

SOUTH AFRICA / JUDGMENT

Victoria v Mxiki and Others (3924/09)

[2010] ZAECHGC 86 (16 September 2010)

[2010] ZAECHGC 86**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

O.H. Crisp

CASE / FILE NUMBER

3924/09

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****EASTERN****CAPE, GRAHAMSTOWN****CASE****NO: 3924/09****Date****Heard : 26 August 2010****Judgment****delivered : 16th September 2010****In**

the matter between:

MBATHA

NOMPUMELELO VICTORIAApplicant

and

SIGANGA

WELSH MXIKI

.....1st

Respondent

MASTER

OF THE EASTERN CAPE HIGH COURT2nd

Respondent

MASTER

OF THE NORTH GAUTENG HIGH COURT3rd

Respondent

JUDGMENT**CRISP AJ:**

- [1] The Applicant brought an application compelling the second Respondent the Master of the Eastern Cape High Court to close his file under estate number 1024/09 relating to the estate of MXIKI KAWUTA, who died intestate on the 19th of February 2009, and transmit the file to the third Respondent, the Master of the North Gauteng High Court. The third Respondent was thereafter to be directed to register the estate of the deceased.
- [2] The Applicant instituted these proceedings on the basis that she and the deceased had married by means of customary rites on the 3rd November 2007. The Applicant and the deceased had a son who was born on the 4th of July 2006.
- [3] The Applicant and the deceased shared a common home in Ebony Park, KEMPTON Park District in the Gauteng Province.
- [4] The deceased died in Gauteng but was buried in Whittlesea, in the Eastern Cape Province, where his parents reside.
- [5] On the 21st March 2008 and the 11th of April 2008 respectively, the deceased and the Applicant purchased fixed property, both of which were registered as property owned by MXIKI KAWUTA and MBATHA NOMPUMELELO. In her founding papers the Applicant contends that she is unable to deal with the mortgage bonds as well as the other assets in the deceased estate, without letters of executorship.
- [6] The second Respondent issued a report dated the 13th of November 2009 indicating that he/she will abide by the decision arrived at by this court.
- [7] In his answering papers filed on the 13th of January 2010 the first Respondent opposes the application essentially on the basis,so he contends, that no customary marriage had occurred between the Applicant and the deceased on the 3rd of November 2007. It is common cause that the first Respondent is the natural father of the deceased.
- [8] Mr Mangolele, counsel for the Applicant, informed me at the commencement of the proceedings,that the customary marriage is irrelevant insofar as the relief, sought by the Applicant is concerned. He undertook to address me on this issue only because the customary marriage had been raised in the first Respondent's answering papers. The only issue to be considered, according to Mr Mangolele, is whether or not the second Respondent had the right to retain the estate file of the deceased, when it is common cause that at the time of his death the deceased was permanently resident in Gauteng. On this basis, so contended Counsel, the second Respondent lacked jurisdiction since the distribution of the assets of the deceased estate did not fall within his/her jurisdiction.

[9] As, proof of his submission, Counsel referred me to the provisions of section 4 of the ADMINISTRATION OF ESTATES ACT, ACT NO 66 OF 1965 (the “ESTATES Act”). Section 4 is quoted below.

“JURISDICTION OF MASTERS

(1) In respect of the estate of a deceased person which is not governed by the principles of the customary law, or of any portion thereof, jurisdiction lie

(a) In the case of a deceased person who was, at the date of his or her death, ordinarily resident within the area of jurisdiction of a High Court, with the Master appointed in respect of that area; and

(b) In the case of a deceased person who was not at that date so resident with the Master to whom application is made to grant letters of executorship or to sign and seal any such letters of executorship or sign and seal any such letters already granted in respect of the estate concerned. Provided that on written application by any person having an interest in the deceased estate, a Master who would otherwise have no jurisdiction in respect of that estate may, with the consent of the Master who has such jurisdiction assume jurisdiction in respect of that estate.

1(A) The Master shall not have jurisdiction in respect of any property if the devolution of the property is governed by the principles of customary law, or of the estate of a person if the devolution of all the property of the person is governed by the principles of customary law and no documents in respect of such property or estate shall be lodged with the Master, except a will or a document purporting to be a will.”

[10] Since Counsel had indicated that he does not appear as the representative of the customary wife of the deceased, I asked him

what the Applicant’s locus standi was in the matter. Counsel indicated that Applicant instituted proceedings solely as the mother of the deceased’s minor son.

[11] Mr Mangolele referred me to BHE AND OTHERS V MAGISTRATE, KHAYELITSHA AND OTHERS (COMMISSION FOR GENDER EQUALITY AS AMICUS CURIAE); SHIBI V SITHOLE AND OTHERS; SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND ANOTHER V PRESIDENT OF THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND ANOTHER [2004] ZACC 17; 2005 (1) SA 580 (CC) in which I was to find authority relating to the office to which an intestate deceased estate was to be reported as set down by the Constitutional Court.

[12] The Bhe

judgement

most certainly appears to have led to the amendments in subsection 1 of section 4 of the ESTATES Act. No mention is, however, made of an office to which the estate of a deceased is to be reported. I agree with Counsel that if he has abandoned the customary marriage issue then in that event the BHE

judgment

certainly confirms that the third Respondent has jurisdiction in the distribution of the estate of the deceased. I cannot, however, further agree with him when he contends that a customary marriage has no relevance whatsoever in the determination of jurisdiction in the administration of a deceased estate. I say so for the simple reason that Section 4 (1) specifically refers to “the estate of a deceased person which is not governed by the principles of customary law” (emphasis added).

[13] The judgement, however, lends support to Mr Mangolela’s contention that a court cannot simply fall back on the PLASCON – EVANS rule in matters of status.¹ On this basis, Mr Mangolela suggested that I ought to pay scant regard to the averments raised by the first Respondent in his answering

papers.

[14] Mr Mangolela referred me to the second Respondent’s report and contended that the averments therein set out are unconstitutional. I indicated to Mr Mangolela that I did not follow his argument. All the second Respondent had done was to quote the provisions of section 4 (1A), 4 (3) and 4 (4) of the Estates Act verbatim. Second Respondent appears to be advising court that the deceased estate was not distributed by her office because the provisions of Section 4 (1A) limits a Master from administering an estate governed by the principles of customary law. Second Respondent further alludes thereto that even had his office administered the deceased estate in circumstances where it was later discovered that the third Respondent had jurisdiction, no prejudice would be caused, because the provisions of section 4(4) allows for the cancellation of letters of executorship which may have wrongly been issued by the second Respondent.

[15] Regard being had thereto that Applicant does not seek an order declaring that the customary union was valid, Mr Mangolela has

probably wisely abandoned premising the Applicant’s locus standi in this matter upon the customary union.

[16] First Respondent has premised his opposition to the order sought by the Applicant upon what appears to be his bona fide view that no customary marriage took place between his deceased’s son and the Applicant. On this basis, first Respondent may not be faulted for opposing the application when the founding papers were served upon him. Even though the customary marriage is no longer in issue and that accordingly the PLASCON EVANS rule is

available to this court, I do not propose to decide upon the validity of the customary marriage, save to reiterate that first Respondent's opposition to the application was not without merit. Mr Brooks, who appeared on behalf of the first Respondent, informs me that opposing papers were filed for two reasons. The first was that first Respondent had formed the view that the Applicant's locus standi was founded upon the customary marriage. The second reason was simply that his client was cited as the first Respondent.

- [17] Mr Mangolela advised me that a line of communication had been opened between the Applicant and the second Respondent in an attempt to resolve the impasse amicably. This line of communication was abruptly terminated when, in a letter dated the 18th of August 2009, annexed to the founding papers, as annexure "MNVII" second Respondent invited the Applicant to take legal action.
- [18] I am not certain what the stance of the second Respondent would have been had the Applicant declared that she approached the Master, simply as an "interested party", being as the mother of the minor child and no longer as the customary wife of the deceased.
- [19] My view is that the provisions of section 4 (1) (a) are applicable, since the Applicant has abandoned, the alleged customary marriage as her reason for instituting these proceedings. It is probable that the second Respondent would have adopted a similar approach had the Applicant so advised the second Respondent. I cannot be certain hereof, however.
- [20] The Applicant has in a generic fashion sought costs on a punitive scale. He has not specified who ought to be responsible for the costs, neither has he indicated whether he seeks costs jointly and severally.
- [21] As I have alluded to above, the first Respondent cannot be faulted for filing opposing papers and appearing at court. He has only been advised at court that the Applicant has changed the basis of her locus standi in this matter. First Respondent is accordingly entitled to costs.
- [22] Applicant contends that she was obliged to approach court because of the stance adopted by the second Respondent. Regrettably, second Respondent was not represented at court. I accordingly cannot be certain what the view of the second Respondent would have been had Applicant, prior to the 18th of August 2009, indicated that she abandons the customary marriage as the basis upon which she declares herself to be an interested party in the estate of the deceased.
- [23] In view of the aforesaid difficulty I regrettably find myself constrained to order that the costs follow the result on a party and party scale.
- [24] I accordingly make the following order:

The second Respondent is ordered to close the file opened under estate number 1024/09 in the estate of the late MXIKI KAWUTA and to hand over the original contents to the third Respondent within fourteen (14) days of receipt of this court order;

The third Respondent is directed to register the estate of the late MXIKI KAWUTA, and

The costs occasioned by the Applicant and the First Respondent are to be paid from the assets of the deceased estate.

O.H. CRISP

ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicant : Adv M.S. Mangolela

Attorneys for Applicant : Messrs Mili Attorneys

110 High Street

Grahamstown

Counsel for the 1st Respondent : Adv R.W.M. Brooks

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1LANGA DCJ (as he then was) at para 13 of the BHE judgment: “[13]Since the question whether or not the two minor daughters of Ms BHE are extra marital children bears on their status, reliance on the rule in PLASCON – EVANS was, in my view inappropriate. I consider that the evidence produced is not sufficient to resolve the issue one way or another. It will accordingly be necessary for the purpose of this judgment, to deal with the effects of extra marital birth on intestate succession from the perspective of the rule of promogeniture of section 201 of the Act and the regulation.

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Prepared on 8 October 2026 · Esheria