

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

“REPORTABLE”

**THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

Case No.: **A117/2024**

Before **ALLIE, J et HENNEY, J et NUKU, J**

Hearing: **16 August 2024**

Judgment Delivered: **3 September 2024**

In the matter between:

THE EXECUTIVE MAYOR OF THE CITY OF CAPE TOWN Appellant

And

**THE DIRECTOR OF PUBLIC PROSECUTIONS:
WESTERN CAPE** 1st Respondent

BABSY NTAMEHLO 2nd Respondent

JUDGMENT ELECTRONICALLY DELIVERED ON 3 SEPTEMBER 2024

ALLIE, J:

1. This is an appeal against the paragraph 3 of the following orders that the court *a quo* made *mero motu*, which orders were made at the end of Sentence Proceedings in the criminal trial of the State against Babsy Ntamehlo:

- “1. The patrimonial benefits of the marriage between the accused and the deceased in respect of the property referred to as 9[...] O[...] Street, Fisantekraal, Durbanville are forfeited to the accused in favour of the only child, L T[...].*
- 2. Advocate Zuko Mapoma, a practising Advocate at the Cape Bar is appointed as curator ad litem for the child, L T[...], at State’s cost.*
- 3. The Mayor of the City of Cape Town shall, without undue delay, ensure the establishment of a Trust for the benefit of the minor child, L T[...], and assist in upholding the rights of the minor child of freehold ownership of the property referred to as 9[...] O[...] Street, Fisantekraal, Durbanville, in trust, as envisaged and in the spirit of Chapter 13: Upgrading of Informal Settlements, National Department of Housing dated 14 October 2004, pages 18 to 29 and to take all necessary steps and ancillary for the full realisation of this objective.*
- 4. The Premier of the Province of the Eastern Cape shall within 30 days of this order trace the remains of the deceased, N[...] T[...], buried within the boundaries of the Province of the Eastern Cape, and shall immediately take all the necessary steps to ensure that the minor child, L T[...] as well as Nonkuthalo’s family visit such grave as part of their emotional and psycho-social therapy as advised by the Social Worker, Katleho Phiri.*
- 5. The Director-General, National Department of Social Development, is ordered to provide all the necessary resources, human and otherwise, to support Ms Katlego Phiri, and all other necessary professionals in assisting the minor child with his emotional, psycho-social and other needs within their mandate as may be necessarily required.*

6. *The State, the curator ad litem, the Mayor of the City of Cape Town, the Premier of the Province of the Eastern Cape and the Director-General, National Department of Social Development, are granted leave to approach the court on notice should the need arise on the feasibility of the order.”*
2. On 25 August 2023, the Appellant brought an application for leave to intervene as a party in the criminal matter and for leave to appeal in the court *a quo*.
3. On 13 November 2023, the court *a quo* dismissed the application for leave to appeal, on the basis that the application was brought prematurely, but granted the application for leave to intervene.
4. The appellant applied to the Supreme Court of Appeal for leave to appeal.
5. The Supreme Court of Appeal granted the Appellant leave to appeal on 27 February 2024.
6. The grounds of appeal are as follows:
 - 6.1. The court *a quo* as a criminal trial court lacked jurisdiction to grant the order being challenged in this appeal, namely paragraph 3 which orders the Mayor to establish a Trust for the minor child of the deceased and the accused and to assist in having the immovable property transferred to the trustees, which order relies on the order of forfeiture of ownership of the property made in paragraph 1 of the court *a quo*'s orders and is supplemented by paragraph 6 which grants the Mayor leave to approach the court *a quo* should he find the order in paragraph 3 not feasible.
 - 6.2. The court *a quo* made the orders being appealed against in circumstances where the Appellant was not a party to the proceedings before the court *a quo*;

- 6.2. The order of forfeiture of the accused's half share of the immovable property that he co-owns with the deceased is wrong in law and falls to be set aside;
- 6.3. The court *a quo* exceeded its powers in that it performed a function beyond the powers conferred upon it by the Criminal Procedures Act 51 of 1977, section 28(2) of the Constitution of the Republic of South Africa, the Correctional Services Act and the Prevention and Combatting of Trafficking in Persons Act by ordering that the accused forfeit his share of the immovable property and that share be held in trust for the benefit of the said minor child and by making related orders to give effect to those orders;
- 6.4. The court *a quo* impermissibly relied on Section 173 of the Constitution and paragraph 64 of the **H v Fetal Assessment Centre**¹ case as grounds upon which it could make the orders complained of. The reliance on section 173 is impermissible because the court *a quo* did not seek to develop the common law nor could it ignore legislation and rely on the Constitution and assume jurisdiction that it is not clothed with.
- 6.5. The criminal trial was not '*a matter concerning the child*' which is a jurisdictional fact required to cause section 28(2) of the Constitution to apply;
- 6.6. The appellant cannot ignore the order of the court *a quo*, for to do so would cause him to be in contempt of court, hence he brings this appeal;
- 6.6. For all the reasons stated in the above grounds of appeal, the Appellant's counsel contended that the court *a quo* lacked jurisdiction.

Facts

¹ 2015 (2) SA 193 (CC)

7. The facts are as follows.
8. The State charged Mr Babsy Ntamehlo with the murder of his wife, one N[...] T[...].
9. They were married and had one child, L N[...], who was a minor at the time when the trial began.
10. The family lived in a house referred to by the court *a quo* as a RDP (Reconstruction and Development Program) house, which is categorised as affordable housing, in Fisantekraal, Durbanville, Western Cape.
11. The house was allocated to the accused.
12. Disputes arose between the deceased and the accused, who wanted the deceased to vacate the house, but she allegedly refused to do so because she was married to the accused and had spent money from the sale of her house towards the household. The deceased allegedly wanted to save the marriage even though the accused did at some stage, move out and live with another woman, for a while.
13. On 26 October 2022, the court convicted the accused, Babsy Ntamehlo of the planned murder.
14. After requesting a Pre-Sentence Report, which the court received, it delivered judgment on sentence on 2 August 2023.
15. At the time of sentencing, the court *a quo* had before it the Pre-Sentence Report and a Victim Impact Report referred to in its reasons for the orders that it made.
16. In the Pre-Sentence Report, the Probation Officer provides the date of birth of the minor child L, namely, 17 August 2005. That means that at the time when

the accused was sentenced on 2 August 2023, his son, L was approximately two weeks away from attaining the age of majority.

17. In the Pre-Sentence Report it is mentioned that since the arrest of the accused, the house in Fisantekraal has been let to tenants and the rent is utilised for the benefit of L. The T[...] family is managing that arrangement.
18. The report also records that L is living with the T[...] (maternal) family who are taking care of him and providing for his needs.
19. One day prior to the hearing of this appeal, Mr Mapoma, an advocate who was appointed as a *curator ad litem* to L, filed a Practice Note informing the Court that L is currently 19 years old and had attained the age of majority in August 2023.
20. Counsel for the Appellant then handed up to this Court a copy of an updated report of a social worker employed by the Department of Social Development, in respect of L.
21. In the social worker's updated report, L's date of birth is given as 14 August 2005. The social worker records that L is residing with his maternal grandmother, her husband, their three children and one grandchild in Delft.
22. The social worker further mentioned that L did not foresee returning to the house in Fisantekraal.
23. In the judgment on sentence, the court *a quo* mentioned that not only is L a victim but his maternal family were also victims.
24. The court *a quo* stated that L has been living with his maternal grandmother and family since the murder and was clearly aware of the fact that L did have a home and did not wish to live in the Fisantekraal house.

25. The court *a quo* provided the following reasons for what follows thereafter as the order in paragraph1:

“The accused must be found on policy considerations, to lack the capacity to benefit from the person whom he has unlawfully killed. The accused is also unworthy to retain his share of 9[...] O[...] Street, Fisantekraal. The time has arrived, in my view, based on reasonableness, fairness and public policy considerations as factors, to determine whether a spouse should be declared unworthy to receive his or her half-share of the estate as a result of his or her own wrongdoing, as a necessary quantum leap in the fight against gender- based violence especially where it includes the killing of another....The unworthy spouse principle is already part of our law. Section 9(1) of the Divorce Act (Act 70 of 1979) provides that when a decree of divorce is granted on the grounds of irretrievable breakdown of the marriage the court may order that the patrimonial benefits of the marriage be forfeited....”

26. The court *a quo* found support for what it thought was the development of the common law with regard to forfeiture of the benefits of the marriage on death of a spouse and with regard to a convicted murderer not inheriting from his victim in section 173 of the Constitution and in the case of *H v Fetal Assessment Centre*, a case that concerned a civil claim brought by a mother on behalf of a child. In the *Fetal* case it was common cause that the case was a matter involving the child.
27. The court *a quo* then went on to explain that the paternity of the father of the deceased, and the paternity of the father of the accused were in doubt and that had caused the child, L to have an identity crisis. The court *a quo*, then concluded that the issue of grandfathers’ paternity had the potential to deny the child a home.
28. It is not certain whether the court *a quo* meant to convey that the child could be denied a physical, bricks and mortar home or a familial bond type of home.

29. With regard to the bricks and mortar, family home, the Probation Officer and the Social Worker both make clear that L is not living in that house and it would appear that he did not want to live there.
30. With regard to a familial bond “home”, it is also clearly stated in both the report on Pre – Sentence and the Victim Impact Report, recorded by the court *a quo*, that L had found physical and emotional support and a family home with his maternal grandmother and her family.

Applicable Law

31. In **NDPP v Zuma**,² the Supreme Court of Appeal considered the proper exercise of judicial function when adjudicating cases that it is seized with as follows:

“[15] It is crucial to provide an exposition of the functions of a judicial officer because, for reasons that are impossible to fathom, the court below failed to adhere to some basic tenets, in particular that in exercising the judicial function judges are themselves constrained by the law. The underlying theme of the court’s judgment was that the judiciary is independent; that judges are no respecters of persons; and that they stand between the subject and any attempted encroachments on liberties by the executive (para 161-162). This commendable approach was unfortunately subverted by a failure to confine the judgment to the issues before the court; by deciding matters that were not germane or relevant; by creating new factual issues; by making gratuitous findings against persons who were not called upon to defend themselves; by failing to distinguish between allegation, fact and suspicion; and by transgressing the proper boundaries between judicial, executive and legislative functions.”

² National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)

32. At paragraph 19, the Supreme Court of Appeal went on to discuss the limits on the exercise of judicial powers:

“[19] The independence of the judiciary depends on the judiciary’s respect for the limits of its powers. Even if, in the words of the learned judge, the judiciary forms a ‘secular priesthood’ (para 161) this does not mean that it is entitled to pontificate or be judgemental especially about those who have not been called upon to defend themselves – as said, its function is to adjudicate the issues between the parties to the litigation and not extraneous issues.”

33. Provision for judicial independence is contained in section 165(2), (3) & (4) of the Constitution of the RSA, 1996 as follows:

*“165(2) The courts are independent and subject only to the Constitution **and the law**, which they must apply impartially and without fear, favour or prejudice (emphasis added)*

165(3) No person or organ of state may interfere with the functioning of the courts.

165(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.”

34. The Constitution makes clear in section 171, that all courts operate in terms of National Legislation. It provides as follows:

“171. All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.”

35. In Section 173, the Constitution provides as follows for the courts to exercise its inherent powers subject to certain conditions, namely the interests of justice:

*“173. The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, **and to develop the common law, taking into account the interests of justice.**” (emphasis added).*

36. The purpose of the judiciary in a constitutional democracy is to regulate compliance with the Constitution and constitutionally consonant legislation.
37. Unlike the other arms of government, the judiciary does not command a police force or an army that can enforce its orders.
38. It therefore relies on its legitimacy and society’s respect for the principle of legality and the rule of law, for enforcement of its orders.
39. If it is to retain that legitimacy and credibility, the judiciary must itself demonstrate respect for and compliance with the principle of legality and the rule of law.
40. When judges adjudicate cases that serve before them, they are not performing administrative action but they are exercising public power as an arm of government.
41. In **Albutt**³ the Constitutional Court found that:

“It is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law. More recently, and in the context of section 84(2)(j), we held that although there is no right to be pardoned, an applicant seeking pardon has a right to have his application “considered and decided upon rationally, in good faith, [and] in accordance with the principle of legality”. It follows therefore that the

³ Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC) para 49

exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it.”

42. Following on Albutt, the Constitutional Court decided in **Fedsure**,⁴ as follows concerning the application of the principle of legality and the rule of law in the interim Constitution:

“[58] It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality and the doctrine of legality which is an instance of the rule of law that underpins the South African Constitution. “

43. The Constitutional Court decided in **Pharmaceutical Manufacturers Association of SA** ⁵ that the principle of legality means that the exercise of public power should be neither arbitrary nor irrational.
44. Turning to the doctrine of separation of powers that sets parameters for the exercise of power by each of the three arms of government, the following are relevant considerations.
45. The doctrine of separation of powers, has as its primary objective, the prevention of a concentration of power in any one of the three arms of government, namely the executive, legislature and judiciary in order to prevent oppressive or overbroad consequences in the exercise of state power.

⁴ Fedsure Life Assurance Ltd v Grater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC) para 58

⁵ Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of South Africa [2000] ZACC 1; 2000 (2) SA 674 (CC) (para 20)

46. Each arm of government has the role of providing oversight over the other.
47. **Moseneke DCJ** (as he then was) said as follows in describing separation of powers:

*“Checks and balances ensure that all branches of government are interdependent, and that no single branch may act unilaterally. For example, the President is elected by Parliament and sworn in by the Chief Justice. In other words, the head of the executive is elected by the legislature and sworn in by the judiciary. The judiciary itself is appointed by the executive. And the legislature enacts laws to which the President must assent, and which are subsequently interpreted by the judiciary and whose orders must be enforced by the executive. The branches of government are not in competition with one another. Rather they are symbiotic. They are part of a beautiful mosaic which will work only if we bring all our public goodness to the fore.”*⁶

48. A tension will, undoubtedly exist between the three arms of government in the exercise of their separate powers, but that tension, if it's in conformity with the doctrine of separation of powers and the Constitution, is meant to be a healthy one.
49. The judiciary has been bound to act within the confines of the Code of Judicial Conduct⁷ and it has itself incorporated into the Preamble of its Code of Conduct, the Bangalore Principles of Judicial Conduct, (2001) as revised at the Hague (2002), which has at its core, the following principles:
- a. Independence;
 - b. Impartiality;

⁶ 3 Moseneke D in a speech delivered at the University of the Western Cape, 2015. Available at https://wwwgroundup.org.za/article/separation-of-powers-have-courts-crossed-line_3152

⁷ <https://www.gov.za/documents/notices/judicial-service-commission-act-code-judicial-conduct-18-oct-2012>

- c. Integrity;
- d. Propriety;
- e. Equality;
- f. Diligence;
- g. Competence

- 50. That independence ranks fore-most, is no coincidence. It's a requirement in section 165(2) of the Constitution as well and it commands independence from the judiciary.
- 51. The Bangalore Principles state in relation to the principle of judicial independence that: *Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial.*
- 52. The Bangalore Principles state that the application of the principle of judicial independence should be as follows: *A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.*
- 53. Section 165(2) also makes the judiciary's exercise of power subject only to the Constitution and the law.
- 54. Judges are therefore duty bound to act within the provisions of the Constitution and all applicable law, including legislation.

55. In this instance, the legislation that gives a judge presiding over a criminal trial the power to do so, primarily, is the Criminal Procedure Act 51 of 1977.⁸
56. Section 300 of the Criminal Procedure Act provides for a limited form of compensation to persons who have suffered financial loss as follows:

“(1) Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss:

Provided that-

(a) a regional court or a magistrate's court shall not make any such award if the compensation applied for exceeds the amount determined by the Minister from time to time by notice in the Gazette in respect of the respective courts.

(2) For the purposes of determining the amount of the compensation or the liability of the convicted person therefore, the court may refer to the evidence and the proceedings at the trial or hear further evidence either upon affidavit or orally.

(3) (a) An award made under this section-

(i) by a magistrate's court, shall have the effect of a civil judgment of that court;

(ii) by a regional court, shall have the effect of a civil judgment of the magistrate's court of the district in which the relevant trial took place.

⁸ Sefatsa and Others v Attorney-General-Transvaal and Another 1989(1) SA 821 (A) at 834E

(4) Where money of the person convicted is taken from him upon his arrest, the court may order that payment be made forthwith from such money in satisfaction or on account of the award.

(5) (a) A person in whose favour an award has been made under this section may within sixty days after the date on which the award was made, in writing renounce the award by lodging with the registrar or clerk of the court in question a document of renunciation and, where applicable, by making repayment of any moneys paid under subsection (4)(b) Where the person concerned does not renounce an award under paragraph (a) within the period of sixty days, no person against whom the award was made shall be liable at the suit of the person concerned to any other civil proceedings in respect of the injury for which the award was made.”

57. Clearly, *in casu*, there was no application brought in the court *a quo* by the prosecution nor anyone on behalf of any injured person for an order of the kind contemplated in section 300.

58. The offences for which the accused was charged in the court *a quo* did not include damage to or loss of, property to some other person.

59. I hasten to add, that the consequences of the laws of intestacy, specifically with regard to inheritance concerning the deceased's half share of the immovable property that constituted her home, would apply to the child of the deceased, L.

60. **Van Leeuwen** in his **Censura Forensis** Part 1, Book 3, Ch 4.42 states:

“He who has killed another or has given aid or assistance in the commission of this crime, is unworthy of succeeding to that man by testament or on intestacy and what has been left to him the treasury deprives the murderer of on the ground that he is unworthy of it. But unworthy persons of this kind, as is the case too with other unworthy persons, are regarded by usage as incapable of taking, and what has

been left to them is regarded as not having been left.” (Schreiner’s translation.)

61. Our common law recognises that the maxim: “**De Bloedige Hand Erft Niet**,” namely, the bloody hand does not inherit, would apply to the accused *a quo* who cannot inherit the deceased’s half share of the property.
62. The **Digest** uses the maxim: *nemo ex suo delicto meliorem suam condicionem facere potest* (**D. 50.17.134(1)**) to describe the principle that no one is allowed to improve his condition by his own crime.

63. In paragraph 23 of the judgment of the court *a quo* the following is said:

“A person who kills another, as an economic impact of domestic violence, should not be entitled to benefit from the estate of the person whom he or she has killed. The general principle is that no person may be enriched by his or her own unlawful conduct, or to benefit from conduct that is punishable by law.”

64. From the above-quoted passage, it is not clear whether the court *a quo* was alive to the principle and maxim that already exists in the common law and that has been applied by our courts.
65. It is a recognised common law principle that someone who intentionally and unlawfully murders another, can’t benefit under the will of the deceased nor in terms of the laws of intestacy.
66. There was accordingly no need to develop the common law on that aspect. The section 173 Constitutional power to protect and regulate the court’s own process, and to develop the common law, taking into account the interests of justice, was therefore not required to be exercised by the court *a quo*.
67. Therefore the following words used by the court *a quo* in paragraph 23, quoted above, namely: “ ... as an economic impact of domestic violence’ does not

qualify the legal position with regard to a perpetrator not inheriting when he has murdered the person from who, he stands to inherit.

68. In considering the reasoning in the judgment of the court *a quo*, it is necessary to make a few remarks concerning the need for judicial officers not to stray into the arena of making comments or statements that have the effect of attracting populist rhetoric.
69. Judges must not only be independent and impartial and adjudicate without fear and favour and prejudice but they must also be seen and be perceived to be thus, in order to maintain the legitimacy of the judiciary and respect for the rule of law.
70. The judgment *a quo*, is peppered with references to popular protest songs and slogans like: “*Senzeni na?* (What have we done?) *Wathint’ Abafazi !* (You strike a woman) *Siyaya e Pitoli* (We are marching to Pretoria) *Sefikile e Pitoli* (We have arrived in Pretoria) *Amandla Ngawethu!* (The power is ours)”
71. While the history and import of the above-named protest slogans and songs are fully understood and appreciated by this Court, it is necessary in the exercise of judicial power, to remind ourselves that courts are meant to uphold the law and apply it without playing to a public gallery or the court of public opinion.
72. The protest songs and slogans referred to above, unless they form part of the evidence and facts of the case, have no place in a judgment.
73. While this Court recognises that gender based violence is a scourge on society and that all too often the perpetrator is a person who has or had an intimate relationship with the victim, there are no grounds, on the facts of the case, that served before the court *a quo*, that calls for the development of the common law, to specifically prohibit a person in the position of the accused from inheriting **because** he perpetrated gender based violence on his late wife in an attempt to derive an economic advantage. The common law prohibits him from inheriting anyway because he is not entitled to benefit from his own mischief.

74. If the reference in paragraph 23 of the judgment *a quo*, to domestic violence, is a reference to the evidence that the accused had perpetrated violence on the deceased, prior to the murder, then it is axiomatic that the court *a quo* could not punish the accused for acts of domestic violence that did not form part of the charges for which he was indicted.
75. Turning, once again to the remarks of the court *a quo* concerning the paternity of L's mother and L's father, the following considerations are relevant. It is more likely than not, that L, would inherit his late mother's half share of the immovable property.
76. The court *a quo* referred at paragraph 27 of its judgment on sentence, to the paternity of the child's mother and that of the father and a possible identity crisis for the child. The court however refers only to the aspect of the paternity of the child's parent as being determinative of the child's identity.
77. Paragraph 27 reads as follows:

The true identity of the father is in doubt as regards the father's paternal relations. His elders point to one family as his paternal relatives whilst the accused insisted that his mother told him about a different person as his father, both distinct from Ntamehlo as the father who raised him. It was on the eve of the mother's burial that another family informed the T[...] family that the mother was their blood child and took away the deceased's body. The child learned only after his mother's death that he may not be related by blood to the T[...] family. This is because it is now alleged that the deceased was conceived in a relationship of her mother with another man other than Mr T[...] to whom she was married.

78. Regrettably the reasoning appears to evince a patriarchal understanding of identity. An order that is based on the Court *a quo*'s understanding of who would be the relatives of the minor is not harmonious with a Constitutional democracy where family relations are not limited to paternal relatives of the

mother or of the father or the child. Paragraph 27 harks back to the offensive and thankfully, now repealed, Black Administration Act 38 of 1927.

79. The paternity of the father of the deceased or for that matter of the accused, is irrelevant to the fact that L, if he is the only child of the deceased, should inherit. The court *a quo*'s remarks concerning the paternity of the grandfathers of L are unfortunate and misplaced.
80. The Black Administration Act 38 of 1927 which provided for the administration of deceased estates of black persons for 79 years, has been repealed and with it the patriarchal method of devolution of inheritance based on paternity and primogeniture.
81. In **Bhe and Others**⁹ the Constitutional Court expressed its view on customary law applicable to deceased estates as follows:

“[78] The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.”

82. The **Bhe**, **Shibi** and the **SAHRC** cases declared as unconstitutional and invalid, sections 23(10) (a), (c) and (e) of the Black Administration Act 38 of 1927, as well as Regulation 2(e) of the Regulations of the Administration and Distribution of Estates of Deceased Blacks GN R 200 of 1987 and section 1(4) (b) of the Intestate Succession Act 81 of 1987.
83. The Black Administration Act was finally repealed on 31 July 2006.
84. That Act provided for discrimination on the grounds of race and gender.

⁹ Bhe and Others v Khayelitsha Magistrate and Others 2005 (1) SA 580 (CC)

85. It provided for a separate legislative framework in which estates of black persons were administered even in the case of intestacy which prevented those persons from having the protection of the Intestate Succession Act, that applied to everyone else.
86. The Black Administration Act allowed for devolution of estate assets on the basis of African customary law, which was generally understood and applied as follows: the property in the estate becomes the property of an heir who is determined in accordance with the system of male primogeniture.
87. Under the Black Administration Act, the surviving spouse did not obtain ownership of the property in the estate. Her rights were limited to a personal claim against the male heir.
88. In intestacy, there was no justification for a compulsory and invariable rule of law which had the effect of placing the property to which a woman has a right, under the ownership and control of a male relative of her late husband.
89. The court *a quo* appears to have found the power to implement section 28(2) of the Constitution during the course of sentence proceedings of the accused in the criminal trial by having regard to **H v Fetal** where at paragraph 64, the Constitutional Court held that the Court is obliged to act in the best interests of the child *in all matters concerning the child*.
90. This Court accepts that the conviction of the father for the murder of the mother, does have an impact on the minor child.
91. In cases where it was necessary for the Court to have regard to who would become the child's primary caregiver if his /her surviving parent was sentenced to imprisonment, the best interests of the child would be relevant to the determination of the type of sentence to be imposed on the accused as a primary caregiver of the child.

92. In **Bannatyne**¹⁰ it was held as follows concerning the obligation to consider the best interests of the child:

“[24] The right in question in children’s maintenance matters is contained in section 28 of the Constitution Section 28(2) provides:

‘A child’s best interests are of paramount importance in every matter concerning the child.’

*Children have a right to proper parental care. It is universally recognised **in the context of family law** that the best interests of the child are of paramount importance. While the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents, there is an obligation on the State to create the necessary environment for parents to do so. This Court has held that the State. . . must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28.”* (emphasis added)

93. However, *in casu*, the court *a quo* failed to examine and make a finding on whether the sentence proceedings designed specifically for the punishment of the accused, could be properly considered to be a matter relating to the child.
94. The child is the relative of the deceased most impacted by the murder of his mother but he is neither a party to the criminal trial nor are the proceedings designed to establish what is in his best interests.
95. There would have been many relatives of the deceased who were also adversely affected by her murder, most notably her brother who lived with her as well her mother who now cares for the son of the deceased and the accused.

¹⁰ Bannatyne v Bannatyne (Commission for Gender Equality; as Amicus Curiae) 2003 (2) SA 363 (CC) para 24

96. The factors that courts are implored to consider in imposing a sentence in a criminal trial, include the interests of society. Society, includes the relatives of the deceased. The consideration of those interests are expressed in the sentence imposed and the reasons therefor.
97. There are no legal authorities that have considered what constitutes a matter involving the interests of the child because in all instances where courts have been called upon to make that determination, it was common cause that the matter related to a minor child.
98. The court *a quo*'s views that the accused ought to forfeit the benefits of the marriage between him and the deceased, in that he should forfeit his half share of the property at Fisantekraal, is not based on any substantive legal provision.
99. Once a spouse is deceased, the marriage ends, therefore the Divorce Act and section 9(1) thereof, has no application.
100. Consequently, paragraph 1 of the order of the court *a quo* in the judgment on sentence, namely, the order on the accused's forfeiture of the benefit of ownership of the property, is not based on the principle of legality, is *ultra vires* and falls to be declared null and void.
101. In **Tasima**,¹¹ the Constitutional court discussed the basis of the finding that the first order is wrong in law and the impact that would have on the sustainability of the second order as follows:

189] This Court confronted the issue whether the Government's appeal against the first order was preempted by its attempts to comply with that order and its failure to appeal it timeously. Von Abo explained that, were the first order wrong in law, the second would be legally untenable. The Government's failure to appeal the first order could not prevent the court from reaching a conclusion on the first order. Von Abo said

¹¹ Department of Transport and Others v Tasima (Pty) Limited 2017 (2) SA 622 (CC) at [1890 and [192]

nothing about the rights of parties to ignore a court order. Nor did it take a view on whether a court must ignore the injury to the rule of law suffered when a party ignores a court order. The same is true of the subsequent decision of the Supreme Court of Appeal in Von Abo II, in which the first order was set aside by the Court.”

102. At paragraph 192, of the Tasima case, the Court goes on to discuss the necessity for a challenge to an invalid order as follows:

“[192] Shifren is to the same effect. The Court there quoted Voet:

‘If a decision is ipso jure void, there is no need of an appeal. Nay the plaintiff can, notwithstanding the judicial decision, set in motion once more the same action, and will by a replication of fraud or of nullity shut out a defence of res judicata which has been raised against him by his opponent. Likewise on the other side a defendant who is sued in the action rei judicatae on a decision ipso jure void will easily evade such action by setting up the nullity.’

The focus here was on what effect an invalid order would have on another court. The point is that the ordinary consequences flowing from res judicata do not apply where the original decision is “ipso jure void”. This does not upset the requirement that a court order must be appropriately challenged in order to be set aside.” (footnotes omitted)

103. In **Matjhabeng**¹² the Constitutional Court held as follows concerning the *audi alteram partem* rule of natural justice and joinder of parties with a direct and substantial interest:

[92] The law on joinder is well settled. No court can make findings adverse to any person’s interests, without that person first being a party to the

¹² Matjhabeng Local Municipality v Eskom Holdings Ltd and Others 2018(1) SA 1 (CC) at [92] to [93]

proceedings before it. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences – including a penalty of committal – for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors’ rights to freedom and security of the person are, in the end, not arbitrarily deprived.

[93] The principles which are fundamental to judicial adjudication, in a constitutional order, were reaffirmed by this Court in its recent decision in Lushaba, where the Court, per Jafta J, endorsed principles stated by Ackermann J in De Lange:

“[F]air procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that . . . the other side should be heard [audi alterem partem], aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law. . . . Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest, like personal freedom, tugs at the strings of what I feel is just, and points in the direction of a violation.” (footnotes omitted)

104. The mayor, the proposed curator *ad litem*, the Premier of the Eastern Cape and the Director- General, National Department of Social Development were not joined as parties to the criminal proceedings in the court *a quo*, nor were they given notice of the court’s intention to make orders compelling them to perform certain obligations that the court *a quo* imposed on them.

105. Section 1(c) of the Constitution of the RSA, 1996, provides not only for supremacy of the Constitution but also that the rule of law is a foundational value of Republic of South Africa.
106. In **De Beer**,¹³ the Constitutional Court held as follows concerning procedural fairness that must be upheld by the courts in complying with the rule of law, prior to making court orders:

“[11] This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected....” (footnotes omitted)

107. Regrettably, the court *a quo*, failed to adopt the well-developed practice of ordering the registrar of the court to bring the content of a judgment and order to the attention of the requisite authorities or role-players and instead chose to order those role-players or persons that were not before the court *a quo*, to perform certain obligations, some of which fall outside those persons’ exercise of power.

¹³ De Beer NO v North- Central Local Council and South-Central Local Council and Other (Umhlathuzana Civic Association Intervening) 2002 (1) SA429(CC) at [18]

108. The mayor can only act within the confines of the powers bestowed on him in terms of national legislation such as: The Municipal Structures Act 117 of 1998; the Municipal Systems Act 32 of 2000; the Disaster Management Act 57 of 2002; the Municipal Finance Management Act (MFMA) 56 of 2003; the Intergovernmental Relations Framework Act 13 of 2005; and the Spatial Planning and Land Use Management Act 16 of 2013.
109. The mayor can also act in terms of the powers granted to him in the following provincial legislation and by-laws: The Trade and Investment Promotion Agency Act 3 of 1996; the City of Cape Town Establishment Notice and the current by-laws made by the City of Cape Town.
110. There is no provision in the municipal budget for the establishment of trusts for minor children and if the mayor were to comply with paragraph 3 of the order *a quo*, he would have to utilise municipal funds in contravention of the MFMA.
111. The order in paragraph 3 effectively compels the mayor to act *ultra vires* or to be in contempt of court by not complying with the order.
112. Paragraph 3 of the order of the court *a quo*, namely the order that the Mayor establish a trust for the child and assist the child in gaining ownership of the property in Fisantekraal, is dependent on paragraph 1, therefore, if paragraph 1 is unsustainable in law, the court *a quo*, equally did not have jurisdiction to make the Order in paragraph 3.
113. The order in paragraph 6 is ancillary to the order in paragraph 3, in that paragraph 6 grants the Mayor and other persons who were not parties to the case and were not before the court *a quo*, the right to approach the court for leave to elucidate the feasibility of the order. Therefore if the order in paragraph 3 falls to be set aside, so should the order in paragraph 6.
114. This Court for the reasons stated herein, finds that the court *a quo* had no jurisdiction to make the following orders that the court *a quo* said were made in the interests of justice:

"In the interests of justice, the court makes the following orders:

- 1. The patrimonial benefits of the marriage between the accused and the deceased in respect of the property referred to as 9[...] O[...] Street, Fisantekraal, Durbanville are forfeited by the accused in favour of the only child, L[...]2 T[...].*
- 2. Advocate Zuko Mapoma, a practicing Advocate at the Cape Bar is appointed as curator ad litem for the child, L[...]2 T[...], at State's costs.*
- 3. The Mayor of the City of Cape Town shall, without undue delay, ensure the establishment of a Trust for the benefit of the minor child, L[...]2 T[...], and assist in upholding the rights of the minor child of freehold ownership of the property referred to as 9[...] O[...] Street, Fisantekraal, Durbanville, in trust, as envisaged and in the spirit of Chapter 13: Upgrading of Informal Settlements, National Department of Housing, dated 14 October 2004, pages 18 to 29, and to take all steps necessary and ancillary for the full realization of this objective.*
- 4. The Premier of the Province of the Eastern Cape shall within 30 days of this order trace the remains of the deceased, N[...]1 T[...], buried within the boundaries of the Province of the Eastern Cape, and shall immediately take all the necessary steps to ensure that the minor child, L[...]2 T[...] as well as N[...]2's family visit such grave as part of their emotional and psycho-social therapy as advised by the Social Worker, Katlego Phiri.*
- 5. The Director-General, National Department of Social Development, is ordered to provide all the necessary resources, human and otherwise, to support Ms Katlego Phiri, and all other necessary professionals in assisting the minor child with his emotional, psycho-*

social and other needs within their mandate as may be necessarily required.

6. *The State, the curator ad litem, the Mayor of the City of Cape Town, the Premier of the Province of the Eastern Cape and the Director-General, National Department of Social Development, are granted leave to approach the court on notice, should the need arise on the feasibility of the order.”*

115. In so doing, the court *a quo* exceeded the bounds of its powers and failed to apply the rule of law and the principle of legality, therefore the orders fall to be set aside on the basis that they are wrong in law and constitute a nullity.

116. The mayor explains in his founding affidavit to the application for leave to appeal to the Supreme Court of Appeal that the reference in Order 3 to: *Chapter 13: Upgrading of Informal Settlements, National Department of Housing, dated 14 October 2004, pages 18 to 29* is a reference to a 2004 National Housing Code that has been replaced by a 2009 National Housing Code. Therefore the order refers to a Code that is no longer applicable and serves to underscore the further danger of making an order against the Mayor in his absence.

117. The issue of awarding costs does not arise in that there is no opposition to this appeal and the Notice of Appeal does not seek a costs order, in any event.

IT IS ORDERED THAT:

1. The appeal succeeds;
2. Paragraph 3 of the order *a quo* , namely , the order that; *The Mayor of the City of Cape Town shall, without undue delay, ensure the establishment of a Trust for the benefit of the minor child, L[...]2 T[...], and assist in upholding the rights of the minor child of freehold ownership of the property referred to as 9[...] O[...] Street, Fisantekraal, Durbanville, in*

trust, as envisaged and in the spirit of Chapter 13: Upgrading of Informal Settlements, National Department of Housing, dated 14 October 2004, pages 18 to 29, and to take all steps necessary and ancillary for the full realization of this objective, is hereby set aside;

3. Orders 1,2, 4, 5 and 6 of the court *a quo* are declared to be nullities.

JUDGE R. ALLIE

HENNEY, J:

I agree.

JUDGE R.C.A. HENNEY

NUKU, J:

I agree.

JUDGE L. NUKU

Appearances:

On behalf of Appellant: Adv Andrew Breitenbach SC
 Adv Kessler Perumalsamy

Attorneys: *Riley Incorporated*

On behalf of 1st Resp: Abides by the decision of the Court

On behalf of 2nd Resp: Abides by the decision of the Court

