IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2021/18447

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

9/3/2023
DATE

JMoorcroft
SIGNATURE

In the matter between:

JEANETTE DOLLY CHRISTINA MAPHATSOE	First Applicant
MOLOBATSI EPHRAIM RAMOKOKA	Second Applicant
BILLY PATRICK RAMOKOKA	Third Applicant
PENROSE STEVEN MOKETE RAMOKOKA	Fourth Applicant
ESLEY LETLHOGONOLO RAMAKOKA	Fifth Applicant

and

SUSAN ERASMUS	First Respondent
ESTHÈ MULLER INC. ATTORNEYS	Second Respondent
LESHOME DAISY MHLONGO	Third Respondent
THE MASTER OF THE HIGH COURT: JOHANNESBURG	Fourth Respondent
ESTER PETRONELLA MULLER	Fifth Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Application proceedings not appropriate when there are foreseeable disputes of fact- no case made out for relief sought – application dismissed

Misjoinder – joinder of respondent's attorney – no case made out for

Non-joinder – Minister of Home Affairs must be joined in application to seek registration of customary marriage in terms of section 4(7) of the Recognition of Customary Marriages Act, 120 of 1998

Order

[1] In this matter I make the following order:

1. *The application is dismissed;*
2. *The applicants are ordered to pay the respondents' costs, jointly and severally the one paying the other to be absolved;*
3. *The counter-application by the 3rd respondent (counter-applicant) is dismissed;*
4. *No cost order is made in respect of the counter-application.*

[2] The reasons for the order follow below.

Introduction

[3] The applicants brought an application[1] to compel the 1st, 2nd and 3rd respondents to file the will of the late Mr Ramakoka ("the deceased") with the Master (the 4th respondent), alternatively that the 1st respondent be called before the Court to give oral evidence as to the whereabouts of the will. They also sought an order interdicting the 5th respondent from administering the estate of the deceased and an order that the Master withdraw the letters of executorship[2] issued to the 3rd respondent in respect of the estate of the deceased.

[4] The alternative relief foreshadows a dispute of fact. The 1st respondent, against whom the alternative relief is sought, is cited as an employee of the 2nd respondent – a firm of attorneys. The 5th respondent is the attorney who is the principal of the 2nd respondent. The joinder of the 1st and 2nd respondents constitute a misjoinder: They have no interest in the dispute between other parties to the litigation save for the fact that they represented the 3rd respondent (Ms Mhlongo) as her attorneys. Ms Mhlongo is the executor of the deceased estate appointed by the Master.

1 CaseLines 001-1.
2 CaseLines 001-22.

The affidavits

[5] The applicants are siblings and a nephew (also alleged to be an adopted child) of the deceased. They say that the deceased died intestate and that he was not survived by any parents, spouses or descendants. The deceased nominated[3] them as the beneficiaries of his provident scheme.

[6] In 2013 there were lobola negotiations[4] between the Ramakoka family and the family of Ms Mhlongo. The question whether a customary marriage was concluded between the deceased and Ms Mhlongo is disputed and is the subject of the 3rd respondent's counter - application. His marital status was reflected as single at the Provident Fund.[5]

[7] Before he died in 2019 he allegedly told the deponent to the founding affidavit (Ms Maphatsoe) that he had a will that was with the 2nd respondent, the firm of attorneys. The applicant say this that this was confirmed by the 2nd respondent at a meeting after his funeral.[6] This is disputed in the answering papers.

[8] Early in 2020 the applicants' attorney wrote[7] to the 2nd respondent to enquire about the will but the 2nd respondent denied that the firm was in possession of a will.[8]

[9] The applicants disputed[9] the Ms Mhlongo's appointment as executrix and also disputed the existence of a customary marriage. In December 2020 a meeting[10] was held with the Master and the Master agreed to hold matters in abeyance until April 2021 to allow an approach to the Department of Home Affairs in connection with the possible existence of a customary marriage.

[10] In their answering affidavit the 1st, 2nd and 5th respondents deny that the firm of attorneys had ever represented to the applicants that the deceased had a will. The firm

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3 CaseLines 001-35.
4 CaseLines 001-37.
5 CaseLines 001-39.
6 CaseLines 001-13.
7 CaseLines 001-44.
8 CaseLines 003-88.
9 CaseLines 001-47.
10 CaseLines 001-49.

had never been told of or referred to a will. They never knew the deceased during his lifetime and their source of information was instructions from Ms Mhlongo.

The application

[11] The 1st, 2nd, and 5th respondents have no legal interest in the application or in the counter application. Their joinder constitutes a misjoinder and this was dealt with above.

[12] The applicants should have known when they brought the application that disputes of fact were bound to arise. [11] They knew that the 1st, 2nd, and 5th respondent who had no legal interest in the application had categorically denied that they were in possession of a will and that their denial were recorded in writing. There were no objectively verifiable facts indicating that the 2nd respondent and its officers were in possession of a will. The application must therefore be dismissed with costs.

[13] In respect of the relief sought against the Master I was advised from the Bar an arrangement was in place with the Master in terms of which the matter is being held in abeyance. In any event, no case was made out for relief in terms of section 35(10) of the Administration of Estates Act, 66 of 1965.

The counter- application by the 3rd respondent

[14] Ms Mhlongo filed her own answering affidavit and with it a counter-application. In the counter-application she seeks an order that the Director – General of Home Affairs be joined to the application as a respondent, that the customary marriage between herself and the deceased be declared valid, and that the Director-General be ordered to register the marriage.

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[11] See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1162 to 1168; *Gounder v Top Spec Investments (Pty) Ltd* 2008 (5) SA 151 (SCA) 154B–C.

[15] Prayer 3 of the notice of motion in the counter – application requires the Director – General, the administrative head of the Department of Home Affairs to register a customary marriage.

[16] The application to join the Director-General was withdrawn at the hearing. The Director – General was in any event not the correct party to be joined as the Minister of Home Affairs, *N O*, is the member of the Cabinet referred to in the Recognition of Customary Marriages Act, 120 of 1998. Section 4(7) of the Act provides that the Court *"may, upon application made to that court and upon investigation instituted by that court, order the registration of a customary marriage."* The Minister is an interested party and the non-joinder of the Minister is fatal to the counter-application.

[17] I therefore dismiss the counter-application without deciding the merits of the counter - application and whether the dispute between the 3rd respondent and the applicants can be adjudicated in an application as opposed to a trial.[12]

[18] For the reasons above I grant the order above.

J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **10 MARCH 2023**.

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12 See also *Mamadi and Another v Premier of Limpopo Province and Others* [2022] ZACC 26 par. 22 and *Lombaard v Droprop CC* [2010] ZASCA 86; 2010 (5) SA 1 (SCA) par. 26, last sentence.

ATTORNEY FOR THE APPLICANTS:	J H GWEBU
INSTRUCTED BY:	MADLELA GWEBU MASHAMBA INC
COUNSEL FOR 1st, 2nd , & 5th RESPONDENTS:	W F WANNENBURG
INSTRUCTED BY:	ESTHE MULLER INC
COUNSEL FOR 3rd RESPONDENT:	P TSHAVHUNGWE
INSTRUCTED BY:	MOLATI ATTORNEYS
DATE OF THE HEARING:	6 MARCH 2023
DATE OF ORDER:	10 MARCH 2023
DATE OF JUDGMENT:	10 MARCH 2023