second defendant as representative of the estate and his claim to the inheritance by virtue of being the eldest son, is recorded in the documentation by the fourth defendant, the magistrate Ladybrand. The fact that the estate was so administered is confirmed by plaintiff's evidence referred to above that the second defendant got all

and then distributed it to the others. On plaintiff's allegations in the pleadings the first defendant got one third then gave it to the second defendant, thereby contravening section 15(3) (c). There is simply no evidence to establish that that ever happened.

[37] The liquidation and distribution account, drawn by First National Bank, states that Matseliso and Sellalane were married in community of property – there is however no distribution – those documents refer to the redistribution agreement. Mr Heymans said that the sole purpose of the liquidation and distribution account was to determine the fee of First National Bank. That accords with the other evidence. The estate was never administered as one in community of property.

[38] Plaintiff's case is based on how the estate should have been administered, namely that each of the three defendants should have got one third.

[39] That never happened. If the estate had been so administered, one third (roughly speaking) would have been allocated to the first defendant. That never became an asset in his estate because the estate was never so administered. If the estate of Matseliso and Sellalane had been so administered, the first defendant would possibly have had an entitlement; that however never happened. Then there was also the redistribution agreement.

THE REDISTRIBUTION AGREEMENT

[40] Accepting that the marriage of Matseliso and Sellalane was one in community of property, the question arises whether the three defendants were entitled to enter into the redistribution agreement. A redistribution agreement will not be sanctioned by the Court if the heirs disagree, and if the redistribution agreement goes against the wishes of the testator and varies the terms of the will.

DE WET v DE WET AND OTHERS 1951 (4) SA 212 (C) at 218; BYDAWELL v CHAPMAN N.O. AND OTHERS 1953 (3) SA 514 (A) at 524.

[41] In this case, however, there is no will. There are no wishes of a testator.

[42] Mr Heymans relies on section 15 to say the redistribution agreement is invalid because it takes away rights which would have existed, had the estate devolved under section 1(1)(c) of the Inheritance Succession Act.

[43] There was never an asset in the joint estate which the first defendant could donate to any person. There was at best for plaintiff possibly an entitlement to an inheritance, which the first defendant never accepted, as is evidenced by the redistribution agreement. There was no obligation on first defendant to accept an inheritance. It has not even been proved that first defendant was entitled to the inheritance plaintiff alleges. For that reason plaintiff's claim under section 15(3) has to fail.

DELICT

[44] Plaintiff also failed to make out a case in delict. She has not

shown that the second defendant performed any unlawful act. There is no allegation of wrongfulness on the part of the second defendant. It is not plaintiff's case that second defendant entered into the redistribution agreement with the intent to wrongfully deprive her of her rights. Her evidence is that the second defendant was unaware of her marital problems and certainly there was no evidence to show that the second defendant was aware of the agreement in the order of court or that she was claiming an entitlement to the inheritance. That makes any delictual claim untenable.

ENRICHMENT

[45] An heir who has been paid too much is liable to another heir on the basis of enrichment. A *condictio indebiti* will lie against any person, legatee or heir who has been paid more than he should have been out of the assets of the deceased - **LAING v LE ROUX** 1921 CPD 745 at 748. But in this case there is simply no basis on which the plaintiff can claim that she was impoverished. She could not have been impoverished because if the first defendant had no right she

had even less of a right. She is not an heir. No enrichment claim can stand. There was no wrongful distribution.

[46] This is not a claim for breach of contract against the first defendant. Plaintiff claims payment only from the second defendant. Plaintiff has failed to make out a case.

[47] Plaintiff's claims are dismissed with costs.

J.

A KRUGER,

On behalf of Plaintiff:

Advocate P Heymans
Instructed by
AP Pretorius en Vennote
BLOEMFONTEIN

On behalf of Defendants:

Advokate JY Claasen
Instructed by
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