

SOUTH AFRICA / JUDGMENT

Malo and Another v Siswana and Another (A137/2008) [2010] ZAWCHC 128 (11 June 2010)

[2010] ZAWCHC 128

COURT

Western Cape High Court, Cape Town

BEFORE

Traverso, Samela

CASE / FILE NUMBER

A137/2008

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE COVERSHEET

Case No.: A137/2008

In the matter between

THEMBILE LIVINGSTONE MALO First Applicant

NONTULELEKO FLORENCE MALO Second Applicant

and

BUZEKA SISWANA First Respondent

LONWABO SISWANA Second Respondent

(and all persons claiming the right of occupation through or under them)

Coram TRAVERSO, DJP et SAMELA, AJ

Judgment

by SAMELA, AJ

For the Applicants Adv M Holland 0214221512

Instructed by Walkers I nc (MAH/W23894) 021464441

For the Respondent Adv N Mayosi - 0214265081

Instructed by FJMO Attorneys Inc (N Oliphant) 0219451596

Date/s of hearing 24/10/08,30/04/08

Judgment

delivered on 11 JUNE 2010

REPORTABLE IN THE HIGH COURT OF SOUTH AFRICA WESTERN CAPE HIGH COURT, CAPE TOWN CASE NO.: A137/08 In the matter between THEMBILE LIVINGSTONE MALO First Applicant NONTULELEKO FLORENCE MALO Second Applicant and BUZEKA SISWANA First Respondent LONWABO SISWANA Second Respondent (and all persons claiming the right of Occupation through or under them)

JUDGMENT

DELIVERED ON 11 JUNE 2010 SAMELA, AJ [1] This is an appeal against the judgment of a Mitchell's Plain Magistrate, dismissing the Appellants' application for eviction of the Respondents. The Appellants had brought an application for eviction of the Respondents from the immovable property known as Erf 18884, Khayelitsha, commonly known as 16 Mapolo Street, Khayelitsha ("the property"). The Appellants had brought an application for eviction on the basis that occupation of the property by the Respondents was unlawful. [2] The Respondents had opposed the eviction application on the ground that they are occupying the property lawfully. August 2004 to purchase the property which was registered in Appellants' names on the 19th February 2007. At the time of sale and transfer of the property into Appellants' names, the Respondents were in occupation of property. The executrix was married to George Monwabisi Manengele ("the deceased", who died on the 30th July 2002), on the 21st February 1993. Before marrying the executrix, the deceased had married the First Respondent on the 20th December 1986 in accordance with customary law. At the time of the deceased's marriage to the executrix, the first marriage was still in subsistence. After the death of the deceased, the executrix had applied for and obtained from the Master of the High Court, a letter of authority on the 4th November 2004, authorising her to wind up the deceased's estate. This letter of authority was subsequently withdrawn by the Master of the High Court on the 20th September 2007. [4] The basis for the relief sought by the Appellants is that the Respondents' occupation of the property is unlawful in that they do not have the Appellants' consent or permission to occupy the property. [5] The Respondents opposed the application on various grounds. [6] Firstly, they contend that they were entitled to occupy the property by virtue of the marriage of the First Respondent to the deceased. The First Respondent alleges that she was married to the deceased by custom in 1986. [7] Secondly, the Respondents aver that the marriage between the executrix and the deceased was invalid on the ground that at the time that the deceased married the executrix, he was still married to the First Respondent. [8] Thirdly, the First Respondent alleges that the executrix had no authority to sell the property to the Appellants and that the Appellants were aware at the time of the sale, that the property did not belong to the executrix and that she had no authority to sell

it. [9] Fourthly, the First Respondent avers that the letter of authority, on the authority of which the executrix purported to sell the property had been fraudulently obtained. The First Respondent points out that upon investigation at the Master's Office as to how the letter of authority was granted, she discovered that the executrix did not disclose the following:

- (i) at the time of the deceased's death, she had not been living with him for almost eight years;
- (ii) the deceased had been living with his customary law wife at the time of his death; (iii) the deceased had dependants. [10] The Magistrate dismissed the application for eviction and found for the Respondents on the ground that the executrix did not have authority to sell the property, and that at the time the executrix got married to the deceased, the deceased's marriage to the First Respondent was still in existence. [11] The Appellants appeal against the Magistrate's decision on the ground that the Magistrate misdirected himself in finding that the marriage between the executrix and the deceased was invalid. Mr Holland, who appeared on behalf of the Appellants pointed out that the issue before the Magistrate was not whether the executrix's marriage to the deceased was valid or not. He submitted that the Magistrate was required to decide whether the eviction was to be granted or not. [12] The question is whether the Magistrate was wrong in dismissing the Appellants' application. [13] This application had been brought before the Magistrate in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("the PIE Act"). The PIE Act was enacted in order to give effect to the provision of section 26(3) of the Republic of South Africa Act 108 of 1996 ("the Constitution"), which provides that; "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions." [14] The PIE Act defines an owner in section 1 as: "... the registered owner of the land, including an organ of state." [15] Owner in the Deeds Registries Act 47 of 1937 is defined in section 102 as: in relation to - "(a) immovable property, subject to paragraph (b), the person registered as the owner or holder thereof and includes the trustee in an insolvent estate, a liquidator or trustee elected or appointed under the Agricultural Credit Act, 1966 (Act 28 of 1966), the liquidator of a company or a close corporation which is an owner and the executor of any owner who has died or the representative recognised by law of any owner who is a minor or of unsound mind or is otherwise under disability, provided such trustee, liquidator, executor or legal representative is acting within the authority conferred on him or her by law. [Para
- (a) substituted by s.22(d) of Act 14 of 1993 and by s.9(b) of Act 11 of 1996]; (b) immovable property, real rights in immovable property and notarial bonds -
- (i) which are registered in the name of both spouses in a marriage in community of property, either one or both of the spouses; which are registered in the name of only one spouse and which forms part of the joint estate of both spouses in a marriage in community of property, either one or both of the spouses; " [16] An unlawful occupier is defined in section 1 of the PIE Act as: "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person

who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996)." [17] Sections 4(7) and (8) of PIE Act deal with eviction of unlawful occupiers: "4.

Eviction of unlawful occupiers. 7. If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women. 8. If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine - a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)." [18] Mr Holland submitted that the executrix was married to the deceased, and on the death of the deceased, she became the sole owner of the property, and that being so, was entitled to sell and transfer ownership of the property to the Appellants. [19] In reply, Ms Mayosi, who appeared on behalf of the Respondents, submitted that the Respondents were occupying the property lawfully. She pointed out that the First Respondent was validly married to the deceased in accordance with the customary law in 1986. She argued that the executrix married the deceased in 1993 whilst the marriage between the First Respondent and the deceased was still in existence. She further submitted that the executrix's marriage was therefore null and void and that proprietary consequences could not flow therefrom. [20] The customary marriage between the deceased and the First Respondent was regulated by section 1 of Act 3 of 1988 (amending section 22 of the Native Administration Act 38 of 1927) which provided that: "(1) A man and a woman between whom a customary union subsists are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman. (2) Subject to subsection (1), no person who is a partner in a customary union shall be competent to contract a marriage during the subsistence of that union. (7) No marriage contracted after the commencement of this Act but before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and the issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union, [repealed by the Recognition of Customary Marriages Act. 120 of 1998]" [21] Since 15 November 2000, the deceased and the First Respondent's customary marriage was regulated by the Recognition of Customary

Marriages Act 120 of 1998 ("the Act"). [22] Section 3(2) of the Act provides: "Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act No 25 of 1961), during the subsistence of such customary marriage. [23] Section 7(1) of the Act provides: "The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law." [24] Section 8(1) provides: "A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage." [25] Upon a perusal of a copy of a marriage certificate which was submitted in the court a quo, exhibit BS3, I am satisfied that a marriage between the deceased and First Respondent existed. Also, upon a perusal of a copy of a marriage certificate which was admitted in the court a quo as exhibit TLM3, a marriage between the deceased and the executrix was solemnised. The latter marriage was entered into between the deceased and the executrix, contrary to section 3(2) of the Act (The Recognition of Customary Marriage Act) which expressly prohibits parties in a customary marriage to enter into a civil marriage with another person. It is clear to me that the marriage between the deceased and the First Respondent was not dissolved by court and therefore the deceased's marriage to the executrix was null and void. [26] The rule of primogeniture which is applicable in this matter was clearly explained in *Bhe v Magistrate, Khayelitsha*

[2004] ZACC 17; 2005 (1) SA 580 (CC) at 617-618 where the court stated: "The rule of primogeniture was central to the customary law of succession. The general rule was that only a male related to the deceased qualified as intestate heir. Women did not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head was his heir. If the deceased was not survived by any male descendants, his father succeeded him. If his father also did not survive him, an heir was sought among the father's male descendants related to him through the male line. The exclusion of women from heirship, and consequently from being able to inherit property, was in keeping with a patriarchal system which reserved for women a position of subservience and subordination in which they were regarded as perpetual minors under the tutelage of fathers, husbands, or heads of the extended family. Extra-marital children were not entitled to succeed to their father's estate in customary law. They, however, qualified for succession in their mother's family, but subject to the principle of primogeniture. The eldest male extra-marital child qualified for succession only after all male intra-marital children and other close male members of the family." [27] The court made very important findings at the following paragraphs [52, 91 and 92]:

- (i) [Para 52] "Section 28 of the Constitution provides specific protection for the rights of children. Our constitutional obligations in relation to children are particularly important for we vest in our children our hopes for a better life for all. The inclusion of this provision in the Constitution marks the constitutional importance of protecting the rights of children, not only those rights expressly conferred by s28 but also all the other rights in the Constitution which, appropriately construed, are also conferred upon children. Children, therefore, may not be subjected to unfair discrimination in breach of s9(3) just as adults may

not be." (ii) [Para 91] "The exclusion of women from inheritance on the grounds of gender is a clear violation of s9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order." (iii) [Para 92] "The principle of primogeniture also violates the right of women to human dignity as guaranteed in s10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex and gender. Their dignity is further affronted by the fact that as women, they are also excluded from intestate succession and denied the right, which other members of the population have, to be holders of, and to control property." [28] I am of the view that the Magistrate's approach in arriving at his decision was correct. The customary rule of primogeniture was partly applicable in this matter. In my view, there are two enquiries to be made, firstly, the validity of the executrix's marriage to the deceased, and secondly, whether or not the Appellants are the owners of the property. One cannot entertain the second enquiry without having decided on the first one. [29] It is clear from the record that the issue before the Magistrate was not the validity of the marriage between the executrix and the deceased, and the Magistrate never pronounced on it. The Magistrate had to decide whether the Appellants were lawful owners of the property or not. [30] The first enquiry refers to the validity of the executrix's marriage to the deceased. It is clear from what I have discussed above that the executrix's marriage to the deceased was invalid. It follows that on the death of the deceased, the executrix could not become the owner of the property as she could not succeed the deceased ab intestato. [31] The second inquiry is whether the Appellants acquired ownership of property notwithstanding that the executrix did not have the authority to sell and transfer ownership of property. I have observed in the record that the executrix entered into a sale

agreement with the Appellants on the 12th August 2004, before she applied for and obtained a letter of authority to wind up the deceased estate. The First Respondent, in her answering papers, avers:

- (i) [Para 34] "It has emerged that the sale of our home to the Applicants was a simulated illegal act of conscious collusion between the buyer and the seller done for the sole purpose of hastily putting the house beyond the reach of its bona fide owner." (ii) [Para 37] "The First Respondent was in fact an accomplice in a simulated illegal transaction that was intended to deprive the Applicant and her children of a home for the direct benefit of Vuyiswa Jacobs and this he was aware of all the time." (iii) [Para 40] "The transfer of the property by Vuyiswa to the Applicants was illegal and void based on the following:
 - a. Vuyiswa, the purported seller never had legal title to the home as she was never married to the deceased so there never was a joint estate between the two;

- b. The purported seller had fraudulently acquired the Letters of Authority from the Master and this authority has subsequently been withdrawn;
- c. The purported buyer being the First Applicant, had consciously participated in a simulated transaction that was illegal and done

for the sole purpose of depriving me and my children of our home." These averments made by the First Respondent were not disputed and replied to by the Respondents and stands as they were. [32] In the circumstances I find: Firstly, that the executrix at the time of sale and transfer of property had no authority to deal with property and its disposal. [33] Secondly, the Appellants were aware at the time they bought and took transfer of property from the executrix that she had no authority to sell and transfer property to them. [34] It follows, therefore, that the sale and transfer of property to the Appellants did not confer ownership on the Appellants. It is for these reasons that Mr Holland's submission that the executrix was the sole owner of the property and entitled to sell and transfer ownership of the property to the Appellants is untenable and rejected. [35] Upon the death of the deceased, in terms of customary law of succession, his (minor) son became an heir. The First and Second

Respondents both fell under the guardianship of the deceased's nearest male major relative, who assumed control and administration

of the deceased's property on behalf of the deceased's family, until the minor son became a major (see Seymour Customary Law in Southern Africa, Juta 5th Edition at 216-217). That was the legal position before the Bhe's ruling in October 2004. [36] After Bhe's ruling the situation was as follows: the customary rule of primogeniture was declared invalid and unconstitutional to the extent it excludes women, children and extra-marital children from inheriting. In accordance with the court's ruling, First and Second Respondents jointly became the owners of property. At the time the executrix applied for a letter of authority on the 4th November 2004, the Respondents were already owners of the property. [37] It is trite law that an owner is entitled to his or her lawful possession of his/her property and may be granted an ejectment order against an unlawful occupier of the property provided that right is not limited by the Constitution, statute or any other legal basis, see *Brisley v Drotosky* 2002

- (4) SA 1 (SCA) [2002(12) BCLR 1229]. [38] I am satisfied that the Respondents' occupation of the property was not unlawful and that the application for eviction was correctly refused. [39] In conclusion, I would like to express my displeasure in the manner some Respondents are cited in this matter. It is apposite to the remarks made by the learned Judge Sachs in *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005
- (1) SA 217 (CC) at 239 E where it is stated: "Thus, those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity." I associate myself with the views expressed in these matter. The Order [40] In the result, I would dismiss the appeal

with costs. SAMELA, AJ I agree and it is so ordered TRAVERSO, DJP

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO.: A137/08

In the matter between

THEMBILE LIVINGSTONE MALO First Applicant

NONTULELEKO FLORENCE MALO Second Applicant

BUZEKA SISWANA First Respondent

LONWABO SISWANA Second Respondent

(and all persons claiming the right of Occupation through or under them)

JUDGMENT

DELIVERED ON 11 JUNE 2010

SAMELA, AJ

- [1] This is an appeal against the judgment of a Mitchell's Plain Magistrate, dismissing the Appellants' application for eviction of the Respondents. The Appellants had brought an application for eviction of the Respondents from the immovable property known as Erf 18884, Khayelitsha, commonly known as 16 Mapolo Street, Khayelitsha ("the property"). The Appellants had brought an application for eviction on the basis that occupation of the property by the Respondents was unlawful.
- [2] The Respondents had opposed the eviction application on the ground that they are occupying the property lawfully.

August 2004 to purchase the property which was registered in Appellants' names on the 19th February 2007. At the time of sale and transfer of the property into Appellants' names, the Respondents were in occupation of property. The executrix was married to George Monwabisi Manengele ("the deceased", who died on the 30th July 2002), on the 21st February 1993. Before marrying the executrix, the deceased had married the First Respondent on the 20th December 1986 in accordance with customary law. At the time of the deceased's marriage to the executrix, the first marriage was still in subsistence. After the death of the deceased, the executrix had applied for and obtained from the Master of the High Court, a letter of authority on the 4th November 2004, authorising her to wind up the deceased's estate. This letter of authority was subsequently withdrawn by the Master of the High Court on the 20th September 2007.

- [4] The basis for the relief sought by the Appellants is that the Respondents' occupation of the property is unlawful in that they do not have the Appellants' consent or permission to occupy the property.
- [5] The Respondents opposed the application on various grounds.
- [6] Firstly, they contend that they were entitled to occupy the property by virtue of the marriage of the First Respondent to the deceased. The First Respondent alleges that she was married to the deceased by custom in 1986.
- [7] Secondly, the Respondents aver that the marriage between the executrix and the deceased was invalid on the ground that at the time that the deceased married the executrix, he was still married to the First Respondent.
- [8] Thirdly, the First Respondent alleges that the executrix had no authority to sell the property to the Appellants and that the Appellants were aware at the time of the sale, that the property did not belong to the executrix and that she had no authority to sell it.
- [9] Fourthly, the First Respondent avers that the letter of authority, on the authority of which the executrix purported to sell the property had been fraudulently obtained. The First Respondent points out that upon investigation at the Master's Office as to how the letter of authority was granted, she discovered that the executrix did not disclose the following:
- (i) at the time of the deceased's death, she had not been living with him for almost eight years;
 - (ii) the deceased had been living with his customary law wife at the time of his death;
 - (iii) the deceased had dependants.
- [10] The Magistrate dismissed the application for eviction and found for the Respondents on the ground that the executrix did not have authority to sell the property, and that at the time the executrix got married to the deceased, the deceased's marriage to the First Respondent was still in existence.
- [11] The Appellants appeal against the Magistrate's decision on the ground that the Magistrate misdirected himself in finding that the marriage between the executrix and the deceased was invalid. Mr Holland, who appeared on behalf of the Appellants pointed out that the issue before the Magistrate was not whether the executrix's marriage to the deceased was valid or not. He submitted that the Magistrate was required to decide whether the eviction was to be granted or not.
- [12] The question is whether the Magistrate was wrong in dismissing the Appellants' application.
- [13] This application had been brought before the Magistrate in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("the PIE Act"). The PIE Act was enacted in order to give effect to the provision of section 26(3) of the Republic of South Africa Act 108 of 1996 ("the Constitution"), which provides that;

"No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[14] The PIE Act defines an owner in section 1 as:

"... the registered owner of the land, including an organ of state."

[15] Owner in the Deeds Registries Act 47 of 1937 is defined in section 102 as: in relation to -

"(a) immovable property, subject to paragraph (b), the person registered as the owner or holder thereof and includes the trustee in an insolvent estate, a liquidator or trustee elected or appointed under the Agricultural Credit Act, 1966 (Act 28 of 1966), the liquidator of a company or a close corporation which is an owner and the executor of any owner who has died or the representative recognised by law of any owner who is a minor or of unsound mind or is otherwise under disability, provided such trustee, liquidator, executor or legal representative is acting within the authority conferred on him or her by law. [Para

(a) substituted by s.22(d) of Act 14 of 1993 and by s.9(b) of Act 11 of 1996];

(b) immovable property, real rights in immovable property and notarial bonds -

(i) which are registered in the name of both spouses in a marriage in community of property, either one or both of the spouses;

which are registered in the name of only one spouse and which forms part of the joint estate of both spouses in a marriage in community of property, either one or both of the spouses; "

[16] An unlawful occupier is defined in section 1 of the PIE Act as:

"a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996)."

[17] Sections 4(7) and (8) of PIE Act deal with eviction of unlawful occupiers:

"4. Eviction of unlawful occupiers.

7. If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

8. If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine -

a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)."

[18] Mr Holland submitted that the executrix was married to the deceased, and on the death of the deceased, she became the sole owner of the property, and that being so, was entitled to sell and transfer ownership of the property to the Appellants.

[19] In reply, Ms Mayosi, who appeared on behalf of the Respondents, submitted that the Respondents were occupying the property lawfully. She pointed out that the First Respondent was validly married to the deceased in accordance with the customary law in 1986. She argued that the executrix married the deceased in 1993 whilst the marriage between the First Respondent and the deceased was still in existence. She further submitted that the executrix's marriage was therefore null and void and that proprietary consequences could not flow therefrom.

[20] The customary marriage between the deceased and the First Respondent was regulated by section 1 of Act 3 of 1988 (amending section 22 of the Native Administration Act 38 of 1927) which provided that:

"(1) A man and a woman between whom a customary union subsists are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman.

(2) Subject to subsection (1), no person who is a partner in a customary union shall be competent to contract a marriage during the subsistence of that union.

.....

(7) No marriage contracted after the commencement of this Act but before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and the issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union, [repealed by the Recognition of Customary Marriages Act. 120 of 1998]"

[21] Since 15 November 2000, the deceased and the First Respondent's customary marriage was regulated by the Recognition of Customary

Marriages Act 120 of 1998 ("the Act").

[22] Section 3(2) of the Act provides:

"Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act No 25 of 1961), during the subsistence of such customary marriage.

[23] Section 7(1) of the Act provides:

"The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law."

[24] Section 8(1) provides:

"A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage."

[25] Upon a perusal of a copy of a marriage certificate which was submitted in the court a quo, exhibit BS3, I am satisfied that a marriage between the deceased and First Respondent existed. Also, upon a perusal of a copy of a marriage certificate which was admitted in the court a quo as exhibit TLM3, a marriage between the deceased and the executrix was solemnised. The latter marriage was entered into between the deceased and the executrix, contrary to section 3(2) of the Act (The Recognition of Customary Marriage Act) which expressly prohibits parties in a customary marriage to enter into a civil marriage with another person. It is clear to me that the marriage between the deceased and the First Respondent was not dissolved by court and therefore the deceased's marriage to the executrix was null and void.

[26] The rule of primogeniture which is applicable in this matter was clearly explained in *Bhe v Magistrate, Khayelitsha*

[2004] ZACC 17; 2005 (1) SA 580 (CC) at 617-618 where the court stated:

"The rule of primogeniture was central to the customary law of succession. The general rule was that only a male related to the deceased qualified as intestate heir. Women did not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head was his heir. If the deceased was not survived by any male descendants, his father succeeded him. If his father also did not survive him, an heir was sought among the father's male descendants related to him through the male line. The exclusion of women from heirship, and consequently from being able to inherit property, was in keeping with a patriarchal system which reserved for women a position of subservience and subordination in which they were regarded as perpetual minors under the tutelage of fathers, husbands, or heads of the extended family. Extra-marital children were not entitled to succeed to their father's estate in customary law. They, however, qualified for succession in their mother's family, but subject to the principle of primogeniture. The eldest male extra-marital child qualified for succession only after all male intra-marital children and other close male members of the family."

[27] The court made very important findings at the following paragraphs [52, 91 and 92]:

(i) [Para 52] "Section 28 of the Constitution provides specific protection for the rights of children. Our constitutional obligations in relation to children are particularly important for we vest in our children our hopes for a better life for all. The inclusion of this provision in the Constitution marks the constitutional importance of protecting the rights of children, not only those rights expressly conferred by s28 but also all the other rights in the Constitution which, appropriately construed, are also conferred upon children. Children, therefore, may not be subjected to unfair discrimination in breach of s9(3) just as adults may not be."

(ii) [Para 91] "The exclusion of women from inheritance on the grounds of gender is a clear violation of s9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order."

(iii) [Para 92] "The principle of primogeniture also violates the right of women to human dignity as guaranteed in s10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex and gender. Their dignity is further affronted by the fact that as women, they are also excluded from intestate succession and denied the right, which other members of the population have, to be holders of, and to control property."

[28] I am of the view that the Magistrate's approach in arriving at his decision was correct. The customary rule of primogeniture was partly applicable in this matter. In my view, there are two enquiries to be made, firstly, the validity of the executrix's marriage to the deceased, and secondly, whether or not the Appellants are the owners of the property. One cannot entertain the second enquiry without having decided on the first one.

[29] It is clear from the record that the issue before the Magistrate was not the validity of the marriage between the executrix and the deceased, and the Magistrate never pronounced on it. The Magistrate had to decide whether the Appellants were lawful owners of the property or not.

[30] The first enquiry refers to the validity of the executrix's marriage to the deceased. It is clear from what I have discussed above that the executrix's marriage to the deceased was invalid. It follows that on the death of the deceased, the executrix could not become the owner of the property as she could not succeed the deceased ab intestato.

[31] The second inquiry is whether the Appellants acquired ownership of property notwithstanding that the executrix did not have the authority to sell and transfer ownership of property. I have observed in the record that the executrix entered into a sale

agreement with the Appellants on the 12th August 2004, before she applied for and obtained a letter of authority to wind up the deceased estate. The First Respondent, in her answering papers, avers:

- (i) [Para 34] "It has emerged that the sale of our home to the Applicants was a simulated illegal act of conscious collusion between the buyer and the seller done for the sole purpose of hastily putting the house beyond the reach of its bona fide owner."
- (ii) [Para 37] "The First Respondent was in fact an accomplice in a simulated illegal transaction that was intended to deprive the Applicant and her children of a home for the direct benefit of Vuyiswa Jacobs and this he was aware of all the time."
- (iii) [Para 40] "The transfer of the property by Vuyiswa to the Applicants was illegal and void based on the following:
 - a. Vuyiswa, the purported seller never had legal title to the home as she was never married to the deceased so there never was a joint estate between the two;
 - b. The purported seller had fraudulently acquired the Letters of Authority from the Master and this authority has subsequently been withdrawn;
 - c. The purported buyer being the First Applicant, had consciously participated in a simulated transaction that was illegal and done

for the sole purpose of depriving me and my children of our home."

These averments made by the First Respondent were not disputed and replied to by the Respondents and stands as they were.

[32] In the circumstances I find:

Firstly, that the executrix at the time of sale and transfer of property had no authority to deal with property and its disposal.

[33] Secondly, the Appellants were aware at the time they bought and took transfer of property from the executrix that she had no authority to sell and transfer property to them.

[34] It follows, therefore, that the sale and transfer of property to the Appellants did not confer ownership on the Appellants. It is for these reasons that Mr Holland's submission that the executrix was the sole owner of the property and entitled to sell and transfer ownership of the property to the Appellants is untenable and rejected.

[35] Upon the death of the deceased, in terms of customary law of succession, his (minor) son became an heir. The First and Second

Respondents both fell under the guardianship of the deceased's nearest male major relative, who assumed control and administration

of the deceased's property on behalf of the deceased's family, until the minor son became a major (see Seymour Customary Law in Southern Africa, Juta 5th Edition at 216-217). That was the legal position before the Bhe's ruling in October 2004.

[36] After Bhe's ruling the situation was as follows: the customary rule of primogeniture was declared invalid and unconstitutional to the extent it excludes women, children and extra-marital children from inheriting. In accordance with the court's ruling, First and Second Respondents jointly became the owners of property. At the time the executrix applied for a letter of authority on the 4th November 2004, the Respondents were already owners of the property.

[37] It is trite law that an owner is entitled to his or her lawful possession of his/her property and may be granted an ejectment order against an unlawful occupier of the property provided that right is not limited by the Constitution, statute or any other legal basis, see *Brisley v Drotosky* 2002

(4) SA 1 (SCA) [2002(12) BCLR 1229].

[38] I am satisfied that the Respondents' occupation of the property was not unlawful and that the application for eviction was correctly refused.

[39] In conclusion, I would like to express my displeasure in the manner some Respondents are cited in this matter. It is apposite to the remarks made by the learned Judge Sachs in *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005

(1) SA 217 (CC) at 239 E where it is stated:

"Thus, those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity."

I associate myself with the views expressed in these matter.

The Order

[40] In the result, I would dismiss the appeal with costs.

I agree and it is so ordered

TRAVERSO, DJP

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