

**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU NATAL LOCAL DIVISION, DURBAN**



CASE NO. 8488/2015

In the matter between:

<b>ZAMO MUSAWENKOSI CELE</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>THABISILE ZANDILE MLANGENI</b>	<b>2<sup>ND</sup> APPLICANT</b>
<b>DUMILE BEAUTY NENE</b>	<b>3<sup>RD</sup> APPLICANT</b>
<b>GOODNESS NESI SISHI</b>	<b>4<sup>TH</sup> APPLICANT</b>
<b>NONTUTHUKO EDITH CELE (MARITAL)</b>	<b>5<sup>TH</sup> APPLICANT</b>
<b>BONGIWE LYNETTE CELE</b>	<b>6<sup>TH</sup> APPLICANT</b>
<b>VUSUMUZI TERRENCE CELE</b>	<b>7<sup>TH</sup> APPLICANT</b>

and

<b>NTOMBIZETHU ANTONIA CELE</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>SIBUSISO MOFOKENG</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>TSHEPISO MARIBANE</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>REGISTRAR OF DEEDS</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>MASTER OF DEEDS</b>	<b>5<sup>TH</sup> RESPONDENT</b>

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## J U D G M E N T

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### STEYN J

[1] This is an application to set aside the sale of the immovable property described as Erf [...]9 Umlazi C, Registration Division FT, Province of KwaZulu-Natal, in extent (260) two hundred and sixty square metres. Hereinafter it shall be referred to as 'the property'. The applicants in addition sought the sale of the property be declared unlawful and wrongful, and that the property be declared part of the matrimonial property of the marriage between the late Mfana Cele and Matshotsho Tholakele Cele. The application was opposed by the first respondent on the basis that she is the lawful owner of the property and is therefore entitled to sell it to the second and third respondents. It was also opposed by the second and third respondents in that they purchased the property in good faith and are entitled to ownership thereof.

### The parties

[2] The applicants, excluding the fifth applicant, are the six surviving children born out of the marriage between Matshotsho Tholakele Cele and Mfana Cele. The parents of the applicants were married on 8 July 1961, which was a marriage in community of property and of profit and loss in terms of s 22(6) of the Black Administration Act 38 of 1927.<sup>1</sup> The fifth applicant is the wife of the first applicant. The first respondent is a widow, who was married to Mfana Cele who died on 26 March 2001.<sup>2</sup> The second respondent is married to the third respondent and they are the new owners of the property in dispute. The fourth and fifth respondents are cited in their official capacities and no relief is sought against them.

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<sup>1</sup> Act 38 of 1927 the repealed Black Administration Act.

<sup>2</sup> See ZM12.

[3] Mr Kwitshana, counsel appearing on behalf of the applicants, conceded at the onset of the matter being heard that the applicants' supplementary affidavit was not filed in accordance with the Uniform Rules of Court and agreed, albeit reluctantly, that the application ought to be decided on the papers filed<sup>3</sup> in accordance with the Rules.

[4] The chronology of the material events is central to the issues that need to be decided and in order to appreciate and understand the issues that need to be determined. I shall list the time line of events:

- (a) On 8 July 1961 - Tholakele Matshotsho Mlambo married Mfana Petros Cele.
- (b) On 10 January - 1985 the property in dispute was registered in the name of Mfana Cele.<sup>4</sup>
- (c) On 18 March - 1988 the Intestate Succession Act 81 of 1987 came into operation.<sup>5</sup>
- (d) On 18 April 1991 – Tholakele, the mother of the applicants, died intestate.
- (e) On 20 December 1994 - Mfana Cele, the applicants' father, married Ntombizethu Antonia Ndlovu. They were married in community of property.
- (f) On 26 March 2001 Mfana Cele died intestate.
- (g) On 7 November 2014 the property was transferred to the second and third respondents pursuant to the sale of the property in July/August 2014.

[5] The issues that require determination are whether:

- (a) the applicants were entitled to inherit from the deceased estates, that is the estate of the late Matshotsho Tholakele Cele who died intestate, and/or the late Mfana Cele who died intestate;

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<sup>3</sup> The papers that are excluded are pages 187 to 207.

<sup>4</sup> See 'C' at 102 of the papers, the deed of grant in respect of ownership unit for residential purposes.

<sup>5</sup> See *Government Gazette* 11188, 18 March 1988.

- (b) the property was lawfully inherited by the first respondent in terms of the Intestate Succession Act, which entitled her to ownership of the property;<sup>6</sup> If so, then she had the right to sell the property to the second and third respondents.

[6] It is common cause that the applicants, with the exclusion of the fifth applicant, are the descendants of Tholakele and Mfana Cele. Their parents were married in community of property and the effect of their chosen marriage regime was that the Black Administration Act impacted on their marriage.

[7] In determining whether the property formed part of the estate of Mfana Cele and the first respondent, it is necessary to analyse the historical events and the operation of the Intestate Succession Act. Since the late Tholakele and the late Mfana were married to each other in community of property during the purchase of the property, the effect of their marital regime was that the property was co-owned by them. When Tholakele died there was nothing to distribute amongst her descendants because the Intestate Succession Act found application and Mfana, as the surviving spouse, inherited the whole of Tholakele's portion of their joint estate. The immovable property became part of the estate of Mfana Cele and when he elected to marry the first respondent in 1994, in community of property, the first respondent as of right became co-owner of the assets brought into their estate, which included the property.

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<sup>6</sup> See s 1(1) of Act 81 of 1987 that reads:

'If after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and –

- (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;
- (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;
- (c) is survived by a spouse as well as a descendant –
  - (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and
  - (ii) such descendant shall inherit the residue (if any) of the intestate estate;'

[8] Mfana Cele the applicants' late father decided firstly to marry the first respondent in community of property and secondly not to have a will. When he died on 26 March 2001 the value of the property was R42 000, the half share of this joint estate was R21 000. Once more with the application of the Intestate Succession Act, the descendants were not entitled to inherit as the estate's value was R42 000 and in terms of s 1(1)(c)(ii) of the Intestate Succession Act, a descendant shall inherit the residue (if any) of the intestate estate. The fixed amount in terms of the Act in 2001 was more than R42 000 and as such there was nothing to distribute amongst the descendants of the late Mfana Cele.

[9] Mr Kwitshana had great difficulty referring me to any authority that would exclude the operation of the Intestate Succession Act. In fact, he placed reliance on *Motsamai v Motsamai* (CIV/APN/166/2008) as authority that the property owned by Tholakele Cele and Mfana Cele should be regarded as separate from the joint estate and accordingly the first respondent could not obtain any right thereto. Despite the fact that counsel could not provide me with any copies of the decision, I obtained both decisions (*Motsamai v Motsamai* decided on 23 February 2011 and *Motsamai v Motsamai* decided on 30 September 2011). A careful analysis of the *Motsamai* decisions show that it is no authority for Mr Kwitshana's submission. In fact, on the contrary it supports various submissions of the respondents in this case. In deciding upon the issues I placed reliance on the Intestate Succession Act. Further, in *Bhe & others v Magistrate Khayelitsha & others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole & others*; *South African Human Rights Commission v President of the Republic of South Africa & another*<sup>7</sup> it was decided that the customary law of succession in essence is replaced with the intestate rules as contained in the Intestate Succession Act.<sup>8</sup>

[10] I am not persuaded on the papers that the applicants had any right to the property in dispute. The applicants elected to ignore the operation of the Intestate

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<sup>7</sup> 2005 (1) SA 580 (CC).

<sup>8</sup> See Lawsa 2<sup>nd</sup> ed Vol 32 para 204 *et seq.*

Succession Act, which is the legal basis of the first respondent's right of ownership, coupled with her marital relationship with Mfana Cele.

[11] The papers filed by the applicants never dealt with the value of the property nor the legal basis for why the property should have fallen outside the scope of the joint estate of Mfana Cele and the first respondent. The applicants have failed in their burden of proof to show that they were entitled to inherit in terms of the Intestate Succession Act from their biological parents and they have failed to show on a balance of probabilities that they have a valid claim to the property in terms of customary law.

[13] The respondents have persuaded me that the application ought to be dismissed.

[14] The application is dismissed with costs jointly and severally, the one paying the other to be absolved.

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STEYN J

Application heard on : 1 November 2016

Counsel for the applicants : Mr AM Kwitshana

Instructed by : MM Ntanzu Attorneys

Counsel for the respondents : Mr M Sewpal

Instructed by : G Munien & Associates

Judgment handed down on : 9 January 2017