



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case No: 5307/2022

In the matter between:

NANDIPHA TSHALI

1st Applicant

LUBABALO TSHALI

2nd Applicant

and

NOKWANELA ABEGAIL NANDI

1st Respondent

THENJIWE MONICA LOLIWE

2nd Respondent

BUZIWE OLGA CHARLIE

3rd Respondent

FIKILE WELCOME TSHALI

4th Respondent

NKOSINATHI SINDEPHI TSHALI

5th Respondent

MDODANA TSHALI

6th Respondent

AVIWE WELILE CHOPHA, N.O.

7th Respondent

(In his capacity as the Executor of Estate
Late NOMPUMELELO VERONICA TSHALI)

No. 002520/2019)

MASTER OF THE HIGH COURT, MTHATHA

8th Respondent

REGISTRAR OF DEEDS, MTHATHA

9th Respondent

JUDGMENT

DAWOOD ADJP:

[1] The applicants herein sought orders in the following terms: -

“1. First and Second Applicants are declared to be the customarily adopted children or descendants of the late NOMPUMELELO VERONICA TSHALI and, consequently are her intestate heirs.

2. That the siblings of the late NOMPUMELELO VERONICA TSHALI, namely the First to Sixth Respondents, are not the intestate heirs of the deceased, and would have been entitled to inherit only if the deceased was not survived by any descendant in terms of Section 1(e)(i) (bb) of the Intestate Succession Act.

Or alternatively to paragraphs 1 and 2 above -

That in the event of a dispute or uncertainty arising in connection with the status of my claim in relation to the deceased whose estate in terms of the Reform of Customary Law of Succession and Regulation of Related Matters Act No. 11 of 2009 devolves in terms of the Intestate Succession Act then the Eighth Respondent, the Master of the High Court, Mthatha be directed, subject to Section 5(2) of the former Act, to make such a determination as may be just and equitable in order to resolve the dispute or remove the uncertainty.

3. That, in the event of the Applicants being declared as the descendants and thereof heirs of the late *Nompumelelo Veronica Tshali*-

- 3.1 the Executor be prohibited from proceeding with the distribution of the deceased's estate according to the Liquidation and Distribution Account which was approved by the 8th Respondent during or about April 2022 to August 2022.
- 3.2 The Redistribution Agreement entered into by the 1st to the 6th Respondents and accepted by the 8th Respondent on or about 5th April 2022 be set aside.
- 3.3 The Liquidation and Distribution Account drawn by the 7th Respondent reflecting the 1st to the 6th Respondents as the heirs of the late *Nompumelelo Veronica Tshali* be set aside and any distribution made pursuant on the basis of that distribution account be declared null and void and the ownership of the assets of the estate be restored to it
- 3.4 The next of kin affidavit reflecting the 1st to the 6th Respondents as the only next of kin of the late *Nompumelelo Veronica Tshali* be declared null and void or alternatively supplemented to reflect the applicants as her descendants.

4. That the costs of the application be granted against any of the Respondents who opposes the application.

5. Granting such further and/or alternative relief as this Honourable Court may deem appropriate in the circumstances.

Factual background

[2] The first applicant in support of her case stated that the deceased took her under her wing and accepted and raised her like her child.¹

¹ See paragraphs 18, 19, 20, 26, 34 of the Founding Affidavit at page 17.

[3] The first applicant sought to rely on the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009. (hereinafter referred to as the Act). The applicant wished to rely on the provisions of Section 1 of the Act which defines a descendant as ‘*a person who is not a descendant in terms of the Intestate Succession Act, but who, during the lifetime of the deceased was accepted by the deceased person in accordance with customary law as his or her own child*’.

[4] The applicant did not meaningfully dispute the averments regarding the requirements for a customary law adoption as illustrated by Professor *Ndima*, an expert in customary law, in his report on adoption.² In his report *he inter alia* stated the following:

“...Whilst common law adoption is a public affair that is achieved through a court order, customary law adoption is a private matter that does not involve any state institution. Nevertheless, it calls for due attention to the significant formality of the child’s natural father and the adoptive parent(s) entering into an adoption agreement in a meeting of the families in the presence of the community leader. In this meeting the adoptive parent announces that he/she is taking the child as his/her successor. The latter acquires all the succession rights from the adoptive parent/house; and loses those of the biological unit. (none of these happened in this matter) All that this means is that adoption happens neither automatically nor quietly – it happens at a significant ritual attended by relevant clan members because it affects the adopted child’s family membership and or his /her clan.”

In his conclusion and recommendations, he stated the following:

“By their own admission, the applicants in this case were never legally adopted in the prescribed adoptive ceremony that would have rendered them the deceased’s descendants and intestate heirs. All that they are admitting is that the deceased benevolently provided them with the benefits of life to

² See pages 147 -150 of the Updated Index to the main application.

ensure their survival and upbringing as children of her relative(s) – thus demonstrating tremendous Ubuntu qualities.”

[5] In this case, the sixth respondent who is the biological father of the first applicant and the grandfather of the second applicant states that he never gave up his parental rights and obligations to the first applicant but that the deceased had merely taken care of her on his behalf. There is a direct denial of any customary law adoption by her biological father and there is no evidence whatsoever from the second applicant’s father save the averment by the first respondent that the sixth respondent had been paid damages by the applicant’s father despite this being disputed by the first applicant.³

[6] The first applicant in her replying affidavit instead averred that in section 1 of the Act the definition does not state that one must have been adopted in terms of customary law but it states that the deceased must have, during his lifetime, accepted the person in accordance with customary law as his or her own child.⁴ This is contrary to the relief she seeks in her Notice of Motion that they be regarded as the customary adopted children of the deceased.

[7] The first applicant further failed to state that she had relinquished any of her rights to her son, the second applicant, but merely said that the deceased had taken over his responsibility.

[8] I shall briefly deal with the argument raised that since the deceased had accepted them as her own children as demonstrated by her medical aid card, the record at the Department of Transport where the deceased worked which reflects

³ See paragraph 3 of the 6th Respondent’s Opposing Affidavit at 164 and at paragraph 4 he states the following:

“For instance, there can never be adoption in terms of customary law, without involvement of the entire family, without the family’s concurrence on the adoption of a child (a concurrence is usually reached after a family meeting is held) and without a traditional celebratory ceremony where the members of the community are informed about the adoption. The deceased would not have unilaterally adopted the applicants without our involvement as her family and without a traditional ceremony. In fact, on any reasonable construction of the founding affidavit; the applicants do not assert that the deceased had an intention of adopting them, in terms of customary law rites. The first applicant has simply made a series of allegations, which do nothing but demonstrate humanity, compassion and *ubuntu*.”

⁴ See paragraph 4.5 at page 187 of the Replying Affidavit.

them as her children and the fact that they are the beneficiaries in respect of the deceased's Sanlam Retirement Annuity that they are the descendants of the deceased. If that was what the Act had envisaged, it would have stopped at the words '*had accepted them as her own.*' The Act however went on to say, '*in accordance with customary law*'. The Act envisaged that her act of acceptance be in accordance with the customary law.

There is no evidence that her act of acceptance was in accordance with customary law. The deceased had not approached the biological parents to have them relinquish their rights, nor had families undertaken a public ceremony prior to her acceptance. There needed to be a relinquishing of rights prior to an acceptance of the rights. An acceptance cannot be done until and unless something is done by another person, in this case the parents of the first applicant whereby they give up their rights. It is only then that it can be accepted and acquired by another. The sixth respondent expressly disputes that he has done so.⁵

[9] The applicants in this case: -

(a) did not state that any of the requirements of a customary law adoption were complied with in terms of which the biological parents publicly relinquished their rights and obligations to either applicant or the adoptive parent accepting these rights in a public ceremony.

⁵ See *Doreen Maureen Maswanganyi v Dhumela Cathrine Baloyi* N.O & Ano 62122/2014 (GP) where Makgoka J stated:

"[20] It is so even if the deceased regarded herself as having adopted the applicant. This is because adoption is an agreement between the biological and adoptive parents, and never a unilateral act. I have already found that I discern no such agreement between the deceased and the applicant's parents."

See also *Maneli v Maneli* 2010 (7) BCLR 703 (GSJ) where Mokgoatheng J held *inter alia*:

"[7] The rationale of Xhosa customary law adoption ceremony is to proclaim and signify to the world that the adoptive parents have formally accepted parental responsibility for the minor child. The adopted minor child is thereafter accepted and regarded by society as a child of the adoptive parents. Customary law adoption is widely practiced by Xhosas in the Eastern and Western Cape Provinces of the Republic of South Africa."

See also *Shilubana and Others v Nwamitwa* 2009 (2) SA (CC) in para 43 it was held:

"The import of this section, in the words of Langa DCJ in *Bhe*, that customary law 'is protected by and subject to the Constitution in its own right'. Customary law, like any other law, must accord to the Constitution. Like any other law, customary law has a status that requires respect. As this court held in *Alexkor v Richtersveld Community*, customary law must be recognised as 'an integral part of our law' and 'an independent source of norms within the legal system'. It is a body of law by which millions of South Africans regulates their lives and must be treated accordingly.

(b) sought to rely on the deceased's acceptance ignoring the fact for a binding agreement to come into existence there needed to be a relinquishing of rights first prior to the acceptance of the same.

(c) could not gainsay the sixth respondent's contention, which this court must accept having regard to the doctrine applied in *Plascon - Evans*⁶ which has been endorsed by the Supreme Court of Appeal and the Constitutional Court.⁷ The sixth respondent explicitly stated that he had not relinquished his rights to the first applicant, and it appears he even received the damages in respect of the second applicant from the second applicant's biological father.

(d) The first applicant also did not say that she had relinquished her rights and obligations *vis-a-viz* the second applicant which was a requirement prior to the deceased acquiring such rights and obligations irrespective of the fact that the deceased accepted him as her own child as well.

(e) The applicants made no averment that any customarily law formalities were adhered to in order to establishing a customary law adoption, save that they lived with the deceased and she provided them with support during her lifetime.⁸

⁶ *Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51: 1984 (3) SA 623 (A) at 634E-635C.

⁷ In *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) the court said the following on the principle:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon –Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the Applicant's (Mr Zuma's) affidavits, which have been admitted by the Respondent (the NDPP) together with the facts alleged by the latter, justify such order. It may be different if the Respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.’ (para 26) The *Plascon –Evans* rule has been emphatically endorsed by the Constitutional Court. See for example *President of the Republic of South Africa & Others v M & G Media Ltd* 2012 (2) SA 50 (CC): [2011] ZACC 32 para 34.”

See also *P.M.M v D.S.M N.O and Others* (5858/2019) [2022] ZAGPPHC 15 (10 January 2022): where Khumalo J stated: -

“[33] In that case, there being factual disputes, the *Plascon Evans Rule* is applicable. The factual disputes are to be resolved on the basis of the principles enunciated in the *Plascon Evans Rule* that prescribes that in motion proceedings, if disputes of fact arise on the affidavits, a final order may be granted if those facts averred in the Applicant's affidavits, which have been admitted by the Respondent, together with the facts as stated by the Respondent, justify the granting of such relief.”

“[49] In that framework, the court has to determine whether the facts as alleged by the Applicant do prove at least an adoption in accordance with the Xhosa Customary Law to have taken place so as to be recognised as the descendent of the deceased.

[59] The Reform of the Customary Succession Act has now codified the adoption by customary law to be legal, therefore proof by the Applicant of (customary law adoption having taken place)

[10] I take cognisance of the fact that the applicants considered the deceased their mother and guardian and accordingly they cannot be faulted for believing that they were justly entitled to be the heirs to her estate despite this being misguided and false having regard to both the common law and customary law. The applicants failed to discharge the *onus* resting upon them to establish their entitlement to any relief sought in the notice of motion.

[11] The applicants unfortunately failed to demonstrate that they were entitled to any of the relief they sought.

[12] It is rather unfortunate that the Master failed to file any report in this matter and equally unfortunate that the family did not resolve this matter amicably amongst themselves. The applicants' belief, despite being contrary to common law and customary law, that they were the children of the deceased who was the only real parent they knew, cannot in the circumstances of this case be visited with a cost order being granted against them. Their attorney's failure to consider the provisions of the Act properly whilst it may be construed as negligent is not of such a nature to be construed as grossly reckless or negligent such as to warrant a *de bonis propriis* cost order against them. I am accordingly in the exercise of my discretion disposed to making no order as to costs.

[13] I accordingly make the following order:

- (i) **The application is dismissed with no order as to costs.**

FBA DAWOOD
ACTING DEPUTY JUDGE PRESIDENT

having been accepted by the deceased during his lifetime as his own child in accordance with the Xhosa customary law will entitle him to be regarded as a descendent of the deceased, eligible to inherit in terms of Intestate Succession Act."

Appearances

For the Applicants:

Instructed by:

Mr Mpeto

Graham Mpeto & Associates

26 Madeira Street

MTHATHA

For the Respondents:

Instructed by:

Adv Ntikinca

Z Mfiki Incorporated

63 Cnr Blakeway & Park Road

MTHATHA

Date heard

06 March 2025

Date delivered

20 May 2025