

SOUTH AFRICA / JUDGMENT

None v Tshabalala (15549/2011) [2013] ZAGPJHC 100 (3 May 2013) [2013] ZAGPJHC 100

COURT

South Gauteng High Court, Johannesburg

BEFORE

PM Mojaelo

CASE / FILE NUMBER

15549/2011

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REPUBLIC OF SOUTH

AFRICA

SOUTH GAUTENG HIGH

COURT

JOHANNESBURG

CASE NO: 15549/2011

In the matter between:

SIBONGILE

MARGARET NONE

Applicant

and

LYDIA

NOMASONGO TSHABALALA

Respondent

JUDGMENT

MOJAPELO, DJP:

- [1] This matter concerns a dispute regarding the control of the estate of the late Mr Lewis None (Identity No ...) who died on 30 January 2011. He did not leave a will. His registered assets include two immovable property, one at 480B Zola Extension 3 Township, Soweto (Zola 3) and the other House number 248, Erf 7143, Zola Extension 1 Township, Soweto (Zola 1), motor vehicles and a tavern or shebeen business that operates from Zola 3 property.
- [2] The applicant and the respondent are two women who were involved in different ways in the life of the deceased. They each have one child with him.
- [3] The applicant was married to the deceased by a civil marriage on 9 August 1985. It is common cause that the marriage subsisted at the time of the death of the deceased. They were thus married for 26 years. The couple was initially blessed with two children, namely, Mpho and Mphonyana, who were twins born on 7 September 1986. Unfortunately Mphonyana passed away 7 months later on 13 April 1987. Mpho is therefore the only surviving child of the deceased and the applicant.
- [4] The respondent also lived with the deceased for some time as a couple in a relationship like that of husband and wife. It is not exactly clear as to how long they lived together. She alleges that the deceased paid lobola for her and that they lived in a customary marriage for 18 years up to the death of the deceased. One child was born out of that relationship. The respondent does not provide details of that child in the papers before me. The existence of the child and its paternity is not in dispute.
- [5] It is common cause on the papers that the purported customary marriage between the respondent and the deceased was entered into during the existence of the civil marriage between the deceased and the applicant. It is further common cause that the customary marriage is invalid for that reason.
- [6] The applicant was appointed as executrix of the estate of the deceased by Letters of Executorship issued by the Master of the High Court on or about 18 February 2011. The exact date of issue is not clear from the copy before me; it had already been issued by 22 February 2011 as it was used as an annexure to an affidavit deposed to by the applicant on that day.
- [7] The dispute between the parties was first brought to this court by way of an urgent application issued on 21 February 2011 under case number 07637/2011. The respondent effectively then sought control of the estate of the deceased by way of prayers which are similar, though not identical, to prayers in the present application. That application was removed from the roll and was never enrolled again. The papers in that matter have however now been incorporated by reference into this matter through the respondent's answering affidavit and founding affidavit in support of a counter-application. The

application itself has not been set down before me, and appears to have been abandoned.

- [8] The present application was initiated by way of notice of motion issued on 18 April 2011, also initially by way of urgent application. On 21 April 2011 it was struck off from the roll of the urgent court (per Monama J) for lack of urgency. It thereafter served in the ordinary motion court before different judges on 24 May 2011 and 1 June 2011 when it was postponed without any order regarding costs.
- [9] The current application then finally served before Moshidi J on 04 August 2011 who made an order in the following terms:

“IT IS ORDERED THAT:-

1. The Respondent is to report all property, including books and documents, belonging to or was in possession of the late Lewis None before his death.
2. The Sheriff takes inventory of all reported property in terms of item 1 above.
3. The Respondent is restrained and interdicted from damaging, removing and or disposing the property in House No. 248, Erf [...], Zola Extension 1 Township, Soweto.
4. The status of the Respondent, Lydia Nomasonto Tshabalala, is to be referred to trial:-
 - 4.1 The notice of motion and founding affidavit stand as simple summons;
 - 4.2 The answering affidavit shall stand as an entry of appearance to defend;
 - 4.3 The Applicant shall file a declaration in regard the disputed issues under paragraph 4 of the Draft Order within 20 days from the date hereof;
 - 4.4 The Draft Order thereafter (sic) the normal rules on normal provisions of the uniform rules shall apply.
5. The Respondent is to surrender all the motor vehicles (registered in the name of the deceased – Annexure ‘SMN 11’ of the Founding Affidavit) in the premises of House No. 248, Erf [...], Zola Extension 1 Township, Soweto, to the control and custody of the Applicant.
6. The Applicant must not sell or dispose of the motor vehicles mentioned in item 5 above pending the determination of the matter in item 4 above.
7. The costs are reserved.”

- [10] It is that order that brought this matter before this court on the civil trial roll. It deserves to be mentioned that only a declaration had been filed when the matter came before the civil trial on 22 April 2013 court. No further pleadings had been delivered or exchanged and the provisions of the Uniform Rules of Court with regard to civil trials had not been complied with. The pleadings for the civil trial were not complete. Furthermore when the matter came before the civil trial court no discovery had taken place, no pre-trial conference had been held in terms of the rules and none of the legal representatives had filed a practice

note in terms of Practice Manual of this court. The last two are prerequisites for the allocation of a matter and the commencement of trial in this court. The parties had done very little to comply with the order of Moshidi J and I expressed my displeasure.

[11] By consent of the legal representatives on both sides, it was ordered that none of them shall recover any trial costs for the first day. Thereafter the legal representatives on both sides placed on record that they were acting pro bono and would not be charging fees in this case. The matter stood down for the parties to hold a pre-trial conference as directed by the court. A plea and counterclaim by the respondent as well as a plea to the counterclaim and a replication by the applicant were also filed. It appeared necessary to accommodate the parties as it appeared that all parties and their witnesses were at court and that the estate is fairly small and its finalisation was delayed by the pending litigation. Evidence in the matter was heard on 24 and 26 April 2013.

[12] In the main application the applicant seeks an order in the following terms (Record p 3 – 4):

“1. That the Respondent report all property, including books and documents, belonging to or was in possession of the late Lewis None before his death;

2. That the Sheriff takes inventory of all reported property in terms of Item 1 above and 3 and 4 below;
3. That the Respondent surrender the immovable property, namely, House No. 248, Erf 7143, Zola Extension 1 Township, Soweto, to the Applicant;
4. That the Respondent surrender all movable property in House No. 248, Erf [...], Zola Extension 1 Township, Soweto, to the control and custody of the Applicant;
5. That the Respondent be restrained and interdicted from damaging, removing and or disposing (of) the property in House No. 248, Erf 7143, Zola Extension 1 Township, Soweto.
6. That the Respondent be ejected from the immovable property, namely, House No. 248, Erf [...], Zola Extension 1 Township, Soweto, with immediate effect.
7. Granting the Applicant further and/or immediate relief.
8. Costs of this application if opposed.”

The respondent in turn filed a counter-application in which she seeks an order in the following terms (Record p 89):

“1. That the Second Respondent (sic) (i.e. Master of the High Court) be ordered to revoke and cancel letters of Executorships

granted to the Applicant on the 30 January 2011 under Number 3352/2011;

2. That the Applicant be restrained and interdicted from squandering and using the assets of the estate of Lewis None;

3. That the Respondent be interdicted and restrained from selling any stock in the shop and shebeen situated at 480B, Zola, Soweto;
4. That the Honourable Court declare that the Applicant is not entitled to inherit any of the assets of the estate of late Lewis None;
- 5 That the relationship between the late Lewis None be declared a universal partnership (sic);
- 6 That the applicant be ordered to pay costs.”

Most of the prayers and relevant issues raised in the application appear to have been resolved by the order of Moshidi J. I am advised that that order was given by agreement between the parties and that no judgment was delivered when it was granted. In the interest of finality I will therefore, in the course of this judgment, comment on or deal with such issues as, from the arguments before me, appear to be either unresolved between the parties or require judicial clarification.

[13] The main issue for determination by this Court is the status of the respondent, Lydia Nomasonto Tshabalala, as referred to this court by paragraph 4 of the court order of 4 August 2011. The parties themselves further formulated and defined the issues in the pre-trial minute of a conference that was held on 23 April 2013. The essential parts of the pre-trial minute that formulate the issues read:

“ADMISSION

- (i) The house number situated at Erf 7143, Zola, Extension 1, Soweto Township, Gauteng belonged to the deceased (Mr. Lewis None).
- (ii) The deceased died interstate.
- (iii) The deceased owned a business of a tavern and a tuck shop which were registered in his names.
- (iv) That the Master of the South Gauteng High Court appointed the Applicant / Plaintiff as the Executrix of Estate Late Lewis None.
- (v) That the deceased had motor vehicles registered in his names being Toyota Stallion, Mazda B-Series, Chevrolet Optra, Tata truck.
- (vi) The deceased had a son with the Applicant namely Mpho and with the Respondent one son.

POINTS IN DISPUTE

- (1) Whether the Respondent / Defendant was legally married to the deceased.
- (ii) Whether the Applicant had left the deceased homestead for 18 (eighteen) years.

(iii) Whether the customary marriage between the Respondent / Defendant and the deceased is valid; and in the event the marriage complies with the law, whether the marriage between the Applicant and the deceased is valid.

(iv) The Defendant / Respondent stated in her papers that in the event the Honourable Court to (sic) declares her customary marriage invalid, in the alternative, she requests the Honourable Court to declare her relationship with the deceased as a universal partnership and the Applicant / Plaintiff dispute that.”

[14] Evidence therefore had to focus on the issues as formulated by the parties. It is not clear, having regard to the prayers in the application and the counter-application, why it is necessary for this court to determine whether the applicant had left the deceased’s homestead (for 18 years) or not. Its determination, it would appear, will not help this court to decide the application or counter-application. It is the evidence of the applicant nevertheless that prior to the death of the deceased she was away from the common home for a period of 14 years as a result of ill-health. It was during this period, according to her, that the respondent had a relationship with the deceased. It is not necessary to determine the exact period of her absence.

[15] As regards the purported customary marriage between the respondent and the deceased, the respondent alleges that the deceased paid lobola for her in the sum of R3 500, 00 and that she became his customary wife. The applicant disputes the existence and validity of the alleged customary marriage. It is further common cause that the co-habitation between the respondent and the deceased started after the marriage between the applicant and the deceased. It is the respondent’s case that the alleged customary marriage was concluded when the applicant and the deceased were not living together.

[16] The respondent does not deny the validity of the marriage between the deceased and the applicant. The existence of that marriage is confirmed by a marriage certificate that is part of the exhibits before court. The applicant states that such marriage was never terminated and that it existed until the death of the deceased. There is no evidence to establish the contrary. I am accordingly satisfied that the civil marriage between the applicant and the deceased was valid and that it subsisted until the death of the deceased.

[17] The purported customary marriage between the respondent and the deceased is, on my assessment of the facts, a non-issue. The relationship that gave rise to it started during the existence of a valid civil marriage between the applicant and the deceased. The alleged customary marriage was thus also concluded during the subsistence of such a civil marriage. It is thus invalid. The respondent herself states that she has been advised that a customary marriage concluded during the existence of a civil marriage is invalid. She accepts the correctness of this advice (see record p 99 para 5.5.3). The advice is in accordance with the Recognition of Customary Marriages Act, 1998 and is indeed correct. The purported customary marriage between the respondent and the deceased is thus invalid and null and void ab initio. The respondent was thus never a lawful wife of the deceased.

The respondent has requested the court, in the alternative, to declare her relationship with the deceased as a universal partnership. I return later to this request. I shall deal first with custody and control of the deceased estate.

- [18] As has been stated the applicant has been appointed as executrix of the estate of the deceased. On the papers the respondent seeks an order directing the Master of the High Court to revoke and cancel the Letters of Executorship. The facts and reasons advanced by the respondent are stated in paragraph 11 (record p 51) and in paragraph 5.1 (record pp 93 – 95) of the respondent's affidavits. There is no allegation that the Letters of Executorship were irregularly applied for or irregularly issued. There is thus no valid reason to revoke same. There is further no allegation that the applicant is not competent to administer the estate. There is thus also no reason to set aside her appointment as the executrix. It is my understanding, in any event, that at the pre-trial conference the respondent conceded the validity of her appointment. Counsel for the respondent further conceded, in argument, that the applicant was validly appointed. Her appointment is no longer challenged. Counsel for the respondent further conceded that as executrix the applicant is entitled to take custody and control of all the assets of the deceased including the Zola 1 property. What counsel for the respondent did not concede is the ejectment of the respondent from the Zola 1 house. He specifically argued against it and submitted that the prerequisites for an application for ejectment from residential property have not been established.
- [19] It needs to be stated that as widow of the deceased and as duly appointed executrix, the applicant has the power to administer the estate of the deceased in terms of the Administration of the Estates Act 66 of 1965 (the Act). She also has specific powers, obligations and authority to take control and custody of the estate of the deceased and to liquidate and distribute same in accordance with the provisions of the Act and the laws of interstate succession. She exercises all her powers under the supervision of the Master of the High Court.
- [20] All the assets that she lays claim to as executrix are registered in the name of the deceased. The documentary proof of such registration, including the title deed to Zola 1, is before court and is indeed in the name of the deceased. On the face of it the executrix is thus entitled to take possession as custodian of such assets, as counsel for the respondent rightly acknowledged. The respondent may not interfere with, obstruct, prevent or hinder the applicant in execution of her duties as executrix. Having regard to the legal powers of the applicant, it is incumbent upon the respondent, whatever her claim may be, to cooperate with the applicant in the execution of her duties as executrix.
- [21] The respondent lays claim to some of the assets on the basis of an alleged universal partnership between her and the deceased. She alleges that the assets in question were acquired by her and the deceased while she lived together with the deceased as man and wife. Her case is thus that she and the deceased are joint owners of the assets in question.

The right of the deceased in those assets is not in dispute. The allegation of universal partnership relates to the extent of the deceased's right inasmuch as the respondent asserts that she has a share in such assets. The allegation does not exclude the right of the deceased in the assets in question. The assets therefore form part of the estate of the deceased. What the respondent asserts is in effect a claim against the estate of the deceased. It has been submitted, and I am persuaded, that it will facilitate the administration of the estate if her claim to a universal partnership is determined.

- [22] There were initially not sufficient allegations in the counter-application to base or support the respondent's claim for a universal partnership. Full allegations were set out for the first time in the respondent's counter-claim on 24 April 2013 after the hearing in this matter had commenced. That claim stands independent of the control and custody of the deceased estate. In the initial papers universal partnership was simply mentioned as an alternative prayer to the main prayer which was the recognition of the respondent as customary wife of the deceased. The essential allegations to sustain the two claims are not identical. This aspect was lost in the initial papers.
- [23] It is convenient to deal with the claim for universal partnership in a separate judgment and not to conflate it with the issues dealt with in this judgment.
- [24] In the premises I make the following order and declaration:
1. The applicant was validly married in community of property to the late Lewis None (Id No...)), who died on 30 January 2011, and the marriage subsisted at the time of his death;
 2. The purported customary marriage between the respondent and the late Lewis None (Id No...), who died on 30 January 2011, is declared null and void ab initio and of no force and effect;
 3. The applicant is the validly appointed executrix of Estate Late Lewis None and is entitled to take control and possession of all the assets of the deceased estate, including house number 248, Erf 7143 Zola Extension 1, Soweto;
 4. The respondent is directed and ordered to allow the applicant access to, control and custody of the said assets of the deceased to enable the applicant to carry on her functions as executrix of the deceased estate;
 - 5.

Judgment

is reserved in the following claims:

- a. the respondent's counter-claim for declaration of a universal partnership between the respondent and the deceased, and

- b. the applicant's claim for ejectment of the respondent from house 248, Erf [...], Zola Extension 1, Soweto,
6. Save as set out in 5 above the respondent's counterclaim is dismissed;
7. The costs of the application and of the counter-application, including those reserved on 14 August 2011, are reserved for determination at the end of the judgment reserved in 5 above (ie on universal partnership and ejectment);
8. In the event of the respondent failing to allow the applicant free access to, custody and control of any of the assets of the deceased,

hindering the applicant in execution of her duty as executrix, or contravening any of the terms of this order or of the court order of 14 August 2011, the applicant may approach this court on the same papers in this matter for ejectment of the respondent and for any related remedy.

PM MOJAPELO

DEPUTY JUDGE PRESIDENT'

03 May 2013

For the Applicant: G L Lidovho

Instructed by Maseko Attorneys

For the Respondent: S S Senosi

of Sofela Senosi Attorneys

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