

SOUTH AFRICA / JUDGMENT

E.S and Another v Kopa and Others (19113/2019) [2021] ZAGPPHC 774 (15 November 2021)

[2021] ZAGPPHC 774

COURT

North Gauteng High Court, Pretoria

BEFORE

Joubert

CASE / FILE NUMBER

19113/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

15

November 2021

Case

Number: 19113/2019

In

the matter between: E[....]
S[....]
First Applicant
E[....]
M[....] S[....]
Second Applicant
on
behalf of the minor child
G[....]
S[....]
and
KHOFELA
ESTHER KOPA
First Respondent
THE
MASTER OF THE HIGH COURT
Second Respondent
(PRETORIA)
MAKULA
ASNATH
KGOSANA
Third Respondent

JUDGMENT

JOUBERT AJ

- [1] This is an application whereby the applicant (Ms S[....]) seeks to remove the first respondent (Ms Kopa) as executor in the deceased estate of the late Dr Charles Makatipe Kgosana (“the deceased”).
- [2] The applicant brings this application in 2 (two) separate capacities. First, in her own name, and secondly, in her capacity as the biological mother of the minor child, G[....] S[....] (“the minor child”). It is not in dispute that the minor child is a child born of the deceased.
- [3] The first respondent, Ms Kopa, was appointed executrix to the deceased estate in terms of a letter of executorship under master reference number 26229/09 issued by the Master of the High Court (the second respondent) on 3 February 2018. She is the mother to 3 (three) of the deceased’s children.
- [4] The third respondent is Ms Kgosana, the first respondent’s attorney, cited as acting as Ms Kopa’s agent in the administration of the estate of the deceased.
- [5] The facts leading up to this application are summarised as follows.

BACKGROUND

FACTS

- [6] Ms Kopa commenced a romantic relationship with the deceased in 1994. According to Ms Kopa (although Ms S[...] seeks to deny this), a customary law marriage was concluded between Ms Kopa and the deceased on 31 December 2000 and after lobola negotiations were concluded, Ms Kopa immediately resided at her husband's (the deceased) home and with her in-laws for a period of 2 (two) years. In 2003, Ms Kopa and the deceased moved to Leeuwfontein, Mpumalanga where they proceeded to establish their home.
- [7] In 2013, Ms Kopa and the deceased bought a house at Capital Park, Pretoria. At that time, the deceased had been employed by the SANDF and Ms Kopa was working at the Denmar Specialist Psychiatric Hospital. According to Ms Kopa, she and the deceased resided together at Capital Park and, from time to time, also resided at their house in Leeuwfontein, Mpumalanga.
- [8] Ms S[...] claims that she became romantically involved with the deceased during October 2013. She claims that during October 2014, they (her and the deceased) agreed that she should resign from her employment at the Fisha Wellness Hospital in Pretoria West so that she could be able to run the deceased's company, Kgosana Consultants (Pty) Ltd (established in 2012) on a fulltime basis.
- [9] Ms Kopa accepts that Ms S[...] had been employed by the deceased as a manager, conducting the management and control of his company on a fulltime basis.
- [10] In 2014, Ms Kopa resided, for most of the time, at her and the deceased's house in Leeuwfontein, together with her 3 (three) children with the deceased.
- [11] The applicant claims that she moved in permanently with the deceased during January 2015. This is denied by the first respondent.
- [12] Over the weekend of 30 September 2017, the deceased travelled to Cape Town to attend at a B & B business he owned in Saldanha Bay. Ms Kopa last spoke to him telephonically on 30 September 2017. Early on the morning of Monday, 2 October 2017, Ms Kopa received a telephone call from the deceased's brother who questioned her on when she last spoke to the deceased. Ms Kopa was then informed that the deceased had disappeared. Ms Kopa's subsequent attempts to contact the deceased were fruitless.
- [13] She was informed by the deceased's brother that he intended to travel to Cape Town to look for his brother.
- [14] Ms S[...] travelled with the deceased's brother to Cape Town to search for him.

- [15] It transpired that the deceased had tragically passed away in a car accident in Cape Town whilst on his way back to the airport to return to Pretoria. His remains had been badly damaged in the accident and he could not be immediately identified. Hence, the delay in his family being advised of his passing.
- [16] Once his remains had been identified and returned to Pretoria, the deceased was buried by Ms Kopa from her and the deceased's common home in Leeuwfontein 3 (three) weeks after his death.
- [17] On about the 12th of October 2017, Ms Kopa, together with family members of the deceased attended at the Master's office in Pretoria to report his estate late. They then discovered that letters of authority had already been issued to Jonas Kgosana (the deceased's aforesaid brother). Ms Kopa succeeded in having the office of the Master cancelling the letter of authority issued to Mr Kgosana and reissuing one to her on 8 November 2017. It is this letter of authority which Ms S[...] seeks to set aside.
- [18] Ms Kopa registered her marriage to the deceased with the Department of Home Affairs on 18 December 2017, only after the demise of the deceased.
- [19] With the assistance of the third respondent, Ms Kopa commenced the administration of the deceased estate.
- [20] Subsequent to his death, it transpired that the deceased had a total of 6 (six) children, 3 (three) of them with Ms Kopa, and 1 (one) with Ms S[...]. A seventh child was born subsequent to the death of the deceased, during April 2018.
- [21] The relief sought by Ms S[...] in her amended notice of motion is as follows:

"1. That the First Respondent be and is hereby removed as Executor in the deceased estate of the Late Doctor Charles Makatipe Kgosana appointed in terms of a letter of executorship no: 26229/09 issued by the Master of the High Court, Pretoria on 3 February 2018;

1.1 The First Respondent is directed forthwith to return to the Second Respondent the aforesaid letters of executorship;

1.2 Declaring the First Respondent unfit to act as Executor in the aforementioned deceased estate;

1.3 Declaring the Third Respondent unfit to act as executor and/or executor's agent in respect of the aforementioned deceased estate;

1.4 That the First and Third Respondents forfeit any entitlement to executors fees;

1.5 That the First Respondent is personally liable for all fees and/or disbursements incurred by the Third Respondent in administering the deceased estate on her behalf;

2. That the Liquidation and distribution account dated 16 November 2018 is hereby set aside.

3. That the First Respondent in her personal capacity, pay the costs of the application de bonis propriis, alternatively on the scale as between attorney and client, jointly and severally with the Third respondent only in the event that the Third Respondent directly or indirectly opposing the application;
4. Further and/or alternative relief as the Honourable court deems fit.”

REMOVAL OF AN EXECUTRIX

[22] Section 54 of Administration of Estates Act, 66 of 1965 (“the Act”) provides as follows:

“54. Removal from office of executor—

- (1) An executor may at any time be removed from his office—
 - (a) by the Court—
 - (i)
 - (ii) if he has at any time been a party to an agreement or arrangement whereby he has undertaken that he will, in his capacity as executor, grant or endeavour to grant to, or obtain or endeavour to obtain for any heir, debtor or creditor of the estate, any benefit to which he is not entitled; or
 - (iii) if he has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to vote for his recommendation to the Master as executor or to effect or to assist in effecting such recommendation; or
 - (iv) if he has accepted or expressed his willingness to accept from any person any benefit whatsoever in consideration of such person being engaged to perform any work on behalf of the estate; or
 - (v) if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned;...”

[23] The applicant, in casu, relies on section 54(1)(a)(v), namely that it is undesirable for the executor to act as executor of the estate.

[24] The bases on which the applicant contends that it is undesirable for Ms Kopa to continue to act as the executor of the estate late Kgosana are that:

“8.1 The Applicant asserts that the First Respondent stands to be removed as executor of the estate on the grounds that:

8.1.1 the Liquidation and Distribution account dated 16 November 2018 does not accurately reflect the full extent of the deceased estate or of the claims lodged against the estate;

8.1.2 the private interests of the First Respondent as the executor, conflicts with those of the estate in that both the Applicant and the First Respondent claims that they are entitled to half of the estate either due to a marriage or a universal partnership. As a result, the First Respondent finds herself in the impossible position where she has to fight for her own claim against the estate as well as defend the claim on behalf of the estate;

8.1.3 the First Respondent failed to disclose the status of the administration of the estate to the Applicant as an interested party in that they have failed to supply the Applicant with vouchers to justify the entries in the Liquidation and Distribution account;

8.1.4 the First Respondent failed to properly consider claims against the estate in particular the maintenance claim instituted on behalf of the Second Applicant;”

[25] Ms Pretorius (on behalf of the applicant) contends that the above issues and/or disputes are of such a nature that Ms Kopa cannot be objective when considering claims against the estate. It is submitted that these circumstances place Ms Kopa in the position where her duty (as executrix) and interest (as heir to part of the estate) may be at conflict. The applicant submits that there is a material conflict of interest in casu (*Die Meester v Meyer en Andere* 1975 (2) SA 1 (T) at 16B).

[26] Specific reliance is placed, in the applicant’s heads, on the perceived dispute between the applicant’s claim to a part of the estate as a result of her alleged status of having been in a universal relationship with the deceased and Ms Kopa’s claim as the alleged wife of the deceased.

THE APPLICANT’S CLAIM AS TO A UNIVERSAL PARTNERSHIP

[27] Before the need arises to consider whether it would be undesirable for Ms Kopa to continue acting as executor in respect of the deceased’s estate, it should be established whether there is any merit in the objections raised by Ms S[...].

[28] I will first consider Ms S[...]'s claim as to the existence of a universal partnership between her and the deceased.

[29] In *Khan v Shaik* 2020 (6) SA 375 (SCA) at paras [6] – [8] states the following as to the nature and essence of a universal partnership:

“The character of a partner's rights in a universal partnership

[6] The label universal partnership in our law refers to the *societas universorum bonorum* of the Roman-Dutch law. The elements of a relationship between two persons that evidences the existence of this species of partnership were most recently affirmed by this court in *Butters v Mncora*:

'I now turn to the relevant legal principles. As rightly pointed out by June Sinclair (assisted by Jaqueline Heaton), *The Law of Marriage* vol 1 274, the general rule of our law is that cohabitation does not give rise to special legal consequences. More particularly, the supportive and protective

measures established by family law are generally not available to those who remain unmarried, despite their cohabitation, even for a lengthy period (see eg *Volks NO v Robinson* [2005] ZACC 2; 2005 (5) BCLR 446 (CC)). Yet a cohabitee can invoke one or more of the remedies available in private law, provided, of course, that he or she can establish the requirements for that remedy. What the plaintiff sought to rely on in this case was a remedy derived from the law of partnership. Hence she had to establish that she and the defendant were not only living together as husband and wife, but that they were partners. As to the essential elements of a partnership, our courts have over the years accepted the formulation by Pothier (RJ Pothier A Treatise on the Law of Partnership (Tudor's Translation 1.3.8)) as a correct statement of our law (see eg *Bester v Van Niekerk* 1960

- (2) SA 779 (A) at 783H – 784A; *Mühlmann v Mühlmann* 1981
- (4) SA 632 (W) at 634C – F; *Pezzutto v Dreyer* [1992] ZASCA 46; 1992
- (3) SA 379 (A) at 390A – C). The three essentials are, firstly, that each of the parties brings something into the partnership or binds themselves to bring something into it, whether it be money or labour or skill. The second element is that the partnership business should be carried on for the joint benefit of both parties. The third is that the object should be to make a profit. A fourth element proposed by Pothier, namely, that the partnership contract should be legitimate, has been discounted by our courts for being common to all contracts (see eg *Bester v Van Niekerk supra* at 784A)'
- [7] In practical terms, a controversy about the existence of a universal partnership arises only when it ends, whether by death or by the parting of ways by the partners. To prosecute a claim to share in the fruits of a disputed partnership, the claimant must thus, for practical purposes, obtain a declarator that the partnership existed.
- [8] Plainly, the essence of the concept of a universal partnership is an agreement about joint effort and the pooling of risk and reward. Upon termination of the universal partnership, what follows is an accounting to one another; the poorer partner becomes the richer partner's creditor. Accordingly, it is the contract that is the foundation of the universal partnership, not the mere fact of the consortium and the mere contributory efforts to building wealth.

A tacit agreement suffices.”

- [30] In *Butters v Mncora* 2012 (4) SA 1 (SCA) at para [34], the Supreme Court of Appeal stated the following in circumstances where a universal partnership was alleged to have existed between co-habitants:

“This appeal is about an alleged tacit agreement. As in all such cases, the court searches the evidence for manifestations of conduct by the parties that are unequivocally consistent with consensus on the issue that is the crux of the agreement and, per contram, any indication which cannot be reconciled with it. At the end of the exercise, if the party placing reliance on such an agreement is to succeed, the court must be satisfied, on a conspectus of all the evidence, that it is more probable than not that the

parties were in agreement, and that a contract between them came into being in consequence of their agreement. Despite the different formulations of the onus that exists (see the discussion in Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vornier Investments (Pty) Ltd [1984] ZASCA 4; 1984

(3) SA 155 (A)) . . . this is the essence of the matter.”

(This statement is in a minority judgment but the majority did not take issue with the principle. It was only the application of the principle that was in dispute.)

[31] The onus is on the party alleging the existence of the universal partnership (a tacit contract) to prove unequivocal conduct giving rise to an inference of consensus on a balance of possibilities. Where the conduct of the parties is capable of more than one inference, the test for when a tacit universal partnership can be held to exist is whether it is more probable than not that the tacit agreement has been reached.[1]

[32] Ms S[...] alleges that she was in a universal relationship with the deceased at the time of his demise. She also claims that, at the time of the deceased's death, he was unmarried.

[33] Ms S[...] seeks to dispute Ms Kopa's claim to the deceased's estate on the basis of what she refers to as “an alleged marriage”, with Ms S[...] alleging Ms Kopa had not resided with the deceased for a period in excess of 10 (ten) years prior to his death.

[34] She does not, however, seek any declaratory relief as to the existence of this alleged universal relationship or the deceased's marriage to the first respondent.

[35] Ms S[...] also seeks to lodge a claim against the deceased's estate on the basis that she and the deceased had resided together as husband and wife and conducted their affairs jointly until the time of his death. She claims that they were in a permanent relationship, to the full knowledge of the first respondent. The first respondent (Ms Kopa) denies having had any knowledge of the deceased's extramarital affair with Ms S[...] prior to his death.

[36] Ms S[...] claims that Ms Kopa's private interests are in conflict with those of the deceased's estate, where she finds herself in the position where she has to fight for her claim against the estate which Ms S[...] disputes in her personal capacity and on behalf of her minor child who, as the biological child of the deceased, is a heir to his estate.

[37] The totality of the evidence relied upon by Ms S[...] as proof of the universal relationship alleged by her is the following:

37.1 the fact that the deceased fathered a child with the applicant;

37.2 the allegation (denied by the first respondent) that the applicant had moved in with the deceased in the Capital Park house, and

37.3 the allegation that they conducted their affairs together (in respect of which no proof was submitted).

[38] In my view, this evidence is not sufficient to lead to the conclusion that the applicant had been in a universal relationship with the deceased.

[39] The applicant has therefore not established the universal relationship on which she partly relies for some of the relief sought.

THE APPLICANT'S COMPLAINT REGARDING THE LIQUIDATION AND DISTRIBUTION ACCOUNT AND THE ADMINISTRATION OF THE ESTATE

[40] The applicant further complains that the Liquidation and Distribution Account prepared on behalf of the first respondent does not accurately reflect the full extent of the deceased estate or of the claims lodged against the estate.

[41] Specifically, the applicant alleges that several assets, such as the deceased's Nedbank account, a Renault motor vehicle and movable furniture. The applicant's allegations in this regard are bald in the extreme.

[42] Ms Kopa, however, responded to these statements (despite complaining of their vagueness) explaining that she is not aware of any Nedbank account. In reply, the applicant failed to provide any details of the Nedbank account referred to. There is therefore no basis on which it be found that there was any failure on the side of the first and third respondents to reflect the alleged Nedbank account in the Liquidation and Distribution Account.

[43] With regard to the remainder of the assets, Ms Kopa states:

"49.1 The movable properties referred to in this paragraph is office furniture that the deceased, together with other professionals jointly acquired for offices in Venda and Polokwane and it was for their joint use. Upon the death of the deceased, the other professionals removed the office furniture in Venda and Polokwane offices and retained the furniture for their own separate use. I am unable to establish the contribution made by the deceased on the acquisition of the furniture since it is not an expensive furniture.

49.2 The Renault motor vehicle and the furniture in Saldahna Bay were stolen. My attorneys assisted me to open a criminal case for theft. The investigation by the police has not revealed any leads and I trust the perpetrators of this crime will some day be arrested."

[44] In reply, the applicant was unable to take issue with the statements made by Ms Kopa in this regard.

[45] Ms S[...] further alleges that Ms Kopa and her agent / attorney, Ms Kgosana, have committed unlawful acts which amount to maladministration of the estate. She alleges that Ms Kopa and Ms Kgosana refused to disclose to Ms S[...] fully the status of the administration of the estate. In amplification of this claim, Ms S[...] attaches a copy of the Liquidation and Distribution account lodged in the deceased estate.

- [46] Ms S[...] also claims that Ms Kopa and her agent / attorney refused to properly consider claims lodged against the estate, in particular in respect of the maintenance for her minor child.
- [47] There is a further claim that Ms Kopa and Ms Kgosana failed to properly reserve the assets of the deceased for the benefit of the heirs, as (so Ms S[...] claims), all of the businesses of the deceased were effectively shut down without due reason.
- [48] In response to these allegations, Ms Kopa explains that Ms S[...] had already received a benefit for the minor child in the amount of R1,094.882.00. This statement is met in the replying affidavit with a bald denial.
- [49] Ms Kopa further states that, with regard to a claim for maintenance, the applicant should approach the Master of the High Court. The applicant also does not dispute this in her replying affidavit.
- [50] Finally, with regard to the status of the administration of the deceased estate, Ms Kopa:
- 50.1 the Master gave her permission to advertise the Liquidation and Distribution Account, and
- 50.2 the Liquidation and Distribution Account was advertised from 1 March 2019 to 22 March 2019.
- [51] These facts are not denied by the applicant. The applicant therefore had access to the Liquidation and Distribution Account. The applicant has not set out any basis on which she would in addition to require insight into the vouchers from which the Liquidation and Distribution Account was compiled. The applicant has further not pointed to any specific discrepancies in the Liquidation and Distribution Account based on which she would be entitled to go beyond the Liquidation and Distribution Account.

CONCLUSION

- [52] Having considered the evidence before me, I am not convinced that the applicant has not established, on a balance of probabilities:
- 52.1 that she was in a universal relationship with the deceased, and
- 52.2 that the respondents were responsible for any maladministration of the deceased estate, as alleged.
- [53] I therefore make an order dismissing the application, with costs.

I JOUBERT

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants: Adv Leonie Pretorius Instructed by: Ndebele Du Plessis Attorneys

Counsel for the Respondent: Adv A.T. Ncongwane SC Instructed by: Makule Asnath Kgosana

Date heard: 7 May 2021 Date of judgment: 15 November 2021

[1] Khan (supra) at paras [20] – 21; Butters (supra) at para [18].

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