IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 7395/2010

In the matter between:

Applicant

NOSICELO NOLUNDI FUNISELO (BORN BHAYI)

and

THE MASTER OF THE HIGH COURT 1st Respondent

SIBUSISO FUNISELO 2nd Respondent

JUDGMENT DELIVERED ON 10 AUGUST 2011

MANTAME, AJ

[1] This is an application for the removal of Second Respondent as an executor of the estate in terms of *Section 54 of the Administration of Estates Act 66 of 1965.* Though the application is couched as such it is clothed and coated with some other prayers that are not related to this legislation. For instance, there are prayers that Second Respondent should furnish a detailed record of all monies received in the taxi business and Bonitas Medical Aid Scheme, maintenance of Applicant and her minor

child, and further that First Respondent be directed to take due regard of the Applicant when appointing a new executor.

[2] Applicant was herein represented by Mr Godla and Respondent was represented by Ms Bartman.

[3] It is common cause that this application was preceded by three applications that have been previously filed herein by the Applicant.

3.1 The first application was made under case no 13542/09 in terms of Rule 43 of the Uniform Rules of court relating to maintenance for the applicant and her minor child.

3.2 The second application was made under case no 20108/09, in the form of an urgent application in which Applicant claimed a distribution of the deceased estate in terms of intestate succession, and in the alternative, a monthly maintenance contribution for herself and her minor child.

3.3 The third application was made under case no 6801/09 and that never found its way to court, as it was subsequently withdrawn.

[4] The first application was removed from the roll at the date of the hearing and the second application was dismissed and the court granted a punitive costs order against the Applicant's attorneys.

[5] The application *in casu* is the fourth application before this court and the issues involved are more or less the same.

[6] It is worth mentioning that Mr Godla intimated at my chambers that he would be making an application for my recusal. Nevertheless, at the start of the proceedings, there was no formal application in terms of the rules of this court, and as such I will not deal with the same.

[7] Coming to the main application, Applicant alleges that she was married to the deceased and the appended marriage certificate to the Notice of Motion is a *prima facie* proof of that effect. A minor child by the name of Oyintando was born out of this marriage. The deceased then died on the 11th November 2008.

[8] During the deceased lifetime, they "occasionally" resided at No 1 Dartmor Close, Parklands, Table View. Applicant was thereafter ejected by Second Respondent from this address immediately after the death of her husband. Applicant has not mentioned what was the address of their permanent residence with the deceased. Applicant is now currently unemployed and resides with her maiden family at No: 62 Zone 20, Langa, Western Cape.

[9] Mr Godla for the Applicant argued that immediately after the death of the deceased, Second Respondent was very quick to report the deceased's estate with the First Respondent during December 2008 and was then appointed as the executor of the

estate to control, liquidate and distribute the assets of the estate. Applicant and her minor child were intentionally omitted as surviving spouse and heir respectively to the deceased estate. Pursuant thereto, Second Respondent refused to disclose the business dealings of her late husband's taxi business.

[10] Applicant contends that Second Respondent elected to mislead the First Respondent by stating that the deceased never married and further failed to state that there is a minor child born between the Applicant and the deceased. Respondent was appointed on the strength of distortion of facts. The issue of the validity of her marriage has no relevance in these proceedings as Applicant has an abridged marriage certificate as *prima facie* proof of her marriage.

[11] As a result of this distortion, Respondent brazenly refuses to include the Applicant and her minor child to the liquidation and distribution account as "ordered" by the First Respondent. In my view, First Respondent does not have *locus standi* to issue orders.

[12] Regarding *locus standi*, of the Applicant reference was made to the marriage certificate. The submission was that Applicant is the surviving spouse of the deceased.

[13] Ms Bartman for the Second Respondent argued that the application before this court is the fourth application, which essentially deals with the same subject matter, is between the same parties and is based on the same cause of action. She firstly

raised the point of *res judicata*, on the basis that the matter has been adjudicated on and this precludes Applicant from approaching the court again.

[14] Secondly, she contended that the presumption of *exceptio rei iudicata* is based on the irrefutable presumption that a final judgment upon a claim submitted to a competent court is correct. The presumption is founded on public policy which requires that litigation should not be endless and upon the requirement of good faith which does not permit of the same thing being demanded more than once. Applicant on the other hand argued that the matter was not dismissed. It was struck off the roll with a punitive cost order. *See* ***African Farms and Townships Ltd v Cape Town Municipality***[1]

[15] Further argument was adduced by Second Respondent to the effect that a related rule is that a party with a single cause of action is obliged to claim in one and the same action whatever remedies the law accords him upon that cause. *See* ***Custom Credit Corporation (Pty) Ltd v Shembe***[2]

[16] Ms Bartman further argued a point of *Lis Alibi pendens*. She argued that if the court finds that the application under case no 20108/09 was not dismissed, then Applicant is precluded from bringing this application as there are pending proceedings between the same parties, based on the same cause of action and in respect of the same subject matter and Respondent need not prove that the applications need to be identical. The present application is in the circumstances vexatious.

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[1] 1963(2) SA 555 A @ 564
[2] 1972(3) SA 462 A @ 472

[17] Thirdly, she submitted that there was dispute of fact which could not be resolved on papers. She submitted that there are fundamentally two disputes of fact, namely:

17.1 whether the Applicant was in fact married to the deceased; and

17.2 whether the deceased was the biological father of the Applicant's child.

[18] Second Respondent has consistently denied that the deceased, ie his father was married to Applicant and that the deceased is her daughter's biological father. As the oldest son in his father's kraal, he was never advised by him that he was married to Applicant.

[19] Further submissions raised by the Second Respondent are that:

19.1 In Applicant's affidavit on case no 13542/02, she states that the marriage took place on the 26th April 2003;

19.2 In Applicant's affidavit in this application, she states that the marriage took place on the 26th October 2003.

[20] In creating further doubt to this marriage, Second Respondent states that his mother died in 2004, which was after the alleged marriage. At the time of her death, the

deceased was still married to Second Respondent's mother; it is therefore likely that he would have known of his father's marriage if in fact it existed.

[21] Further, the application for an abridged marriage certificate was made 7 years after the alleged marriage and in fact posthumously. No reason was advanced by Applicant why it was not timeously done. It is not specific in the marriage certificate as to when the marriage was actually registered, but it seems that it was registered on the day the abridged certificate was applied for in order to support the first application brought by Applicant.

[22] It was contended by counsel for the Second Respondent that though the marriage certificate is a "prima facie" proof that the marriage existed, it is not a conclusive proof that the marriage did take place. Furthermore it is trite that there are various requirements for entry into a customary marriage. It is also trite that a customary marriage is not a single event but involves a developing process which includes families and often ceremonies. Second Respondent and his siblings were not aware of any such ceremonies and or processes taking place. The issue of whether the Applicant was married to the deceased by customary law cannot be resolved on the papers and of necessity oral evidence will have to be led. This issue has been raised in every affidavit in opposition to the relief sought by Applicant, yet she has persisted as she considers the marriage certificate as *prima facie* proof of the existence of her marriage. Second Respondent re-iterated that the production of the marriage certificate is not sufficient in light of the dispute raised.

[23] On the issue of maintenance Second Respondent does recognise the fact that a minor child of a deceased person has a common law claim for maintenance against the estate of the deceased and the surviving spouse has a claim in terms of the Maintenance of Surviving Spouse Act 27 of 1990 against the estate of the deceased spouse for the provision of her reasonable maintenance needs until her death or remarriage. Applicant is well aware that both her status and that of the minor child was disputed and as such should have approached the court for a declaratory order. Once the declaratory order has been granted, Applicant would then be entitled to submit a claim for maintenance to the executor for herself and on behalf of her minor child.

[24] Counsel for Second Respondent argued that the claim for Second Respondent as executor should fail on the basis that Applicant has not made out a proper case in her papers. As such she has not complied with section 54(1)(a)(v) of the Administration of Estates Act 66 of 1966 which reads:

> *"if for any reason the court is satisfied that it is undesirable that he should as as executor of the estate concerned"*
>
> *and*

54(1) (b) (v) of the Administration of Estates Act 66 of 1966 which reads:

> *"if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master"*

[25] The only allegation Applicant made in her founding papers is that the executor has an "attitude that he has no intent whatsoever to deal with the estate in a manner that accords with the best interests of all the heirs" and "has excluded Applicant and the minor child as heirs and beneficiaries." Such a comment cannot be said to be reasonable enough to convince this court when exercising its discretion whether or not to grant the prayer for the removal of Second Respondent as executor.

[26] Though the First Respondent was served with the papers in these proceedings, there is no report by him relating to this matter.

[27] On the issue of debatement of account Ms Bartman submitted that Applicant is not entitled to a debatement of an account relating to the deceased's taxi business or payments made by the medical aid to the estate account, due to the following:

27.1 Applicant has no right, nor alleged the basis of a right to receive an account. The duty to render an account is dependant upon the following:

27.1.1 a fiduciary relationship between the parties;

27.1.2 a contractual obligation;

27.1.3 a statutory duty.

[28] As a result, the relief sought by Applicant is ill conceived and procedurally incorrect and the application should be dismissed with costs.

[29] In reply, Mr Godla argued that a party to proceedings may raise *res judicata* only if the matter has been heard by the court and made final and definitive in judgment or order on the merits of the matter and as such the order should be immune from variation or review because of changed circumstances. *See* ***Le Roux v Le Roux***[3]

[30] Further submission was that in ***Baphalane ba Ramakoka Community v Mphela Family and Others,*** **in** ***Mphela Family and Others v Haakdoornblt Boerdery cc and Others***[4], the court held that "The plea of *res judicata* can only be raised if the same litigant seeks the same relief on the same cause of action.

[31] Before I deal with the issues involved in these proceedings, I am of the view that the *locus standi* of the applicant has to be established. In the Applicants founding affidavit, applicant stated that:

> *"1. I am an adult female unemployed widow of the late Mr Dinizulu Funiselo and the applicant herein residing at No 62 Zone 20, Langa, Western Cape.*
>
> *2. The facts deposed to herein are within my personal knowledge and to the best of my belief, save where the context indicates otherwise both true and correct where I make statements of a hearsay nature, I verily believe in their truth by virtue of their source and where I make submission of a legal nature it is based on the advice of my legal representative."*

[32] Second Respondent has repeatedly and consistently disputed that Applicant is not a widow of his father. To be a widow, there must have been a marriage that has

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[3] 1967(1) SA 446(A)
[4] CCT 75/10 [2011] ZACC 15 (21 April 2011)

been entered into between two parties. Applicant alleges that he was married to the deceased in terms of the customary law and further attaches as proof an abridged marriage certificate and it ends there. The court is aware of the process that one has to undergo in customary marriage. The said process was outlined in detail in ***Mrapukana v Master of the High Court & Another***[5], Applicant herein narrated the process of her customary marriage from the day oonozakuzaku were dispatched to request *intombi*, to *ilobolo*, to *utsiki*, to when *uduli* arrived at her husbands family, that is, when her family was welcomed by the husbands' family and when she ultimately became *umakoti.*

[33] In these proceedings, no basis has been laid for the consummation of this customary marriage. If at all there was any customary marriage from the onset, is questionable. I would rather conclude that dazzling an abridged marriage certificate before this court is an insult to the African Customary culture. A customary marriage in African culture has never been an event for one day, that is attainment of an abridged marriage certificate at Nyanga Home Affairs. It has to be noted that even the abridged marriage certificate was obtained by Applicant posthumously. Even if I were to believe that there was a proper marriage in place, that marriage in any event comes to an end at death of one of the parties. As the *locus standi* has been found to be in dispute, I cannot even start to deal with the issue of succession. I have noted that it was Mr Godla's argument that The First Respondent (The Master) has issued an order that Applicant and her minor child be included in the distribution of the deceased estate. First Respondent is not empowered by any law to make orders. Besides, there was no

[5] [2008] JOL 22875 (C)

First Respondent's Report regarding this matter before this court, to be convinced otherwise.

[34] Even though such marriage has been put in dispute, Applicant has not taken this court into confidence and laid a foundation as to how this customary marriage was consummated in order to erase any dispute that might have been created. I agree with the Second Respondent that customary marriage is a process. There are rituals and ceremonies that have to be performed. None whatsoever have been cited by the Applicant; instead she decided to register her disputed marriage posthumously.

[35] Indeed there is a doubt that has been created in my mind. It is difficult to understand why applicant would have married twice, i.e. one customary marriage took place on the 26th April 2003 and another one on the 26th October 2003. Mr Godla argued that this was an error on the dates. I am not persuaded that the registering offices at Nyanga Home Affairs took into account the provisions of Section 4 of the Recognition of Customary Marriages Act of 1988 when registering Applicant's marriage. This section is silent on "whether customary marriages could be registered posthumously". I am confident that the registering officer failed to apply his or her mind to the provision of section 4. The court cannot find any empowering provisions in the Act and or justification for the Home Affairs official to issue this abridged marriage certificate. It follows therefore that the applicant has failed to establish *locus standi* in these proceedings

[36] Coming to the main application, I will deal with the points *in limine* raised by the Second Respondent. The first point raised was *res judicata.* From the onset, I must state that I had an opportunity of reading through the annexures filed herein on record under case no 13542/09 and 20108/09 respectively, and the court orders subsequent thereto. I agree with Second Respondent that the issues referred to are more or less the same. The only difference is the terminology used and this point *in limine* stands to succeed, in as far as case no 13542/09 is concerned.

[37] In the event that indeed case no 20108/09 was struck off the roll with a punitive cost order, of which it is not clear from the court order, I am of the view that since the issues are more or less the same, Applicant should not have elected to file a new application. Applicant should have re-instated the said application on the roll for hearing. If there are defects in that application same could have been cured by amendment of the application without incurring costs of filing a new application. Applicant is precluded from bringing this application as there are pending proceedings between the same parties, based on the same cause of action and in respect of the same subject matter and Respondent need not prove that the applications need to be identical. On the basis of *lis alibi pendens* this point therefore stands to succeed.

[38] The third point i*n limine* was the one relating to the dispute of fact. Firstly, Applicant has annexed a copy of the abridged marriage certificate as *prima facie* proof of the existence of her marriage. I am not persuaded that the registering officer applied his or her mind on the provisions of Section 4 of the *Recognition of Customary*

Marriages Act 1998, as *Section 4* does not cater for the registration of marriages posthumously. As such, I am not even aware of what was placed before the registering officer to be satisfied that indeed marriage took place between Applicant and the deceased. This court has neither been placed in confidence by Applicant as to how her customary marriage was consummated. As a result, I will not be in a position to recognise the abridged marriage certificate that was obtained posthumously and further recognise that it is indeed the *prima facie* proof of the existence of the marriage. Further there was no birth certificate attached as proof that indeed the minor child does exist and is the biological child of the deceased and Applicant. Therefore these are issues that could be ventilated by relevant documentary proof and when oral evidence is led.

[39] On the merits, Applicants are requesting an order removing Second Respondent from the office of the executor. I am inclined to agree with Second Respondent's submission that Applicant has not made a proper case before this court for it to be satisfied that it is undesirable that Second Respondent should act as executor. Consequently I cannot find any fault with the executor holding this office up until this stage and cannot abuse the court's power and remove him unnecessarily so.

[40] Other issues regarding debatement of account in respect of the deceased taxi business and the deceased medical aid scheme benefits, maintenance of surviving spouse and her alleged minor child, automatically fall away as the Applicant's *locus standi* in these proceedings has not been established.

[41] I will therefore not deal with further arguments by Mr Godla as he failed to furnish the authorities he promised this court.

[42] Given the negligent manner and sloppiness with which this litigation has been conducted by Applicant's attorneys, I will therefore not hesitate to award another punitive costs order in favour of the Second Respondent.

[43] Consequently, I make the following order:

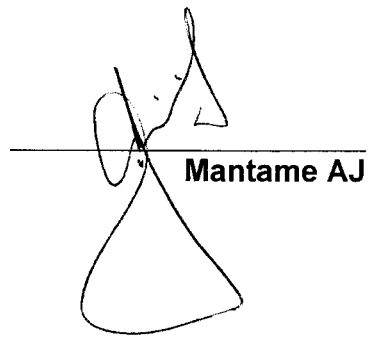
1. Applicant's application is dismissed;

2. Respondent's point *in limine* in respect of *res judica* and *lis alibi pendens* is upheld;

3. The abridged marriage certificate dated 12th May 2009 at Nyanga Home Affairs, Cape Town is declared null and void as it does not comply with section 4 of the Recognition of Customary Marriages Act 120 of 1998;

4. If there was indeed a ruling / order by First Respondent that Applicant and her minor child be included in the Final Liquidation and distribution account, such ruling or order is set aside.

5. Applicant's attorneys are ordered to pay Second Respondent's costs *de bonis propriis.*



Mantame AJ