**IN THE GAUTENG DIVISION HIGH COURT, PRETORIA**

**(REPUBLIC OF SOUTH AFRICA)**

**Case Number: 63462/12**

**Not reportable**

**Of interest to other judges**

**Coram: Molefe J**

**Date Heard: 22 July 2014**

**Date of Judgement: 10 December 2014**

In the matter between:

**L[...] M[...]** **FIRST APPLICANT**

**G[...] N[...] M[...]** **SECOND APPLICANT**

and

**J[...] M[...]** **FIRST RESPONDENT**

**REGISTRAR OF DEEDS** **SECOND APPLICANT**

**JUDGMENT**

**MOLEFE J:**

[1] This is an application in which the following relief is sought by the applicants:

> *1.1 Declaring that portion 302 of the Consolidated Farm Witfontein No 1, Registration Division J.* S. *in the district of Groblersdal (“the property") ought to have devolved intestate to the second applicant upon the death of his father, S[...] M[...] (“the deceased’’);*
>
> *1.2 Alternatively to and in the event of the above Honourable Court finding that the first respondent was, in terms of the Bantu laws and customs, the sole heir to the estate of the deceased, that the Bantu laws and customs be developed so that it treats children of the polygamous deceased who dies intestate, equally (as envisaged in section 9 of the Constitution of the Republic of South Africa, 1996) for the purposes of inheriting with the end result that the property devolve intestate to the applicants and their younger brother, A[...] M[...] M[...];*
>
> *1.3 That the second respondent be directed and authorized to deregister the property from the names of the first respondent and register it in the names of the second applicant or alternatively in the names of the applicants and A[...] M[...] M[...];*
>
> *1.4 That the first applicant shall be responsible for all the costs of the transfer;*
>
> *1.5 That the first respondent pays the costs of this application.*

[2] Subsequent to the hearing of this application and on 23 July 2014, the applicants made an application in terms of Rule 28 (10) of the Uniform Rules of Court to amend the notice of motion for an order in the following terms:

> *2.1 Declaring that portion 302 of the consolidated Farm Witfontein No 1, Registration Division J. S. in the District of Groblersdal (“the property”) which was allocated by S[...] M[...] (“the deceased”) to S[...] T[...] M[...] who was married to him in terms of customary law as the second wife, did not revert to the general house-hold pool upon the death of the deceased but remained the property of the house of S[...];*
>
> *2.2 Alternatively to and in the event of the above Honourable Court finding that the first respondent* was, *in terms of the bantu laws and customs, the sole heir to the estate of the deceased, that the bantu laws and customs be developed so that it treats children of the polygamous deceased who dies intestate, equally (as envisaged in section 9 of the Constitution of the Republic of South Africa, 1996) for the purposes of inheriting with the end result that the property devolve intestate to the applicants and their younger brother, A[...] M[...] M[...];*

*2.3 That the second respondent be directed and authorized to deregister the property from the names of the first respondent and register it in the names of the person or persons which shall be indicated by the applicants and other heirs to the estate of S[...];*

*2.4 That the first applicant shall be responsible for all the costs of the transfer;*

*2.5 That the first respondent pays the costs of this application;*

*2.6 Further and/or alternative relief.*

[3] Rule 28(10) provides that "*the court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit".*

Since the applicants' amendment does not raise a new issue, the amendment of the notice of motion is therefore granted.

[4] The first respondent opposes the relief sought. The applicants were represented by Mr. B. E. Mthumunye and the first respondent by Advocate L. S. Louw. The second respondent is not opposing the application.

**Introduction and background**

[5] It is common cause that S[...] M[...] ("the deceased") a Venda man, was in a polygamous customary marriage to the first respondent's mother ("first customary wife") and to S[...] T[...] M[...], the applicants' mother ('second customary wife'). On 4 July 1969, the deceased passed away intestate. Both the first and second customary wives are also deceased.

[6] During the deceased's lifetime, he brought and acquired two adjacent farms known as Portion 302 ("the property") and 303 of the Consolidated farm Witfontein No 1, Registration Division J. S. in the district of Groblersdal. The deceased allocated portion 303 to the first customary wife and portion 302 to the second customary wife, to live on and to cultivate crops for sustainance;

[7] Subsequent to the deceased's death, and on 30 April 1971, in accordance with the Venda custom, the Bantu Affairs Commissioner appointed the first respondent as the heir of the deceased estate and transferred the farms (both portion 302 and 303) to the first respondent, the deceased's eldest son and also eldest child of the two families. The deceased beget several children with both wives.

[8] The issues to be determined by this Court are the following;

8.1 Whether or not according to Venda customs the passing on of a family head in a polygamous marriage disturbs his allocation of land to his wives;

8.2 Whether the eldest son who is an heir according to Venda custom inherit the property on the western sense of ownership;

8.3 Whether customs should be developed to treat the children of the deceased equally.

[9] It was submitted on behalf of the applicants that the first respondent did not become the owner of the farms in the Western sense of ownership but that he became a custodian of the farms for the benefit of the deceased's entire family. Applicants' counsel submitted that in accordance with the Venda custom, the rule of primogeniture should be applied and the first respondent as heir gets into the shoes of the deceased and has duties towards all the family members.

[10] Applicants' counsel relied on ***Bhe and Others v Khayelitsha Magistrate and Others 2005 (1) SA 580 CC at paragraph 221*** wherein the Constitutional Court held that:

> ''*[221] The rule of male primogeniture may have been consistent with structure and function of the traditional family. The rule prevented the partitioning of the family property and kept it in tact for the support of the widow, unmarried daughters and younger sons. However, the circumstances in which the rule applies today are very different. The cattle-based economy has largely been replaced by cash-based economy. Impovishment, urbanization and migrant labour system have fundamentally affected the traditional family structure".*

[11] The applicants' stance is that the portion 302 should be returned to the second wife's house and to be shared by her children. In the alternative the applicants contend that the first respondent has never resided on the farm and resides in Alexander township, Johannesburg. The applicants and their siblings who grew up in the farm, are unable to utilize the property profitably as the first respondent refuses to release the title deed. The court is in this case requested to develop a customary law which treats children from a polygamous relationship equally to enable them to inherit equally.

[12] Both counsels for the applicants and the first respondent relied on the ***Bhe case*** **supra.** First respondent's counsel argued that the declaration of invalidity of the transfer of ownership must, in terms of the *Bhe* judgment, be made retrospectively to 27 April 1994. Counsel relied on *Bhe supra*, wherein the court stated the following at paragraph 129:

> "*[129] To sum up, the declaration of invalidity must be made retrospectively to 27 April 1994. It must however not apply to any completed transfer of ownership to an heir who had no notice of a*

*challenge to the legal validity of the statutory provisions and the customary-law rule in question. Furthermore, anything done pursuant to the winding-up of an estate in terms of the Act, other than the identification of heirs in a manner inconsistent with this judgment, shall not be invalidated by the order of invalidity in respect of s23 of the Act and its regulations*

It is on this basis that the first respondent's counsel argues that transfer of property prior to April 1994 and prior to a complaint having been lodged cannot be invalidated.

[13] My view is that on what is before me, it cannot be said that the applicants' claim has prescribed and that the application should be dismissed on account of that Section 18 of the Prescription Act 68 of 1969 provides that laws prohibiting acquisition of land or any right in land by prescription are not affected by the provisions of this Act.

[14] The customary law of succession in South Africa was based on the principle of primogeniture. The primogeniture rule is the right, by customary law, of the eldest child to inherit the entire estate, to the exclusion of female children and younger children. Women and younger children are excluded from the succession of estates purely on the basis of gender and birth order[1].

Hughes *Land Tenure* 96 noted that, on the death of the family head, while in a polygamous family, each wife's allotment was secure against the other wives, an allotment to a mother, sister, or daughter automatically reverted to the household pool.

[15] According to Venda customs, all land is communal land which is allocated to a family head by the chief. Ownership of the land is not registered in the name of the family head but is kept in trust by the chief. After the passing of the family, the land remains with the chief and only the use of the land will be transferred to the heir of the family head.

[16] In *casu* however, the deceased bought and owned the land in the Western sense with a title deed registered in his name. The farms are not communal land kept in trust by the Chief.

[17] Until recently, the application of the Intestate Succession Act, 81 of 1987 was regulated on a racial basis. Intestate estates of African people were distributed according to the "*official customary law"*, as entrenched in the Black Administration Act 38 of 1927 and its regulations, while the Intestate Succession Act applied to the rest of the population. The Black Administration Act provided that the estates of Black people who died without leaving a will, devolved according to Black customs. This meant, *inter alia* that the reforms introduced by the Intestate Succession Act did not apply to spouses married in terms of the African customary law. As far as children were concerned this perpetrated discrimination against female children,

extra marital and adopted children. This racial disparity in the treatment of spouses and children disappeared when the Constitutional Court in ***Bhe case***, extended the provisions of the Intestate Succession Act retrospectively, from 27 April 1994, to all intestate heirs irrespective of race.

[18] The Reform of Customary Law of Succession Act[2] ("the RCLSA") which came into operation on 20 September 2012, introduces a new era into the customary law of succession. This Act not only harmonises the common and customary laws of intestate succession but also provides for differences depending on a person's cultural affiliations. For example, if a person lives under a system of customary law and dies without a valid will, his or her estate must devolve in terms of the Intestate Succession Act, but with certain modifications typical to customary law (such as polygamy) a wider circle or relations and other marriage forms[3].

Women and children are specifically included in Section 1 of the RCLSA which defines "*descendant"* as follows:

> "—a *person who is a descendant in terms of the intestate Succession Act, and includes:*
>
> > *(a) a person who is not a descendant in terms of the Intestate Succession Act, but who during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child; and*
> >
> > *(b) a woman referred to in section 2(2) (b) or (c)".*

[19] The principle of primogeniture in the context of the customary law of succession, is clearly in conflict with the Constitution. Section 39 (2) of the Constitution specifically requires a court interpreting customary law to promote the spirit, purport and objects of the Bill of Rights. In similar vein, section 39(3) of the Constitution states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by customary law as long as they are consistent with the Bill of Rights.

[20] Section 9 of the Constitution also guarantees the achievements of substantive equality to ensure that the opportunity to enjoy the benefits of an egalitarian and nonsexist society is available to all, including those who have been subjected to unfair discrimination in the past.

[21] Two prohibited grounds of discrimination are evident in this case; the first relates to gender and the second relates to unfair discrimination on the ground of "*birth"* in the sense that younger children are discriminated against inheriting from the deceased's estate.

In *casu* there is undisputed evidence that the rule of primogeniture was exercised. The first respondent was

appointed as an heir on the basis of being the eldest male child of the deceased. The general rule of primogeniture is that property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head.

[22] It is significant in this case that the farms in dispute were not collectively owned nor were the farms tribal land but the farms were bought and registered in the deceased's name and subsequent to his death, transferred to the first respondent.

[23] The problem with primogeniture was clearly stated in ***Bhe supra*** at paragraph 88:

> "*[88] The basis of the constitutional challenge to the official customary law of succession is that the rule of primogeniture precludes (a) widows from inheriting as the intestate heirs of their late husbands; (b) daughters from inheriting from their parents; (c) younger sons from inheriting from their parents; and (d) extra-marital children from inheriting from their fathers. It* was *contended that these exclusions constitute unfair discrimination on the basis of gender and birth and are part of a scheme underpinned by male domination*".

[24] Among the South African Blacks, married women are allotted land, as part of house property, to cultivate and for residential purposes. This is exactly what the deceased did during his lifetime, by allocating the two portions of the farm to his two wives.

The general principle is that whatever land has been allotted to a wife by her husband, the land belongs to her house and has to be used exclusively for the benefit of such house. *Schapera*[4] describes this position as follows:

> "*No matter how many fields a man has, he must set aside at least one for the special use of his wife. This field will be inherited after her death by her own children. Her husband, if he then marries again, must find another field for his new wife, although she may at first be allowed to cultivate that of her predecessors. So, too, in a polygamous household every wife is entitled to her own field. A field thus set aside for the use of a wife is known among the Kgatla as tshimo ya lapa (house field) and among the Ngwato as tshimo ya mosadi (the wife's field). Its crops belong to the woman to whom it is allocated; and neither they nor the field itself may be used by anyone else without her permission. Many men of rank and wealth also have one or more masimo a kgotla (Kgatla) or Masimo a monna (Ngwato), common household fields, as distinguished from fields set aside fora wife's private use''.*

[25] Urbanization and migrant labour systems have fundamentally affected the traditional family structure.

The first respondent is presently residing with his nuclear family in Alexandra Township, Johannesburg and has not "*stepped into the shoes of the family head*". Customary laws are therefore no longer applicable in our modern society.

[26] Both portions of the farm should not have been registered in the first respondent's name as the farm did not belong to him individually. It is an undisputed evidence that the deceased had prior to his death, had apportioned the two farms to each of his wife. The farms then belonged to each of his wife's house and it had to be used exclusively for the benefit of the first and second wives' houses. Since the title deed is in the first respondent's name, the children of the second wife have been unable to inherit nor enjoy the benefit of their mother's portion of the farm after her death. The winding-up of the deceased's estate should have been done in terms of the Intestate Succession Act and to be consistent with the *Bhe* judgment, with portion 302 inherited by the second wife and her children and portion 303 inherited by the first wife and her children.

[27] It is therefore just and equitable that I make the following order-

> 27. *1 Portion 302 of the consolidated Farm Witfontein No 1, Registration Division J. S. in the District of Groblersdal is declared the property of S[...] T[...] M[...];*
>
> *27.2 The second respondent is directed and authorized to have Portion 302 of the Consolidated Farm Witfontein No 1, Registration Division J. S. in the District of Groblersdal registered into the names of the First and Second Applicants and their sibling A[...] M[...] M[...];*
>
> *27.3 The first respondent is ordered to sign all the necessary documents and to take all other steps reasonably required of him to effect the transfer of portion 302 of the Consolidated Farm Witfontein No 1, Registration Division J. S. in the District of Grobiersdal to the applicants and A[...] M[...] M[...];*
>
> *27 4 The first applicant to be responsible for the costs of the transfer,*
>
> *27.5 The first respondent to pay the costs of this application.*

**D S MOLEFE**

**JUDGE OF THE HIGH COURT**

APPEARANCES:

**Counsel on behalf of 1st and 2nd Applicants:** Mr. B. E. Mthimunye

**Instructed by:** Masombuka and Mthimunye Attorneys

**Counsel on behalf of 1st Respondent:** Adv. L. S. Louw

**Instructed by:** Buthelezi Attorneys

[1]Customary Law of Immovable Property and Succession - Kerraj (1990) page 99

[2]Act 11 of 2009

[3]The Law of Succession in South Africa, Second Edition, 2012, Juanita, Jamneck, Christa Rautenbach, **Mohamed Paleker, Anton van der Linde, Michael Wood-Bodley, page 243**

[4]A Handbook of Tswana Law and Customs [1938] at page 220