IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 5858/2019

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

DATE SIGNATURE

10 January 2022 [redacted]..

In the matter between:

PAUL MISTREY MXHOSANA	**APPLICANT**
and	
DISERLECOE SARAH MXHOSANA N.O (in her capacity as duly appointed Executrix of the estate of the late Velile William Mxhosana	**1ST RESPONDENT**
CAPITEC BANK LIMITED	**2ND RESPONDENT**
MASTER OF THE HIGH COURT	**3RD RESPONDENT**
MMI GROUP HOLDINGS T/A METROPOLITAN	**4TH RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10 January 2022.

JUDGMENT

KHUMALO J

Introduction

[1] In this Application the Applicant, Mr Paul Mistrey Mxhosana, previously known as Kamohelo Tsepo Pacerverence Mxhosana, seeks an order removing the 1st Respondent, Ms Diselecoe Sarah Mxhosana, as an executrix of the deceased estate of the late Velile William Mxhosana ("the late estate"), directing the Master to appoint an executor within 30 days of the order and declaring the Applicant to be the descendant of the deceased as in terms of the Intestate Succession Act 81 of 1987 and the Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

[2] The 1st Respondent is the mother of the late Velile William Mxhosana ("the deceased") who passed away on 6 November 2018. On 14 December 2018 she was appointed and furnished with letters of executorship. She is assisted by her attorneys of record Kutumela Attorneys, who as her duly appointed agents, reported the estate to the Master.

[3] The 2nd Respondent is the Capitec Bank Limited, a registered Commercial Bank. It is the holder of the deceased's main account in which all the monies in it has by order of Collis J in Part A of this matter been frozen until finalisation of this Application.

[4] The Master of the High Court, the 3rd Respondent, is cited in his official capacity as the office that is responsible for the administration of the deceased estate.

[5] The Metropolitan, a financial service provider and the administrator of the deceased's pension Fund and the retirement annuity, is the 4th Respondent.

Factual background

[6] The deceased was employed by the National Defence Force since 1996 until he retired in May 2018 due to ill health. He died intestate, six months later on 6 November 2018, predeceased by his late wife Claudia Sefora Komane ("the late Komane" or "Komane") who died on 29 June 2016. The deceased and the late Komane were married on 24 December 1997 and no children were born from the marriage.

[7] The Applicant is the late Komane's only child born to her on 17 May 1993, prior to her marriage to the deceased. The latter died without issue.

[8] The Applicant alleges in his Founding Affidavit that the deceased and Komane were in a romantic relationship whilst his mother was pregnant with him. He was therefore born whilst Komane and the deceased were in a permanent relationship, with the deceased accepting him as his own son. The deceased was registered as his father in terms of the Births and Deaths Registration Act 51 of 1992 ("Births and Deaths Registration Act"). He as a result carries the surname of the deceased and has attached his birth certificate, registered/issued on 24 January 2019, which he says is the date when he applied for an unabridged one. He grew up knowing the deceased to be his father and was only informed of the true status by his mother and the deceased shortly prior to his mother passing away in 2016. The deceased has during his lifetime accepted and raised him as his own child in accordance with the customary law. He is the deceased's only son.

[9] According to the Applicant he has been living with the deceased since 2001, prior thereto he lived with his mother's sister, however the deceased supported and provided for him since birth. He was always financially dependent on the deceased. On the year of the deceased's death he was enrolled at Tshwane Technology doing his final year. He attached a statement of balance, in proof of his enrolment which also confirmed his residential address. He was staying with the deceased at the time of the deceased's demise. In 2018, when the deceased resigned from work, he cut or abandoned his studies midway in order to look after the deceased. It is his desire to complete his studies.

[10] Furthermore the deceased had registered him as a dependant on his medical aid as well as a beneficiary to his pension fund benefit. He therefore argued that he is entitled to be declared a descendant of the deceased in terms of the Reform of Customary Law of Succession Act and Regulation of Related Matters Act 11 of 2009 ("Reform of Customary Succession Act") and the Intestate Succession Act 81 of 1987 ("the Act"), and in that case he is the only surviving heir of the deceased. He alleges to have never met his biological father.

Removal of 1st Respondent as executrix

[11] On the 1st Respondent as the executrix, the Applicant alleges that the 1st Respondent's letters of executorship should be cancelled for the reason that the 1st Respondent does not regard or acknowledge him as the son or descendant of the deceased. As, the 1st Respondent:

> [11.1] tried to evict him from his home after the deceased's death by locking him out of the house after the funeral. He had to sleep in his car.
>
> [11.2] She also tried to claim the deceased's pension benefit money from the Government Pension Fund as well as the Funds in the deceased bank account held with the 2nd Respondent. The deceased also held an annuity with Metropolitan of which the Applicant is the only beneficiary.
>
> [11.3] She holds herself to be the sole heir hence has failed to furnish security and has no intention to distribute the assets in terms of the Intestate Succession Act 81 of 1987.
>
> [11.4] On 29 January 2019 he sent a letter to the Master challenging the appointment of the 1st Respondent due to her wrongful and mala fide conduct. However, the letter attached refers to application for an appointment of his attorney as the executor of the deceased estate.

[12] The 1st Respondent's in her Opposing affidavit disputed the allegations in the Applicant's Founding Affidavit, mainly that the deceased and Komane were in a permanent relationship when the Applicant was born with the deceased accepting or regarding the Applicant as his own son. As a result Applicant's birth was subsequently registered with the deceased named as the father. The 1st Respondent points out that during that period the deceased was in prison since 1991 and released only in May 1997. He therefore could not have accepted the Applicant as his own son at the time of Applicant's birth. The deceased married Komane on 24 December 1997, at the time the Applicant was staying with Komane's sister until 2001. The registration of Applicant's birth subsequent to the marriage was only in the name of Komane. The Applicant's allegations are therefore not true. The Applicant as indicated did not dispute 1st Respondent's allegations. Instead he, in his Replying Affidavit persisted with the allegations that Komane was in a permanent romantic relationship with the deceased when he was born. They married shortly after his birth and the deceased provided his consent to be identified as the father on registration of the Applicant's birth.

[13] In addition the 1st Respondent denies that there was a customary adoption that ever took place and as a result the Applicant has neither a blood or legal relation with the deceased. The Applicant was also neither dependant or supported by the deceased since birth for the reasons that the deceased was incarcerated until May 1997 and when he got married to Komane on 24 December 1997, the Applicant was staying with his aunt until 2001. Even though they agree as the family that the Applicant was treated as a son by the deceased there was however no adoption by customary law.

[14] In respect of the documents attached by the Applicant, including the unabridged birth certificate, in proof of his allegations on the registration of his birth in the name of the deceased, the 1st Respondent pointed out that they have all been altered, and recently issued. She therefore challenges the authenticity of the documents.

[15] It is further pointed out by the 1st Respondent that the Applicant gives no further details regarding his biological father, if he also consented to the adoption and when the adoption took place.

[16] She disputed that Applicant is registered as a beneficiary on the deceased's pension fund as indicated in the documents he has attached.

[17] The 1st Respondent also pointed out that from the documents attached it indicates that the deceased never paid the Applicant's study fees as alleged. The fees were already owing prior to 2017 until 2018. No proof of payment ever made by the deceased or liability is attached. In addition there is no proof of the Applicant's registration for 2018.

[18] On those grounds the 1st Respondent dispute that the Applicant can be declared a descendant or an heir of the deceased and therefore lacks the *locus standi* to bring the Application challenging her appointment.

[19] The 1st Respondent admits that she approached Capitec on the Pension Fund and enquired on the deceased's bank account for the purpose of the administration of the estate.

Applicant's Supplementary Affidavit

[20] The Applicant was, as per order in the urgent court allowed to supplement his Founding Affidavit where necessary. He made the following allegations in his Supplementary Affidavit;

[20.1] that the deceased and Komane had a relationship prior to deceased being incarcerated. On deceased's arrest in 1991 and sentence to death, the deceased advised Komane to move on with her life. The Applicant was conceived and born when the deceased was in prison. His birth subsequently registered and a certificate issued on 16 March 1998 carrying only Komane's surname. (thus confirming that at the time of Komane's pregnancy and Applicant's birth there was no relationship between deceased and Komane).

[20.2] He shortly after his birth stayed with the aunt, Sheila Mafosi, in Katlehong, Johannesburg, who offered to take care of him as Komane was still in matric. He was raised by his aunt who had no children of her own. After being released from prison, the deceased married Komane on 24 December 1997. The deceased paid lobola and in the lobola letter it was confirmed that the deceased was marrying Komane and the Applicant. The deceased, had according to the Xhosa customary law proclaimed, signifying to the world that he adopted the Applicant and formally accepted parental responsibility for him. The lobola letter was confiscated and destroyed by the 1st Respondent who removed the red file.

[20.3] On 15 September 1998 the deceased and Komane then reregistered his birth amending the surname to that of the deceased as if they were legally married when he was born. He recently on January 2019 obtained an unabridged certificate indicating the deceased to be his father however was not sure if he was registered at the Department as the deceased's biological or adopted son in terms of the Births and Deaths Registration Act 51 of 1992, Child Care Act 74 of 1983 or Childrens Act 38 0f 2005.

[20.4] The deceased and Komane wanted the Applicant to stay with them in 1998 already but his aunt refused as she had no children of her own. He only came to live with them when his aunt passed away in 2001. He never knew that the deceased was not his father until he was informed by the late Komane in 2016 before her passing.

Most of the deceased's family members were not aware that he is not the deceased's son, a fact that is confirmed by Komane's sister in law, Emma Elsie Komane (sister in law) who is married to Komane's brother. When Komane asked her sister in law to look after him when she passes on, the sister in law undertook to do so.

[20.5] Both the sister in law and the deceased financially supported him (the Applicant). The sister in law accepted responsibility to look after him on the passing of his late mother and the deceased and has financially taken care of him since the deceased's death.

[20.6] He does not have a good relationship with the deceased's family as a result of this dispute. The 1st Respondent never accepted him to be a family member. He was advised that the 1st Respondent is not the biological mother of the deceased. The deceased's mother passed on and the deceased's father married the 1st Respondent. Therefore, the 1st Respondent is not a descendant/heir of the deceased.

[20.7] He removed his two abridged certificates from the red file which had all the documents prior to his father's death. He received a payment from the Metropolitan Policy of an amount of R49 000 which he has used to pay the arrears on the utility bill.

[21] Komane's sister in law in her Confirmatory Affidavit alleged that she has known the Applicant, the deceased and Komane from 1995. According to her most of the deceased's family members did not know that the deceased was not the biological father of the Applicant. She was told by the deceased and Komane whom she regularly visited in Pretoria even before the Applicant knew, that the deceased was not Applicant's biological father. Applicant stayed with the deceased and Komane from 2001. The deceased always referred to the Applicant as his son, whom he had adopted and accepted as his child. She always accepted that the deceased legally adopted the Applicant. The Applicant also called deceased 'father' and was fully maintained by the deceased. She also confirmed that Komane who had a long sick bed before she passed away asked her to take care of the Applicant and look out for him should she pass away.

1st Respondent's Answer to Applicant's Supplementary Affidavit

[22] The 1st Respondent persisted to deny that whilst the deceased was in prison there was any contact between the deceased and Komane or that the deceased was tortured. However, alleged to have been advised by the deceased that he was diagnosed with cancer and operated upon to prevent it from spreading to the rest of his genitals. He denied the allegations of miscarriages.

[23] She further pointed out that the Applicant knew long before the passing of Komane that the deceased was not his father. The deceased had however accepted parental responsibility because he was married to the Applicant's mother (as a stepfather). The Applicant's change of surname to that of the deceased was solely so that the deceased can include him as a dependant in his medical aid. She confirmed the payment of lobola but disputed Applicant's allegations regarding the contents of the lobola letter or that she destroyed or was ever in possession of the letter. Further denied that the concept of a "Customary Adoption" exists in the South African Law. She also denied that an adoption took place either in terms of the Children's Act or The Child Care Act or as alleged by Komane's sister in law, who is not part of or related to the Mxhosana family, pointing out that the latter's allegations are **contradictory as the Applicant had stated that he was not sure if the deceased legally adopted him or not.**

[24] The 1st Respondent acknowledged that: The Applicant was raised by his aunt. Komane's sister in law, on being asked by Komane to look after the Applicant on Komane's passing, undertook to do so and that both Komane's sister in law and the deceased financially supported the Applicant. Komane's sister in law accepted responsibility to look after the Applicant on the passing of Komane as well as of the deceased.

[25] The 1st Respondent alleges to appear only on one picture which was taken on the day of the marriage of the deceased and Komane. She denies any knowledge of the other pictures and ever calling the Applicant grandchild. According to her, her husband was never married before but single, when she and her husband decided to get married. She attached the deceased birth certificate indicating that deceased is her son born to her and the deceased in 1972 at Bethlehem, being one of their six children, four of whom are deceased. She as a result is the sole heir in the deceased's estate.

[26] Lastly she denies that the Applicant is registered as a dependant on the Pension Fund. Furthermore, that the Applicant is the only one residing in the house, alleging that he is also renting out the house to tenants. The 1st Respondent further denied that she complained about not having access to any money when some of her children died and expressed her intention to change that.

Legal framework

[27] In terms of s 1 (b) of the Intestate Succession Act 81 of 1987 ('the Act') if a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate. In terms of s 1 (d) (i) and (ii) of the Act, if the deceased is not survived by a spouse or descendant, but by both his parents, his parents shall inherit the intestate estate in equal shares; or if survived by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate.

[28] In terms of s 1 (4) (e) (i) of the Act, **an adopted child shall be deemed to be a descendant** of his adoptive parent or parents and in terms of s 1 (4) (eA) as inserted by s 8 of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 ("Reform of Customary Law of Succession Act"), a person referred to in paragraph (a) of the definition of 'descendant' contained in section 1 of the Reform of Customary Law of Succession Act, shall be deemed (i) to be a descendant of the deceased person referred to in that paragraph.

[29] As already indicated above, s 1 (4) (e) of the Act provides for the adopted child of the deceased to be regarded and recognised as the descendant of the deceased. Whilst a descendant as defined in terms of s 1 of the Reform of Customary Law of Succession Act also includes a person who is not a descendant in terms of s 4 (1) (e) of the 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.

[30] The purpose of the enactment of the Reform of Customary Law of Succession Act as pronounced in the preamble is to modify the customary law of succession so as to provide for

the devolution of certain property in terms of the law of intestate succession, clarify certain matters relating to the law of succession and the law of property in relation to persons subject to customary law, and to amend certain laws in this regard, and to provide for matters connected therewith. It in actual sense modifies the Intestate Succession Act to accommodate customary law intestate succession.

[31] The Applicant, not being the biological son of the deceased, is therefore required to have made a case that he is entitled to be declared a descendent of the deceased by virtue of being an adopted child of the deceased *ex lege* or facto being accepted by the deceased person during his lifetime in accordance with the Xhosa customary law as his own child.

[32] There are disputes of facts arising from the parties' Affidavits especially on the ,factual averments made by Applicant in his Founding Affidavit and Replying Affidavit in relation to how and when the Applicant's alleged adoption by the deceased allegedly took place either *ex lege* or in terms of the Xhosa Customary Law, which are material facts from which it is to be determined if Applicant entitled to the relief sought. The issue being whether or not he has proven an adoption as alleged, which will entitle him to inherit from the deceased as a descendant of the deceased, either in terms of the Act or the Reform of Customary Law of Succession Act. The second question which is the cancellation of the 1st Respondent's letters of executorship, can only be dealt with after the first question is resolved.

[33] In that case, there being factual disputes, the Plascon Evans Rule is applicable. The factual disputes are to be resolved on the basis of the principles enunciated in the Plascon Evans Rule that prescribes that in motion proceedings, if disputes of fact arise on the affidavits, a final order may be granted if those facts averred in the Applicant's affidavits, which have been admitted by the Respondent, together with the facts as stated by the Respondent, justify the granting of such relief; see *Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C. In *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) the court emphatically said the following on the principle:

> "Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well

established under the Plascon –Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the Applicant's (Mr Zuma's) affidavits, which have been admitted by the Respondent (the NDPP) together with the facts alleged by the latter, justify such order. It may be different if the Respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.' (para 26) The *Plascon –Evans* rule has been emphatically endorsed by the Constitutional Court. See for example *President of the Republic of South Africa & Others v M & G Media Ltd* 2012 (2) SA 50 (CC): [2011] ZACC 32 para 34."

Analysis on the facts (dispute of fact)

[34] The Applicant has alleged in its Founding Affidavit that when he was born in 1993 the deceased and Komane were in a permanent romantic relationship with the deceased accepting the Applicant at birth as his own son. As a result, even though the deceased was not his biological father he was registered as his father. He, as a result carries the deceased's surname, who has continued to support him and taken responsibility for him since his birth. He grew up knowing the deceased to be his father and was only informed of the true status by his mother and the deceased shortly prior to his mother's passing away in 2016. The deceased has during his lifetime accepted him and raised him as the deceased's own child as in terms of the customary law. He is the deceased's only son. That was mainly the material facts upon which the Applicant's case was founded being his cause of action for seeking the stated remedies.

[35] The allegations were however proven to be fanciful by the 1st Respondent who indicated that the deceased could not have been in a permanent relationship with Komane at the time or be responsible or have looked after the Applicant from birth upon which he could have then regarded him as his son since the deceased was in prison since 1991 and only released in May 1997. The Applicant's birth in 1993, even though registered in March 1998 following the deceased and Komane's marriage in December 1997 recorded only the surname of Komane on the birth certificate. Furthermore, the Applicant had been staying with his aunt, even after Komane's marriage to the deceased until 2001. These facts were subsequently reiterated in his Replying Affidavit alleging that a romantic relationship existed during Komane's pregnancy and Applicant's birth. The birth of the Applicant to have been subsequently registered, with deceased's consent, naming the deceased to be the father, who allegedly looked after the

Applicant since birth. The allegations were thus confirmed to be the facts (cause of action) upon which the Applicant relies for his relief

[36] The Applicant then, without explaining the proven misrepresentation of facts in his Founding Affidavit, just proceeded in his Supplementary Affidavit to now state the facts as stated by the 1st Respondent, contradicting the averments in his Founding and Replying Affidavit, and added new allegations in an attempt to make a likely case for *locus standi.* He, confirmed 1st Respondent's disputation that a relationship between Komane and the deceased existed when the Applicant was born, alleging that the romantic relationship between the deceased and Komane actually happened prior to the deceased being incarcerated and when the deceased went to prison he told Komane that each one was to go his or her own way. Consequently, agreeing that when the Applicant was conceived in 1992 and born in 1993, when the deceased is said to have regarded the Applicant as his own son and to have consented to Applicant's birth to be registered in the deceased's name, Komane and the deceased were in fact not in a relationship and the latter incarcerated.

[37] The Applicant further alleged that, with the consent of the deceased, following the deceased and Komane's marriage in December 1997, the Applicant's surname was amended to that of the deceased. However, the Applicant's birth was registered a few months thereafter in March 1998 with only the details of Komane. It was only later in September 1998, that the changes to the deceased's surname were effected without any details furnished explaining how that came about. It is also factual that since the deceased was in prison, Applicant's allegation that the deceased also looked after him since birth is also not true.

[38] The Applicant was by order of Collin J allowed to depose to a Supplementary Affidavit if necessary. As the matter should be decided on the facts as pleaded in his Founding Affidavit, it only becomes necessary to supplement if new matters arose in the Answering Affidavit that were not dealt with by the Applicant. But that does not relate to new allegations which were always in the knowledge of the Applicant.

[39] It is a general rule of pleadings that an Applicant must stand or fall by the allegations made in the Founding Affidavit. A case cannot be made in the Replying or subsequent Affidavit. The court will not allow new matter/s in reply when no case was made in the original

application or if the reply or a subsequent affidavit reveals a new cause of action. *In casu*, the Applicant has contradicted and changed facts relating to his cause of action that he pled in the Founding and Replying Affidavit and also proven to be false.

[40] The discrepancies on the factual allegations relating to Applicant's cause of action as in his Founding and Supplementary Affidavits and Applicant's failure to make a case in that regard were pointed out to the Applicant's Counsel. Counsel however insisted that the allegations of the registration of Applicant's birth in the surname of the deceased with deceased's consent, and of the deceased's acceptance and raising of the Applicant as his own son, albeit not from birth, in accordance with the Xhosa customary law made in the Founding Affidavit, remain true. The Applicant's birth registration in the name of the deceased subsequently did take place, also not immediately after marriage, which registration the Applicant is not sure if it was due to a legal adoption which his Counsel then argued was in terms of s 11 of the Births and Deaths Registration Act 51 of 1952 ("Births and Deaths Registration Act"). Counsel further argued that the admitted fact by the 1st Respondent that the deceased indeed accepted and always treated the Applicant as his own son and had subsequently looked after him as such, as expanded in the Supplementary Affidavit warrants consideration for the purpose of establishing if the Applicant entitled to the relief sought.

[41] As a result, with Applicant afterwards yielding in his Supplementary Affidavit to the facts as stated by the 1st Respondent that contradicts the allegations in his Founding and Replying Affidavit, the court, not satisfied as to the inherent credibility of the actual averments in Applicant's Founding Affidavit, could not proceed on the basis thereof, as such facts cannot be included among those upon which the court determines whether the Applicant is entitled to the relief sought; see *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 and 1165. The matter proceeded with the exclusion of the controverted allegations in the Founding Affidavit.

Legal framework on adoption ex lege

[42] An adopted child as in s 1 (4) (e) of the Intestate Succession Act is, according to *Flynn v Farr NO & Others* 2009 (1) SA 584 (C) to be interpreted to exclude children who have been adopted informally. As in terms of section 228 of the Children's Act 38 of 2005 ('Children's Act") a child is adopted when the child is placed in the permanent care of a person in terms of

a court order that has the consequences contemplated in s 242. The adoption should therefore have been processed through the children's court (with notice to each parent and or person whose consent to the adoption is required; see s 233 (1) (a) and 238 (1) of the Children's Act. One of the effects of the adoption order as contemplated in s 242 is the conferring of the surname of the adoptive parent on the adopted child except when otherwise provided in the adoptive order.

[43] The entering of the details of any person who has allegedly taken responsibility for the welfare of the child other than those of the biological/natural parents of the child, as the parent of the child when registering a child in the Register of Births and Deaths without an order of court sanctioning such, does not amount to the child's adoption by that person or prove thereof. Since such registration can only follow and becomes mandatory after an Adoption Order has been made which automatically confers the surname of the adoptive parent on the child. The relevant adoption order, the child's birth certificate, the prescribed birth registration form and the prescribed fee will accompany the Application for the recording of the adoption and any change of surname in the births register.

[44] Furthermore, the adoptive parent/s must, in terms of the applicable law apply to the Director General Home Affairs to record the adoption and any change of surname of the child in the birth register. The Application is to be accompanied by, inter alia, the relevant adoption order. It is also a requirement for the person designated by the Director General as the adoption registrar to record information pertaining to the child's adoption and to keep a register of the personal details of the adopted children, their biological parents and adoptive parents; see s 245 (1) and 247 of the Children's Act. The information in the register is available to adult adoptees.
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[45] There is no allegation of a legal process of adoption ever been formally initiated or pursued in any other way by the deceased. There was also no indication of the situation with his biological father. Even if consideration is had to the Supplementary Affidavit, no credible information can lend truthfulness to the allegation. The Applicant's Counsel conceded that legal adoption as in accordance with the Children's Act did not take place. The Applicant was therefore not an adopted child of the deceased as per intestate Succession Act as he was not legally adopted by the deceased. He therefore cannot be a descendent as per the provisions of s 4 (1) (e) of the Intestate Succession.

[46] In *Flynn v Farr NO and Others* (13967/2007) [2008] ZAWCHC 196 (12 May 2008) 2009 (JOL) 23900 (C) [2009 (1) SA 584 (C) par 1–2] referred to by both parties a matter which is on four with the matter *in casu*, Flynn was also not legally adopted by Farr his stepfather. Although in Flynn's instance the primary relief sought by the Applicant was either for an order declaring that the words "adopted child" in section 1(4) (e) of the Intestate Succession Act 81 of 1987 be interpreted to include both *de lege* adopted children as well as *de facto* adopted children; alternatively, that a definition of adopted child which reads as follows be inserted in section 1(4) (e) of the Act which should read as follows:

> "Adopted child shall include both *de facto* and *de lege* adopted children".

declaring the definition in the said Act unconstitutional and to amend the definition to include both forms of "adoption" and a specific order declaring Flynn a descendant of Farr with a declaration that Flynn inherits the intestate estate of Farr.

[47] The court however refused to recognise Flynn, the stepson, as a descendant of Farr his stepfather, for purposes of the law of intestate succession, despite the fact that the stepfather had acted in loco parentis, treating Flynn for all purposes as his own son during his lifetime.

[48] The provisions of 1 (4) were subsequently amended to include s 1 (4) (eA) or extend the provision in recognition of adoptions that take place *de facto* in the context of Customary Law. Significantly, in the recently enacted Children's Act 38 of 2005, an adopted child and an adoptive parent, are described respectively, as a child who has been adopted, or a person who has adopted a child, in terms of "any" law. The inconsistency that was created between the Children's Act and the provisions of the Intestate Succession Act seems to have been accommodated by the insertion of s 1(4) eA in the latter Act.

Adoption in accordance with Customary Law
("Acceptance by the deceased person during his lifetime of the Applicant as his own child in accordance with customary law")

[49] In that framework, the court has to determine whether the facts as alleged by the Applicant do prove at least an adoption in accordance with the Xhosa Customary Law to have taken place so as to be recognised as the descendent of the deceased.

[50] Section 8 of the Reform of Customary Law Act' is said to furthermore provide for the recognition of other people related to the deceased as descendants. Section 1 thereof recognises a minor child that during the lifetime of the deceased was accepted by the deceased as his own child in accordance with the customary law. Customary Law means customs and practices observed amongst indigenous African people of South Africa which forms part of their culture. This was intended to legitimise customary law adoptions concluded regardless of the absence of a court order: See South African Law Commission Discussion Paper 103 on the Review of the Child Care Act Project 110 (23 December 2001) par 18.3.12. Also to ease the controversy created by the uncertainty that surrounds such practices in relation to intestate succession, as evident in cases like *Metiso v Padongelukkefonds* 2001 (3) SA 1142 (T) and *Maswanganye v Baloyi* [2015] ZAGPPHC 917 whereupon the court was called upon to decide whether a customary law adoption was valid. In *Metiso*, thus creating a legally recognisable duty of support for purposes of a claim against the Road Accident Fund. The court held that the customary law adoption should in the interest of the children be considered valid despite its possible lack of publication as prescribed by custom. The court concluded that the deceased's promise to care for the children, even if not a completed adoption in terms of customary law, was sufficient to create a legally recognisable duty of support towards the children – if not in terms of the common law then a logical extension thereof. Bertelsmann J argued that to deny the legality of such an undertaking would be contrary to – "the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993".

[51] It is important to note that this was, in the interest of the child recognised only for the purpose of creating a duty to support, as in many other instances but not considered for the purpose of intestate succession. As indicated above, adoption was introduced via legislation and has thus always been regulated by statutory law.

[52] The matter of *Maneli v Maneli*, 2010 (7) BCLR 703 (GSJ) 19 April 2010, is also a matter of special interest, decided a few months before the coming into operation on 20 September 2010 of the Reform of Customary Law of Succession Act. The matter was a special

review referred to the South Gauteng High Court by a magistrate. Despite the fact that the issue that had to be determined was whether the magistrate was correct in her conclusion that the Respondent had a legal duty to maintain a minor child he adopted with his wife in terms of customary law subsequent to the performance of Xhosa traditional rites and rituals, Mokgoatleng J went further to make pronouncement on the validity of the *de facto* adoption in accordance with customary law, declaring the minor child lawfully adopted by the parties by ordering that the Director General of the Department of Home Affairs register, in terms of s**ection 2** of The Births and Deaths Registration Act 51 of 1992**,** the minor child as the adopted child of Applicant and the Respondent.

[53] The minor child who was taken into the parties' home at the age of eight (8) months was then twelve years old. A fully developed parent/child relationship existed, the child in all respects regarded and treated as the child of the parties. Pursuant to the customary law adoption, the parties approached the Department of Home Affairs where they registered the minor child "as their own child." The Respondent maintained and paid for educational and medical needs of the minor child. The minor child having bonded with the parties whom it regarded as parents, was emotionally and psychologically attached to the Respondent, to such an extent that even after the parties had separated, the minor child still regarded the Respondent as its parent. At an enquiry held at the Magistrate's Court on a maintenance complaint lodged against the Respondent in terms of section 10 of The Maintenance Act No 99 of 1998, the Respondent was found to have a legal duty to maintain the customary law adopted minor child, notwithstanding not having adopted the child formally in terms of the Child Care Act or the Children's Act.

[54] In its deliberations, the high court focused mainly on the constitutional imperative to develop customary law and the common law to recognise a duty of support between a parent and a child adopted in terms of customary law to improve the effectiveness of the application of the maintenance system. The court pointed out that the rationale of Xhosa customary law adoption ceremony is to proclaim and signify to the world that the adoptive parents have formally accepted parental responsibility for the minor child. The adopted minor child is thereafter accepted and regarded by society as a child of the adoptive parents. Customary law adoption is widely practiced by Xhosas in the Eastern and Western Cape Provinces of the Republic of South Africa.

[55] Komane and the deceased are from Bloemfontein. It is important to differentiate between parental responsibility that gives obligation to child support or maintenance and does not result in a right to (inherit) intestate succession.

[56] For purposes of this discussion, the additional order issued by the High Court directing the Director-General of the Department of Home Affairs to register the child as the adopted child of the parties in terms of the Births and Deaths Registration Act is edifying. The order effectively equated the status of a child adopted in terms of Xhosa customary law with a child adopted in terms of the Children's Act, which gives rise to certain rights including the right of succession which was not possible at the time unless done in terms of the applicable statute.

[57] The order is significant because it was wholly unprecedented in our law at the time. As while customary law adoptions have been recognised for purposes of creating a legally enforceable duty of support in the past, such adoptions have never been recognised in express terms as having the same legal effect as formal adoptions. The Reform of the Customary Law of Succession Act was already enacted at the time of the decision, but not yet applicable, as it came into effect on 20 September 2010. The basis of the court's finding was however wrong in that it canvassed for the reading and interpretation of the words "***for the adoption of children***" enunciated in the preamble ***of the Child Care Act*** purposively not to exclude adoption by customary law as not being contrary to the law of general application. Consequently, that a minor child adopted in terms of Xhosa customary law should be deemed to be legally adopted in terms of the common law and the Constitution of the Republic of South Africa.

[58] However, that is incorrect, the customary law adoptions cannot be regarded as legal in terms of common law as legal adoption can only be achieved in terms of statute. The matter of *Alexkor Ltd and Another v The Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC) on page 478 paragraph 51 case quoted under paragraph 26 is illustrative of the point, stating that:

> "While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211 (3) of the

> Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law…;
> In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law."

[59] The Reform of the Customary Succession Act has now codified the adoption by customary law to be legal, therefore proof by the Applicant of (customary law adoption having taken place) having been accepted by the deceased during his lifetime as his own child in accordance with the Xhosa customary law will entitle him to be regarded as a descendent of the deceased, eligible to inherit in terms of Intestate Succession Act.

[60] The Applicant has alleged that as Komane was married to the deceased on 24 December 1997, during the lobola payment it was confirmed in the lobola letter that the deceased was marrying Komane together with the Applicant, thus proclaiming and signifying or announcing to the whole world the deceased's adoption (being the deceased's acceptance of the Applicant as his own son) and formal acceptance of parental responsibility for him; see *Maneli* par [5]. He was as a result referred to by the 1st Respondent as Ngwanake and the deceased's father being very fond of him. The Applicant alleges to have got this information from the lobola letter that was in a red file in the house, which he believes to have been removed and destroyed by the 1st Respondent. The 1st Respondent disputes all these allegations, that such announcement took place, or that she knows about or had removed a lobola letter.

[61] In proof of the allegation the Applicant has attached a confirmatory Affidavit by Komane's sister in law who rather confirms that the Applicant was actually legally adopted by the deceased, an issue that the Applicant and the Mxhosanas, who are the deceased's family were not aware of. They had thought the deceased was the biological father as the deceased had treated the Applicant as his own child, which treatment the sister in law had observed since she started knowing Komane, the Applicant and the deceased in 1995. She visited them in Pretoria, till Komane predeceased the deceased. Komane asked her to look after the Applicant after her passing, which she together with deceased did and has continued to do even after the passing of the deceased.

[62] The sister in law's Affidavit does not confirm the customary law adoption but in contradiction alleges the adoption to have been a legal adoption. Nevertheless, the legal

adoption is conceded to have not taken place. She alleges that the deceased's family members were not aware that the Applicant was not the deceased's biological son. However, the lobola ceremony involves the two families, as is the wedding as shown in the pictures to have been attended by the Mxhosanas, the deceased's family, whereupon the pronouncement would allegedly have been made to the whole world. It is therefore inconsistent that the Mxhosana family would not be aware that the deceased was not the biological father of the Applicant and also that he was actually adopted by the deceased, especially in accordance with the customary law, as, expectantly, the pronouncement would have been publicly made at the ceremony as is allegedly confirmed in the lobola letter; see Metiso where it is stated in the experts' evidence that:

> … (Even in cases where adoption was not reported to the traditional leader, the adoption would still be valid if due publicity was given to the process and there was agreement between the families of the adopted child and the adoptive parent(s)*'*

Furthermore, the sister in law also seemed to have missed the fact that the deceased was in prison in 1995. She therefore could not have visited the couple during that time or known the deceased by then as she alleges. Her Confirmatory Affidavit therefore of no consequence to the facts as alleged by the Applicant as it fails to confirm the Applicant's allegations.

[63] In addition, the inference of such an adoption having taken place due to the alleged pronouncement at the lobola ceremony is contradicted by the allegation that Komane told the Applicant that the deceased is not his biological father prior to her passing and had asked her sister in law to look after the Applicant on her passing, indicating that notwithstanding the deceased treating the Applicant as his own son Komane never believed it to be the total responsibility of the deceased to take care of the Applicant. The Applicant and the sister in law confirm that the sister in law did accept the responsibility to look after him, and after Komane's passing, the sister in law and the deceased financially supported the Applicant when required. The sister in law had continued doing so even after the death of the deceased. Unlike in *Maneli* where indeed the customary law adoption had taken place and was held to have created an enforceable duty of support on the Respondent.

[64] It also cannot be ignored that notwithstanding the alleged declaration by the deceased during lobola and the wedding, the subsequent registration of the birth of the Applicant, was only in his mother's surname. The registration in the deceased's name was done six months

later with no such adoption being registered, which the 1st Respondent alleges to have been for the purpose of registering the Applicant as a dependant with the deceased's medical aid. The Applicant had also continued to stay with the aunt post the wedding until the aunt passed on in 2001. He then moved in with the deceased and Komane. The aunt's position who did not have any children hence deciding to raise the Applicant is the same as that of Komane, the Applicant was her only child and to the deceased who had no children, the only stepchild. In essence they also besides the Applicant, had no children.

[65] The Applicant further alleges that the deceased was at the time of his passing or illness paying or responsible for his Technicon fees and attached a statement issued by the Tshwane Technicon on 24 January 2019, which indicate that the arrear fees were by 12 November 2017 more than 90 days overdue. The statement is issued to the Applicant with no proof that the deceased was liable or had taken any responsibility for the fees. The fees stood owing even when the deceased was still alive. In addition, no further fees were charged to the account to signify a registration with the Technicon in 2018, despite the Applicant's allegations that he was registered with the institution at the time of the deceased's death. The Applicant has failed in his endevour to prove that the deceased continued to be responsible for him even after the passing away of his mother and of being told that the deceased is not his father.

[66] The Applicant has indicated that the deceased had also included the Applicant as a beneficiary to his pension Fund. The amount had already been paid out to the deceased at the time of his death and therefore falls within the deceased's estate and will be dealt with accordingly. The annuity with Metropolitan accordingly refers to him as a beneficiary and a dependent child for which he might have taken partial responsibility as a stepfather.

[67] The Applicant has therefore failed to prove that the deceased had during his lifetime accepted him as his son in accordance with the customary law. Having failed to prove that the rites and rituals including the usual pronouncement to the whole world that usually takes place according to the Xhosa customary law, did take place. The Applicant therefore failed to make a case for the relief sought.

[68] It is also disconcerting that the Applicant has failed to follow the process as prescribed in section 5 of the Reform of the Customary Law of Succession Act in case of any uncertainty

or disputes arising in connection with the application of the Act, in cases of estates that are to devolve in terms of the Intestate Succession Act. The section clearly outlines the steps that are to be taken that will assist the Master to arrive at a proper decision in relation to the dispute with the necessary investigations and inquiry taking place.

[69] In the urgent matter the question of costs was deferred to when issues in this Application which is Part B are decided upon. The Applicant had insisted that both the costs in Part A and Part B of this application to be paid by the 1st Respondent *de bonis propriis*, which costs may not be recovered from the deceased estate. Having considered all the argument also on the deferred issue.

It is hereby ordered that:

1. The Applicant's Application is dismissed.
2. The Applicant to pay the costs in Part B of this Application.
3. No order as to costs in respect of Part A (which is each party to pay its own costs)

N.V. Khumalo
Judge of the High Court
Gauteng Division, Pretoria

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