

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO. 9489/02

In the matter between:

NONKULULEKO LETTA BHE First Applicant

ANELISA BHE Second Applicant

and

MRS VAN SCHALKWYK N.O. First Respondent

MABOYISI NELSON MGOLOMBANE N.O. Second Respondent

REGISTRAR OF DEEDS Third Respondent

MABOYISI NELSON MGOLOMBANE Fourth Respondent

NOTICE OF MOTION

PART A: URGENT APPLICATION FOR INTERDICT *PENDENTE LITE*

KINDLY TAKE NOTICE that an application will be made to the above Honourable Court on **FRIDAY, 29 NOVEMBER 2002**, at 11h00 or so soon thereafter as counsel may be heard for an order operating as interim relief pending the determination of proceedings in respect of the relief claimed under **PART B** hereunder, in the following terms:

1. That the matter may be heard as one of urgency and that the usual time periods, notice and service in terms of the Rules of Court be dispensed with;
2.
 - 2.1 Interdicting the First Respondent from approving the transfer of the immovable property in the estate of the late Vuyo Elius Mgolombane, registered at the Khayelitsha Magistrate's Court, under reference number 7/1/2-484/2002 ("the deceased estate"), including the immovable property situated at No. 39, 678 Macassar, known as erf 39678 Khayelitsha, situated in the City of Tygerberg, Division Cape, Western Province and held in terms of Title Deed T 33570/97 ("the immovable property");
 - 2.2 Interdicting the Second Respondent from alienating or passing transfer of the immovable property and all movable property in the deceased estate;
 - 2.3 Interdicting the Third Respondent from passing transfer of the immovable property;
3.
 - 3.1 Should the Respondents not oppose this application, ordering that the costs of this application stand over for determination at the hearing of the principal application set out below under **PART B**; or

- 3.2 Should any of the Respondents oppose this application, ordering that such Respondent(s) pay the costs hereof;
4. Granting the Applicants leave to file supplementary affidavits in respect of the relief sought by them under **PART B** by a date to be determined by this Court; and
5. Granting the Applicants further and/or alternative relief.

TAKE FURTHER NOTICE that should the Respondents wish to oppose the interim relief sought in **PART A** above, then they are required to:

- (a) on or before **10h00 on FRIDAY, 29 NOVEMBER 2002**:
- (i) deliver to the Applicants a notice of opposition; and
- (ii) serve any affidavits that they may desire to answer the allegations made by the Applicants.

PART B: DECLARATORS

TAKE FURTHER NOTICE that the Applicants intend applying to the above Honourable Court at a date and time to be fixed by the Registrar for an order in the following terms:

Orders of general application

6. In this order,

- “*an intestate Black estate*” means the deceased estate of a “Black” as defined in s 35 of the Black Administration Act 38 of 1927, who dies in the circumstances contemplated in regulation 2(e) and who is not survived by a spouse but is survived by one or more descendants;
- “*regulation 2(e)*” means regulation 2(e) of the Regulations for the Administration and Distribution of the Estate of Deceased Blacks promulgated under s23(10) of the Black Administration Act 38 of 1927 by Government Notice R200 of 6 February 1987;
- “*the customary law rules*” are the rules of “*Black law and custom*” that govern the distribution of an intestate Black estate in terms of regulation 2(e).

7. It is declared that, under the customary law rules as developed in terms of s8(3) and/or s39(2) of the Constitution, the deceased's surviving descendants inherit the estate *per stirpes*.

8. Alternatively to prayer 7

8.1 It is declared that the customary law rules are unconstitutional and invalid.

8.2 Alternatively to 8.1

It is declared that the customary law rules are “*opposed to the principles of public policy and natural justice*” within the meaning of s1(1) of the Law of Evidence Amendment Act 45 of 1988 and are consequently invalid and/or unenforceable.

8.3 Alternatively to 8.1 and 8.2

It is declared that regulation 2(e) is unconstitutional and invalid insofar as it provides for the distribution of an intestate Black estate to be governed by the customary law rules.

8.4 Alternatively to 8.1 to 8.3

It is declared that ss23(10)(a), (c) and (e) of the Black Administration Act are unconstitutional and invalid and that regulation 2(e) is consequently also invalid.

8.5 Alternatively to 8.1 to 8.4

It is declared that s1(4)(b) of the Intestate Succession Act 81 of 1987 is unconstitutional and invalid insofar as it excludes from the application of s1, any estate or part of any estate in respect of which s23 of the Black Administration Act 38 of 1927 applies.

8.6 Alternatively to 8.1 to 8.5

It is declared that regulation 2(e) and the customary law rules have been repealed and superseded by s6 read with ss5(1) and (2) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

8.7 It is declared that, until the foregoing defects are corrected by a competent legislature, the distribution of an intestate Black estate is governed by s1 of the Intestate Succession Act 81 of 1987.

8.8 This order does not apply to an intestate Black estate,

- if the deceased died before 27 April 1994, or
- if and to the extent that the estate has already been distributed on the date of this order.

Order particular to this application

9. It is declared that the first and second applicants are the only heirs in the estate of the late Vuyo Elius Mgolombane registered at the Khayelitsha Magistrate's Court under reference number 7/1/2-484/2002.

10. The second respondent is ordered to sign all documents and to take all other steps reasonably required of him to transfer the entire residue of the said estate to the first and second applicants in equal shares. If the second respondent fails to do so, the Deputy Sheriff is authorised and directed to do so in his stead.

11. It is declared that the applicants are exclusively entitled to reside in the house at 35 Jula Street, Makaza, situated on Erf 39678 Khayelitsha in the city of Tygerberg until its distribution and transfer in accordance with this order.

12. If this application is opposed, the respondents who oppose it are ordered jointly and severally to pay the applicants' costs.

13. The applicants are afforded further and/or alternative relief.

AND TAKE FURTHER NOTICE that the Respondents must, if they intend opposing **PART B** of this application, deliver a notice of opposition within **10 (TEN)** days of the service of this application, failing which the matter may be heard in the Respondents' absence;

TAKE FURTHER NOTICE that the Applicants appoint the **WOMEN'S LEGAL CENTRE** as their representative in this matter;

AND TAKE FURTHER NOTICE that the Applicants will accept service of all proceedings in this matter at the address of the offices of the Applicants' representative which is set out below;

TAKE FURTHER NOTICE that the affidavits of **NONTUPHEKO MARETAHA BHE, LEON BHE** and **SEDONIA VAN WYK** will be used in support of this application.

DATED at **CAPE TOWN** on this the **28TH** day of **NOVEMBER** 2002

WOMEN'S LEGAL CENTRE

Per: _____
M A O'SULLIVAN
Applicants' Attorney
4th Floor Glaston House
63 Church Street
CAPE TOWN

To : **THE REGISTRAR**
High Court
CAPE TOWN

And to: **MRS VAN SCHALKWYK**
First Respondent
Khayelitsha Magistrate' Court
KHAYELITSHA

And to: **MABOYISI NELSON MGOLOMBANE N.O.**
Second Respondent
36 Nkohisane Street
KHAYELITSHA

And to: **THE REGISTRAR OF DEEDS**
Third Respondent
Plein Street
CAPE TOWN