



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

REPORTABLE

Case No: 14072/17P

In the matter between:

**THEMBINKOSI SIKEBHE NXUMALO
BONAKELE PROMISE NXUMALO
NOMAZWI MINENHLE NXUMALO
VUKANI LETHUKUTHULA NXUMALO**

1ST APPLICANT

2ND APPLICANT

3RD APPLICANT

4TH APPLICANT

and

**NHLANHLA MARGARET NXUMALO
FRANCE SIBUSISO NXUMALO
THUTHUKANI HENDRY NXUMALO
JOYCE WITNESS MADELA
THULANI PATRICK NXUMALO
NTOMBIFUTHI SIMBONGILE NXUMALO
BAZWILE PORTIA NOKUKHANYA SIBIYA
BAHLENGILE ZANDILE NXUMALO
XOLISILE BUSISIWE PRETTY NXUMALO
MALUSI SIKHUMBUZO NXUMALO
MDUDUZI NHLAKANIPHO NXUMALO
NOLWAZI PRINCESS NXUMALO
BUYANI THOKOZANGAYE NXUMALO**

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

5TH RESPONDENT

6TH RESPONDENT

7TH RESPONDENT

8TH RESPONDENT

9TH RESPONDENT

10TH RESPONDENT

11TH RESPONDENT

12TH RESPONDENT

13TH RESPONDENT

SIBONISIWE MASWAZI NXUMALO	14 TH RESPONDENT
BONGAMUSA MUNTUKAYISE NXUMALO	15 TH RESPONDENT
LETHIWE PHILISIWE NXUMALO	16 TH RESPONDENT
SIPHO ZAMOKWAKHE NXUMALO	17 TH RESPONDENT
NTUZAKHE NTOMBINKULU NXUMALO	18 TH RESPONDENT
GCINANGAYE VELILE NXUMALO	19 TH RESPONDENT
NTOMBIFUTHI PRETTY JONA N.O.	20 TH RESPONDENT
MASTER OF THE HIGH COURT	21 ST RESPONDENT

ORDER

The following order is made:

1. The application is dismissed.
2. The applicants, jointly and severally the one paying the other to be absolved, are ordered to pay the costs, including costs of senior counsel where so employed.

JUDGMENT

Delivered on:

MNGADI, J:

[1] The four applicants seek in their notice of motion an order setting aside a redistribution agreement, ordering the withdrawal of the approval by the Master of the High Court of a liquidation and distribution account, a declaration as invalid consent to the creation and registration of the Trust, and an order terminating the Trust. All the respondents, except the 21st respondent who abides by the decision of the court, oppose the application. The relief relating to the removal of 20th respondent as an executor is not pursued.

[2] The four applicants are adult children of the late Mr Flymon Zakhele Nxumalo (the deceased). The respondents, except the 20th and 21st respondents, are also adult children of the deceased, and the first respondent is one of the three surviving customary wives of the deceased. The relief sought relates to the administration of the estate of the deceased. The 20th respondent is the executrix of the estate, and the 21st respondent is the Master of the High Court.

[3] Thembinkosi Sikebhe Nxumalo, the first applicant, has deposed to the founding affidavit, and states as follows. The deceased died intestate on 4 May 2009. His estate was reported to the 21st respondent, who appointed an attorney, Mr Harvey Ntabazwe Gumede (Gumede) as executor of the estate. Gumede died in 2015 and during February 2015 the 20th respondent, an attorney, was appointed as executrix in the place of Gumede.

[4] The deceased was married to Busisiwe Mamayakhe Nxumalo, Nkosingiphile Florence Nxumalo and to Nhlanhla Margaret Nxumalo (the first respondent). The deceased was survived by his three wives. The deceased at the date of his death operated a transport business. He left a sizeable estate consisting of fixed properties and motor vehicles with a nett value of about R12 million.

[5] Gumede had, before he passed on, in execution of his duties, almost finalised the winding up of the estate. He prepared a redistribution agreement, which was signed by all the heirs, so it was believed. He prepared a liquidation and distribution account in accordance with the terms of the redistribution agreement. The liquidation and distribution account, after it had lain for inspection in accordance with the provisions of s 35(4) of the Administration of Estates Act 66 of 1965 (the Estates Act), from 12 November 2010 to 6 December 2010 with no objection, was approved by the 21st respondent. A trust named the Flymon Zakhele Nxumalo Family Trust (the Trust) was created and registered. The awards to the beneficiaries, after the beneficiaries had consented to the creation and registration of a trust, were transferred to the Trust. The Trust commenced paying trust income to the beneficiaries in accordance with the provisions of the trust deed. The

consent to the creation and registration of a trust (the Consent), purportedly signed by each beneficiary, stated that each beneficiaries' award as reflected in the redistribution agreement would be paid and/or transferred into the Trust in return for the heir becoming a trust beneficiary.

[6] The first applicant contends that the signature on the redistribution agreement and on the Consent which purports to be his signature, is not his signature. The second and third applicants make similar contentions. The fourth applicant only disputes the signature on the Consent.

[7] The first applicant states that he, together with his mother, the 2nd applicant, the 3rd applicant, the 4th applicant and Nkosingiphile Florence Nxumalo were, for different reasons, disgruntled with the administration of the estate. They became disgruntled for receiving no assets from the estate, for not receiving any money or receiving less money than other beneficiaries from the Trust. As a result, they lodged complaints with the 21st respondent, the Law Society and the police, but their complaints were either rejected or not responded to. Furthermore, the first applicant challenges the sale and transfer of a property, which formed part of the estate, to one of the respondents; the inclusion in the estate of an immovable property which was registered in the name of the first respondent, and the removal from an amended liquidation and distribution account of movable assets in the amount of R4.3 million. These issues have resulted in other litigation being instituted between the parties, which is still pending.

[8] The first applicant states that during 2016 he consulted with his current attorneys, who investigated the matter for him. He was shown the redistribution agreement and the Consent to the creation and registration of a trust. He was not aware of the existence of these documents. He noted that the signatures on the documents were not his signatures. This means, he contends, that the liquidation and distribution account and the creation and registration of the Trust are based on forged documents. The other applicants, except to contend that it is not their signatures on the relevant documents, claim to have no knowledge of the existence of the redistribution agreement and the Consent.

[9] The applicants attached an affidavit by Mr Irving, a handwriting expert, dated August 2017. Mr Irving concluded that in relation to the four applicants, in respect of the redistribution agreement and the Consent, 'their' signatures have been authored by someone other than the first applicant; in respect of the second and third applicants the signatures were found not to be authentic. In respect of the fourth applicant, only the signature on the Consent was found not to be authentic.

[10] The applicants, after finding that their signatures as stated above were forged, approached the 21st respondent with a request to regard the redistribution agreement, liquidation and distribution account and the creation and registration of the Trust as invalid. They requested to be awarded their shares as intestate heirs. The 21st respondent however advised that he will only act in terms of a court order.

[11] The respondents are not able to explain how the disputed signatures occurred, and as stated, Gumede who was the executor, has passed away. The 20th respondent points out that the liquidation and distribution account laid for inspection in 2010, and there was no objection lodged against the account in terms of s 35 of the Estates Act. She further points out what happened in a related matter instituted by the Fymon Zakhele Nxumalo Family Trust at the Nongoma Magistrates' Court against the first applicant, claiming from him immovable property belonging to the Trust. In that matter, the first applicant in his answering affidavit stated:

'I respectfully refer the above honourable court to the Trust Deed which is Annexure TSN1 to the applicant's founding affidavit and to the preamble to the Trust which is page 5 of the Trust Deed, with particular reference to paragraph 3, wherein the founder is the Executor in the Estate late Fymon Zakhele Nxumalo agreeing to create the Trust on terms and conditions for the purpose of assisting the founder as Executor of my late father's estate in so far as to distributing the assets to the rightful heirs without diverting the object to the deceased's business whilst at the same time acting at the best interest of all heirs. . . I accept that the trust was properly constituted to administer and run the transport business for and on behalf of the estate, but deny that the ownership of assets referred to in schedule A were transferred to the trust'.

It may be added that in the said affidavit, the first applicant was challenging the administration and control of estate assets by the Trust, contending that he was being excluded whereas he was the eldest son, and the one who was knowledgeable about the transport business. He felt that he should be involved as one of the trustees. He claimed that for the said reasons, the Trust should be disbanded. The first applicant is therefore not consistent in claiming that he knew nothing about the creation and existence of the Trust before he was shown documents with his forged signature relating thereto.

[12] In correspondence dated 26 July 2017, the applicants' attorneys wrote that their clients included Busisiwe Mamekhaya Nxumalo and Nkosingiphile Florence Nxumalo, but when the application was instituted the two aforementioned persons were not cited - either as applicants or as respondents. Both have deposed to affidavits and state that they do not want to be served with any documents and do not take issue with the relief sought. It is made clear in the above letter of 26 July 2017 that the real gripe of the applicants is that they want to be paid their shares as heirs in terms of intestate succession, as reflected in the liquidation and distribution account plus a share from the profits generated by the Trust from September 2010 to the date of settlement. If so paid, they do not want to have any share in the Trust and the business conducted by it.

[13] The 20th respondent, as a result of the claim of the applicants that their signatures were forged as stated above, has proposed the redrawing of the liquidation and distribution account and ignoring the disputed redistribution agreement. This proposal does not make clear what will happen to all that what has been done in the administration of the estate, what will happen to the Trust, and all that what has been done by the Trust. It is an extreme measure, which cannot lightly be embarked upon. In that respect, the 20th respondent has engaged the parties with a view of settling the matter. It resulted in a settlement agreement which was signed by all the parties, but which is subject to the approval of the 21st respondent. The 21st respondent has not approved the settlement agreement. The applicants were not prepared to have the matter settled before court in terms of the unapproved settlement agreement.

[14] The handwriting expert opined that Nhlanhla Margaret Nxumalo, the first respondent and one of the surviving spouses of the deceased, signed the redistribution agreement on behalf of eight persons as well as herself. Another unidentified person, according to the handwriting expert, signed on behalf of two other beneficiaries. There is no indication whether the first respondent has admitted to signing for the other beneficiaries, and if so, under what circumstances. It has also not been explained by the other beneficiaries whether the signatures are indeed not their signatures, and if so, how it happen that someone signed for them. The essence of 20th respondent's proposal is to replace the approved liquidation and distribution account with an amended liquidation and distribution account. The applicants, in the amended account, would be awarded a child's share as children of the deceased in terms of the Intestate Succession Act 81 of 1987. The author, D Meyerowitz, in *Meyerowitz on Administration of Estates and Estate Duty* 2004 ed para 12.31 states the following with regard to a redistribution agreement:

'Although not strictly speaking a method of realisation, a redistribution agreement among the heirs can contain elements of realisation. For example, property may be left in undivided shares to A and B. They may agree that A should be awarded the property and B something else, or that A will take over a bigger share of the property and pay estate debts.

The basis of a redistribution agreement is that the heirs or legatees who have vested rights are able to deal with these rights and can therefore agree to a redistribution of their inheritances among themselves. A redistribution therefore could avoid a sale which might otherwise have had to take place in order to pay the estate's liabilities, or because the practical exigencies did not permit a transfer or delivery of the assets to the heirs jointly.' (Footnotes omitted.)

Heirs only partake in the redistribution agreement. It is the duty of the executor, in accordance with the law, to determine who heirs are. The deceased died without a will, and three customary wives survive him. The deceased, in marrying by customary law, indicated that customary law should apply in his case. J C Bekker in *Seymour's Customary Law in Southern Africa* 5 ed (1989) at 47-48 stated that:

'The law of persons or status is, for the most part, bound up either directly or indirectly with the question of marriage, and deals with capacity; marriage, its consummation, consequences and dissolution; children, their minority, tutelage, and emancipation; and succession. . . . When a Black person marries according to customary rites, he contemplates, or must be deemed to have contemplated, that customary law will be applied to all rights and obligations arising therefrom.'

A customary marriage creates a house with house property. The house property belongs to the wife and children of that house. The house of a wife retains its identity and estate even after her husband's death. The original customary law, which discriminated against women in a number of ways, is in conflict with the Constitution. In *Mighty Solutions CC v Engen Petroleum Ltd* 2016 (1) BCLR 28 CC para 1 Van der Westhuizen J said:

'[1] The South African common law of contract is as old as the ancient city of Rome. It developed over centuries in Europe and in the courts of bygone colonies and provinces now making up the Republic of South Africa. Like customary law that has grown from the soil of our continent, it has proven its value over time, but does not always meet the requirements of a constitutional democracy. Therefore it has to be developed in accordance with spirit, purport and objects of the Bill of Rights.'

In para 36 Van Der Westhuizen J further stated that:

'[36] Our common law evolved from an ancient society in which slavery was lawful, through centuries of feudalism, colonialism, discrimination, sexism and exploitation. Furthermore, apartheid laws and practices permeated and to some extent delegitimised much of the pre-1994 South African legal system. Courts have a duty to develop the common law - like customary law - to accord with the Bill of Rights.'

The court further determined in para 38 that:

'[38] Before a court proceeds to develop the common law, it must: (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of the law.'

On the death of the deceased the control and administration of the house property falls under the wife of the deceased. On the death of the wife of the deceased, with system of primogeniture abolished and consistent with the provisions of the Bill of Rights in the Constitution, the house property accrues to the children of that house in equal shares. The family property (property not allotted to any house), on the death of the deceased accrues in equal shares to the houses of the deceased. See J C Bekker *Seymour's Customary Law in Southern Africa* at 25. Therefore, the children of the deceased, the deceased having died before 20 September 2010, are not heirs in the estate of the deceased and were not qualified to be parties to the redistribution agreement. They have

no basis to contest the formation of a Trust. Their interest is confined in ensuring that the house property is utilised in a fair manner for the benefit of the children of the specific house. See the provisions of Reform of Customary Law of Succession and v regulation of Related Matters Act, No.11 of 2009 relating to the estates of persons who died after 20 September 2010.


[15] The relief sought by the applicants entails disbanding the Trust. In argument, they changed their stance and contended that the Trust may continue to operate to manage the transport business of the deceased but their shares had to be paid to them. What the applicants claimed to be their share, is held by the Trust. Therefore, the Trust is not only an interested party to the litigation but also a necessary party. The applicants have not cited the Trust or the trustees. The attitude of the Trust to the relief claimed is unknown. The control and administration of trust property vests in each trustee individually. If there is more than one trustee, they must act jointly in litigation concerning the affairs of the trust. (*Lupacchini NO & another v Minister of Safety and Security* 2010 (6) SA 457 (SCA) at 459E). A party, with direct and substantial interest in the suit, must be joined as a party to the litigation since '... a judgment cannot be pleaded as *res judicata* against someone who was not a party to the suit ... and the Court should not make an order that may prejudice the rights of parties not before it'. (*Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 651.) The applicants, despite an invitation, showed no inclination to join the trustees in the litigation.

[16] The parties did not argue the application of customary law in the administration of the deceased estate, but since the entire dispute revolves around the administration of the estate, it became unavoidable to deal with the issue. It was entirely within the purview of the dispute. The approach of the parties does not bind the court, but the court ensures the supremacy of the Constitution and the law. The 21st respondent appears to have appointed an executor with no knowledge of customary law. Further, the 21st respondent has no mechanism similar to the now repealed s 23 of the Black Administration Act 38 of 1927, read with the provisions of regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks, GN R200, GG 10601, 6 February

1987 relating to the administration of estates in terms of customary law. It results, in my view, in the undermining of customary law as a legal system in contravention of the Constitution. The will of the deceased, as the creator of the estate, is not enforced and it may cause prejudice to the rightful heirs. Putting aside the other issues, the failure to join the trustee(s) in the suit is fatal to the application.

[17] I, accordingly, make the following order:

1. The application is dismissed.
2. The applicants, jointly and severally the one paying the other to be absolved, are ordered to pay costs, including costs of senior counsel where so employed.



MINGADI, J

APPEARANCES

Case Number : 14072/17P

For the Applicants : Mr Lingenfelder

Instructed by : Lingenfelder Attorneys
Gillitis

For the 1st to 19th respondents : Adv. Khan SC

Instructed by : Cebisa Attorneys.
c/o Stowell & Co.
Durban

For 20th respondent : Mr Tendai Kadungure

Instructed by : Gumede and Jone Inc.
Durban

Matter argued on : 02 July 2020

Judgement delivered on : 04 August 2020