

SOUTH AFRICA / JUDGMENT

Nkadimeng v Venter NO and Others (17571/2004) [2008]

ZAGPHC 221 (2 June 2008)

[2008] ZAGPHC 221

COURT

High Courts - Gauteng

BEFORE

V Tlhapi

CASE / FILE NUMBER

17571/2004

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IN

**THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL
PROVINCIAL DIVISION)****CASE****NUMBER :17571/2004****In**

the matter between:

MMATOME
CONSTANCE NKADIMENG APPLICANT
And
MAGISTRATE
VENTER 1st
RESPONDENT
PRETORIA
NORTH ABSA TRUST LIMITED 2nd
RESPONDENT
MACHEKE,
MZAMANI CEDRIC 3rd
RESPONDENT
MMATOME
CONSTANCE NKADIMENG APPLICANT
And
MAGISTRATE
VENTER 1st
RESPONDENT
PRETORIA
NORTH ABSA TRUST LIMITED 2nd
RESPONDENT

MACHEKE,
MZAMANI CEDRIC 3rd
RESPONDENT

JUDGMENT

TLHAPI V. AJ: [1] In this matter the court is required to adjudicate over the issue of costs in the main and second interlocutory applications which remained outstanding after the parties settled on the merits. An order of costs against the applicant was granted by Judge Motata on the 14 September 2004 in the first interlocutory application brought in terms of rule 35 (12) of the Rules of Court I shall refer to the parties as they appear in the main application and to the Master of the High Court. Pretoria as the "Master" In the main application, applicant sought the following relief:

1. an order declaring the third respondent's appointment as the sole heir in the estate the Late Gezani Joseph Macheke invalid;
2. removing the second respondent, who was appointed by the first respondent as representative and administrator of the deceased's estate;
3. ordering the second respondent not to release any assets in the estate to the third respondent and that the latter return all documents and assets of the deceased estate, held by him;
4. that the deceased estate be administered under the supervision of the Master and that the applicant be appointed executor of the deceased estate;
5. that second respondent be ordered to hand over all documents and assets of the deceased estate to the applicant and that she have access to the estate bank accounts;
6. costs against the respondents on an attorney and client scale; An offer in terms rule 34 (4) preceded the second interlocutory application. The relief sought contained some aspects in the offer. The following relief was sought:
 1. that Tinyiko Millicent Maswangani and the Master be joined as fourth and fifth respondents;
 2. that the main application be struck off or dismissed
 3. that the applicant be ordered to pay costs of the main application on the scale between attorney and client, alternatively on a scale between party and party;
 4. that the appointment by the first respondent of the third respondent as sole heir in the deceased estate be set aside;
 5. that the second respondent proceed to administer the deceased estate under the supervision of the Master and that letters of executorship in its favour be issued;

6. that the Master be ordered to issue Letters of Executorship in favour of the second respondent;
7. that for purpose of administration of the deceased estate the Master and the second respondent accept that: 7.1 the applicant was not married to the deceased and that the deceased was unmarried as at date of death; 7.2 that the three children of the applicant Tinyiko Millicent Maswanganyi, Fanisa Nkadimeng and Tiyane Nkadimeng were the biological children of the deceased; 7.3 that the deceased estate pay the costs of the second respondent on a scale as between attorney and client; 7.4 that the applicant pay the costs of this application on a scale between attorney and client alternatively as between party and party; The deceased, the Late Gezani Joseph Macheke died intestate on the 9 September 2003. He was a medical practitioner, and had amassed a substantial estate. The second respondent was nominated to be the administrator of the estate by consent of the applicant and third respondent after they had been convinced by the first respondent, that the second respondent was vested with the necessary expertise in these matters. The second respondent confirmed such fact. The first respondent appointed the second respondent as administrator and directed that the estate be administered and distributed in accordance with section 23 of the Black Administration Act 38 of 1927 and that the third respondent was accordingly considered to be the sole heir. Although the applicant approached the court on the basis that she was married to the deceased it is common cause that the marriage certificate purporting to prove a marriage was not valid. Further, annexures "AB6" and "AB7" by the applicant constitute sufficient proof that she was not married to the deceased and therefore not entitled to inherit from him according to the laws of intestacy. It is further common cause that the deceased was the biological father of applicant's two children Fanisa and Tiyane Nkadimeng. Whether deceased was the biological father of Tinyiko Millicent Maswanganyi still had to be determined. This issue has since been resolved by the parties. The applicant averred that the second respondent in consultation with the first and third respondent proceeded to administer the deceased estate without consulting the guardians of the children or even considering their rights. According to the applicant the third respondent was appointed sole heir without any consultation with her. The applicant contended that this state of affairs prevailed despite the fact that the Constitutional Court had ruled on the appropriate authority to supervise the administration of intestate estates of Black people in *Moseneke v The Master of the High Court* 2001 (2) SA 18 (CC). [8] It was submitted on behalf of the applicant that this should not have prevented the second respondent, from taking cognizance of the rights of the applicant, heirs and others as enshrined in the Constitution of Republic of South Africa Act 108 1996 ("the Constitution"). Further, that the second respondent had the expertise and the fiduciary duty to apply the law in the interests of the heirs and that it had neglected to do so. The second respondent averred, that the deceased's estate fell into the category that had to be administered in terms of the Customary Law under the supervision of the Magistrate. Further that it was not necessary in such instances to advertise the estate and that any claims for maintenance had to be dealt with by the third respondent who bore the responsibility, according to customary

law, to provide for the minor children of the deceased. Another issue raised by the second respondent was that the applicant had failed to join the Master and Tinyako Millicent Maswanganyi as respondents. The second respondent concedes that it did not have the expertise to deal with the administration of intestate estates of Black people and that in this instance it was guided by the first respondent. It is evident that when second respondent took up appointment by the first respondent as administrator of the deceased's estate, it was not aware of the Moseneke case, *supra*. [9] The second respondent launched a second interlocutory application on the 17 April 2007 after the applicant had failed to comply with the court order of the 14 September 2004 and after the attempts at settling the matter with the applicant had failed. The respondent submitted that it had no option but to launch this application because of the conduct of the applicant in failing to join Tinyiko Millicent Maswanganyi and the Master. Further, that the failure by the second respondent to contact this heir was due to the conduct of the applicant. It is evident from the applicant's answering affidavit that the main bone of contention still remained the paternity of Tinyiko Millicent Maswanganyi. [9] Prior to the Moseneke case *supra*, the intestate estates of Black people were not administered in accordance with the Administration of Estates Act 66 of 1965. Subsequent to the ruling in this case the Master's policy document restated the applicability of section 23 of the Black Administration Act *supra* to those cases which had not been excluded by law and, gave directives on how the administration of the intestate estates of deceased Black people who fell within the exceptions had to be supervised. The deceased's estate was one of those to be distributed under the Customary law because he was a single Black male person whose estate did not fall under the exceptions mentioned in the policy document. [9] The Moseneke case *supra*, did not rule on the validity of the laws of inheritance based on primogeniture among Black people. The system of intestate succession in accordance with section 23 of the Black Administration Act, *supra*, was only declared invalid later in *Bhe v The Magistrate Khayelitsha and Shibi v Sithole and Others* [2004] ZACC 17; 2005

- (1) SA 580 (CC). [10] It is my view that the conduct of the applicant leaves much to be desired, especially with regard to the false marriage certificate, the disregard of the order of court in the application brought in terms of rule 35 (12) of the Rules of Court, the delays in attending to the second interlocutory application and in finalizing the main application. On the other hand it is my view too, that the second respondent also neglected, to a certain but important degree to fulfill some of its responsibilities. The fact that it relied in my view, only on the first respondent in advising it on the laws applicable to the administration deceased estates of Black people who had died intestate was not proper. [11] There was uncertainty relating to which law was applicable to the administration of the intestate estates of Black people, or which laws of intestacy were applicable, the administrator was by law obliged to ensure that the interests of all people who could have been affected by his administration of the deceased estate be made aware and be protected . It cannot be denied that one could deduce from the statement of assets and liabilities, annexure "B" dated the 19 February 2004 and lodged by the second respondent with the Magistrate Pretoria North, that the deceased was

a wealthy person. He conducted a business, his medical practice. It cannot be correct that where no procedures were prescribed similar to those in the Administration of Estate's Act, *supra*, that the estate had to be administered in disregard to other laws. The deceased's estate had to be administered by giving due regard to creditors including the Receiver of Revenue and this could have been achieved by adopting the common practice of placing advertisements in a local paper and in the Government Gazette. The fact that no advertisements were placed does not give certainty that interested parties were adequately notified that the deceased's estate was being administered and, that claims had to be lodged before any inheritances were paid out. On the other hand the deceased's estate was not absolved from giving an account in respect of the estate's obligation under the Estate Duty Act 45 of 1995. Further, the second respondent should have been aware of the fact that applicant and third Respondent were no longer on good terms with each other, and this was exacerbated by the paternity claim of Tinyiko Millicent Maswanganyi. The involvement by the second respondent of the applicant in his administration of the deceased's estate was therefore necessary. [12] When the deceased's estate was initially reported the death notice and the next-of-kin affidavit, annexure "AB9" listed the applicant's children by the deceased as descendants with a right to inherit. Although the appointment of the third respondent as sole heir was made on the advise of the first respondent, it is my view that the development of our law since 1994 and the advent of the Constitution Act, *supra*, placed an added responsibility on the first and second respondent to investigate and seek advise on the legality of a law that was blatantly discriminatory and which law had the potential of adversely affecting the interests of other parties during the course of the administration of the deceased's estate. This should have been the case even where the said laws had not been repealed. [13] Having regard to the above, in my view, it would not be justified to award punitive costs against any party. Of importance is the fact that both applications clarified the position at law for the litigants and the interests of the heirs remained protected. [14] In the premise, I make the following order: 1. The costs of the applicant and the second respondent in the main and second interlocutory application be payable from the Estate of late Gezani Joseph Macheke; 2. That a copy of this judgment and a copy of the draft which was made an order of court of the 8 May 2008 be served of the Master of the High Court, V

TLHAPI DATE OF HEARING : 8 MAY 2008

JUDGEMENT

HANDED DOWN ON : 2 JUNE 2008 ATTORNEYS FOR THE APPLICANT : MAGABANE INC.
ADVOCATE FOR THE APPLICANT : NAVIN NAIDOO ATTORNEYS FOR THE SECOND
RESPONDENT : TIM DU TOIT EN KIE INGELYF ADVOCATE FOR THE SECOND RESPONDENT D
VAN DEN BOGERT

JUDGMENT

TLHAPI V. AJ:

[1] In this matter the court is required to adjudicate over the issue of costs in the main and second interlocutory applications which remained outstanding after the parties settled on the merits. An order of costs against the applicant was granted by Judge Motata on the 14 September 2004 in the first interlocutory application brought in terms of rule 35 (12) of the Rules of Court

I shall refer to the parties as they appear in the main application and to the Master of the High Court. Pretoria as the "Master"

In the main application, applicant sought the following relief:

1. an order declaring the third respondent's appointment as the sole heir in the estate the Late Gezani Joseph Macheke invalid;
2. removing the second respondent, who was appointed by the first respondent as representative and administrator of the deceased's estate;
3. ordering the second respondent not to release any assets in the estate to the third respondent and that the latter return all documents and assets of the deceased estate, held by him;
4. that the deceased estate be administered under the supervision of the Master and that the applicant be appointed executor of the deceased estate;
5. that second respondent be ordered to hand over all documents and assets of the deceased estate to the applicant and that she have access to the estate bank accounts;
6. costs against the respondents on an attorney and client scale;

An offer in terms rule 34 (4) preceded the second interlocutory application. The relief sought contained some aspects in the offer. The following relief was sought:

1. that Tinyiko Millicent Maswangani and the Master be joined as fourth and fifth respondents;
2. that the main application be struck off or dismissed
3. that the applicant be ordered to pay costs of the main application on the scale between attorney and client, alternatively on a scale between party and party;
4. that the appointment by the first respondent of the third respondent as sole heir in the deceased estate be set aside;
5. that the second respondent proceed to administer the deceased estate under the supervision of the Master and that letters of executorship in its favour be issued;
6. that the Master be ordered to issue Letters of Executorship in favour of the second respondent;

7. that for purpose of administration of the deceased estate the Master and the second respondent accept that:

7.1 the applicant was not married to the deceased and that the deceased was unmarried as at date of death;

7.2 that the three children of the applicant Tinyiko Millicent Maswanganyi, Fanisa Nkadimeng and Tiyané Nkadimeng were the biological children of the deceased;

7.3 that the deceased estate pay the costs of the second respondent on a scale as between attorney and client;

7.4 that the applicant pay the costs of this application on a scale between attorney and client alternatively as between party and party;

The deceased, the Late Gezani Joseph Macheke died intestate on the 9 September 2003. He was a medical practitioner, and had amassed a substantial estate. The second respondent was nominated to be the administrator of the estate by consent of the applicant and third respondent after they had been convinced by the first respondent, that the second respondent was vested with the necessary expertise in these matters. The second respondent confirmed such fact. The first respondent appointed the second respondent as administrator and directed that the estate be administered and distributed in accordance with section 23 of the Black Administration Act 38 of 1927 and that the third respondent was accordingly considered to be the sole heir.

Although the applicant approached the court on the basis that she was married to the deceased it is common cause that the marriage certificate purporting to prove a marriage was not valid. Further, annexures "AB6" and "AB7" by the applicant constitute sufficient proof that she was not married to the deceased and therefore not entitled to inherit from him according to the laws of intestacy. It is further common cause that the deceased was the biological father of applicant's two children Fanisa and Tiyané Nkadimeng. Whether deceased was the biological father of Tinyiko Millicent Maswanganyi still had to be determined. This issue has since been resolved by the parties.

The applicant averred that the second respondent in consultation with the first and third respondent proceeded to administer the deceased estate without consulting the

guardians of the children or even considering their rights. According to the applicant the third respondent was appointed sole heir without any consultation with her. The applicant contended that this state of affairs prevailed despite the fact that the Constitutional Court had ruled on the appropriate authority to supervise the administration of intestate estates of Black people in *Moseneke v The Master of the High Court* 2001 (2) SA 18 (CC).

[8] It was submitted on behalf of the applicant that this should not have prevented the second respondent, from taking cognizance of the rights of the applicant, heirs and others as enshrined in the Constitution of Republic of South Africa Act 108 1996 ("the Constitution"). Further, that the second respondent had the expertise and the fiduciary duty to apply the

law in the interests of the heirs and that it had neglected to do so. The second respondent averred, that the deceased's estate fell into the category that had to be administered in terms of the Customary Law under the supervision of the Magistrate. Further that it was not necessary in such instances to advertise the estate and that any claims for maintenance had to be dealt with by the third respondent who bore the responsibility, according to customary law, to provide for the minor children of the deceased. Another issue raised by the second respondent was that the applicant had failed to join the Master and Tinyiko Millicent Maswanganyi as respondents.

The second respondent concedes that it did not have the expertise to deal with the administration of intestate estates of Black people and that in this instance it was guided by the first respondent. It is evident that when second respondent took up appointment by the first respondent as administrator of the deceased's estate, it was not aware of the *Moseneke* case, *supra*.

- [9] The second respondent launched a second interlocutory application on the 17 April 2007 after the applicant had failed to comply with the court order of the 14 September 2004 and after the attempts at settling the matter with the applicant had failed. The respondent submitted that it had no option but to launch this application because of the conduct of the applicant in failing to join Tinyiko Millicent Maswanganyi and the Master. Further, that the failure by the second respondent to contact this heir was due to the conduct of the applicant. It is evident from the applicant's answering affidavit that the main bone of contention still remained the paternity of Tinyiko Millicent Maswanganyi.
- [9] Prior to the *Moseneke* case *supra*, the intestate estates of Black people were not administered in accordance with the Administration of Estates Act 66 of 1965. Subsequent to the ruling in this case the Master's policy document restated the applicability of section 23 of the Black Administration Act *supra* to those cases which had not been excluded by law and, gave directives on how the administration of the intestate estates of deceased Black people who fell within the exceptions had to be supervised.

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On the other hand it is my view too, that the second respondent also neglected, to a certain but important degree to fulfill some of its responsibilities. The fact that it relied in my view, only on the first respondent in advising it on the laws applicable to the administration deceased estates of Black people who had died intestate was not proper.

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administrator was by law obliged to ensure that the interests of all people who could have been affected by his administration of the deceased estate be made aware and be protected . It cannot be denied that one could deduce from the statement of assets and liabilities, annexure "B" dated the 19 February 2004 and lodged by the second respondent with the Magistrate Pretoria North, that the deceased was a wealthy person. He conducted a business, his medical practice.

It cannot be correct that where no procedures were prescribed similar to those in the Administration of Estate's Act, supra, that the estate had to be administered in disregard to other laws. The deceased's estate had to be administered by giving due regard to creditors including the Receiver of Revenue and this could have been achieved by adopting the common practice of placing advertisements in a local paper and in the Government Gazette. The fact that no advertisements were placed does not give certainty that interested parties were adequately notified that the deceased's estate was being administered and, that claims had to be lodged before any inheritances were paid out. On the other hand the deceased's estate was not absolved from giving an account in respect of the estate's obligation under the Estate Duty Act 45 of 1995.

Further, the second respondent should have been aware of the fact that applicant and third Respondent were no longer on good terms with each other, and this was exacerbated by the paternity claim of Tinyiko Millicent Maswanganyi. The involvement by the second respondent of the applicant in his administration of the deceased's estate was therefore necessary.

[12] When the deceased's estate was initially reported the death notice and the next-of-kin affidavit, annexure "AB9" listed the applicant's children by the deceased as descendants with a right to inherit. Although the appointment of the third respondent as sole heir was made on the advise of the first respondent, it is my view that the development of our law since 1994 and the advent of the Constitution Act, supra, placed an added responsibility on the first and second respondent to investigate and seek advise on the legality of a law that was blatantly discriminatory and which law had the potential of adversely affecting the interests of other parties during the course of the administration of the deceased's estate. This should have been the case even where the said laws had not been repealed.

[13] Having regard to the above, in my view, it would not be justified to award punitive costs against any party. Of importance is the fact that both applications clarified the position at law for the litigants and the interests of the heirs remained protected.

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2. That a copy of this judgment and a copy of the draft which was made an order of court of the 8 May 2008 be served of the Master of the High Court,

V TLHAPI

DATE OF HEARING : 8 MAY 2008

JUDGEMENT

HANDED DOWN ON : 2 JUNE 2008

ATTORNEYS FOR THE APPLICANT : MAGABANE INC.

ADVOCATE FOR THE APPLICANT : NAVIN NAIDOO

ATTORNEYS FOR THE SECOND RESPONDENT : TIM DU TOIT EN KIE

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ADVOCATE FOR THE SECOND RESPONDENT

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