IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case no. : 9489/02

In the matter between :

NONKULEKO LETTE BHE	First Applicant
ANELISA BHE	Second Applicant
NONTHPHEKO MARETOHE BHE	Third Applicant

and

THE MAGISTRATE KHAYELITSHA	First Respondent
MABOYISI NELSON MGOLOMBANE	Second Respondent
THE PRESIDENT OF SOUTH AFRICA	Third Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent

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SECOND RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned, **MABOYISI NELSON MGOLOMBABE**, do hereby make oath and say that :

1. I am an adult male pensioner who resides in Berlin, Eastern Cape.

2. I am the lawful father of **VUYO ELVIS MGOLOMBANE.**

3. I have personal knowledge of the facts to which I depose in this Affidavit except where it is to apparent from the context that I do not. They are to the best of my knowledge and believe they are correct. The submissions of law I make in this Affidavit are made on the advice of my lawyer.

4. **AD PARAGRAPH 1-15**

I admit the contents hereof.

5. **AD PARAGRAPH 16**

The contents of this paragraph are noted.

6. **AD PARAGRAPH 17**

I admit the contents hereof.

7. **AD PARAGRAPH 18**

I deny the contents hereof. The Applicant was never interested to help Vuyo in building their house. The said Applicant was only interested in my son's money.

8. **AD PARAGRAPH 19**

I admit the contents hereof.

9. **AD PARAGRAPH 20-22**

I deny the contents hereof. It was never my son's intention to marry the Applicant.

10. **AD PARAGRAPH 23-27**

The contents hereof are admitted.

11. **AD PARAGRAPH 28-29**

The contents hereof are admitted.

12. **AD PARAGRAPH 30**

I deny the contents hereof. My son never disclosed to the Applicant what would happen

after his death. The Applicant was not even interested in the terminal illness of my son. The Applicant was not even at the funeral of my son. Such attitude towards my son, gave me grave concern whether she was really interested in the well being of my son.

n13. **AD PARAGRAPH 31**

I deny the contents hereof. Before my son's death he informed me that I had to come to Cape Town. The reason why I had to come to Cape Town was because my son had told me that I must sell the property. He never told me that the property must be used by the three Applicants.

14. **AD PARAGRAPH 32**

I deny the contents of this paragraph. It was never my son's intention to preserve the property for his daughter after his death. He clearly indicated to me that the property must be sold.

15. **AD PARAGRAPH 33-34**

I admit the contents hereof.

16. **AD PARAGRAPH 35**

The contents hereof is noted.

17. **AD PARAGRAPH 36**

I admit the contents hereof.

18. **AD PARAGRAPH 37**

I admit the contents hereof, save to say the following :

18.1 I was not aggressive and hostile towards the Applicant.

18.2 There was never an agreement whereby the proceeds of the sale of the house would be paid for my son's funeral. I had to pay for my son's funeral out of my own pocket. The Applicant did not give financial assistance towards the funeral of my son.

18.3 The street Committee informed me that the proceeds left from the R15000,00 was R5000,00 and that R5000,00 was paid towards the Applicant.

19. **AD PARAGRAPH 38**

I deny the contents hereof. The property was never sold for R6000,00. It was only the site that was being sold for about R7000,00. That decision was made at the Magistrate Court at Khayalitsha.

20. **AD PARAGRAPH 39**

I deny the contents hereof. We never threatened the Applicants. I at all times communicated with them in a polite manner.

21. **AD PARAGRAPH 40**

I admit the contents hereof.

22. **AD PARAGRAPH 41**

The contents hereof are noted.

23. **AD PARAGRAPH 42**

I deny the contents hereof. I was never unruly and aggressive towards the Applicant.

24. **AD PARAGRAPH 43-44**

I admit the contents hereof.

25. **AD PARAGRAPH 45**

I deny the contents hereof. By reason of the fact that my son had paid labola. I am in a rightful possession to have custody over the child.

26. **AD PARAGRAPH 46**

I deny the contents hereof. I was never abusive towards the Applicant. My son has clearly indicated to me that if he dies, I should take the house and sell it. I never threatened the Applicant in a manner that I would endanger the future of Vuyo's two illegitimate daughters.

27. **AD PARAGRAPH 47**

I deny the contents hereof. I fully agree with the fact that I did not want to return Nonkululeko to the Applicant. I was never heated or argumentive with the Applicant. It was always the Applicant that was argumentive, heated and aggressive.

28. **AD PARAGRAPH 48-50**

The contents hereof are admitted.

29. **AD PARAGRAPH 50-56**

The contents hereof are admitted.

30. **AD PARAGRAPH 57**

I deny the contents hereof. Applicant made thus allegation to obtain favour in her Application. I never made threats towards her or that I will make use of a sangoma if I do not get the immovable property. The Applicant herself is a very much wicket person.

31. **AD PARAGRAPH 58**

The contents hereof are noted.

32. **AD PARAGRAPH 59**

I deny the contents hereof. I never told the police to lock Applicant's out of the immovable property.

33. **AD PARAGRAPH 60**

The contents hereof are admitted.

34. **AD PARAGRAPH 61**

The contents hereof are admitted. The reason why I want to sell the property, was because I was the executor of my son's estate and by selling the property, was in the estate's interest.

35. **AD PARAGRAPH 62**

I deny the contents hereof. I will say it again. I never informed the Applicant that I will bewitch her. I never told Applicant that I will send my relative to chase her away from the immovable property.

36. **AD PARAGRAPH 63-64**

The contents hereof are admitted.

37. **AD PARAGRAPH 65**

The contents hereof are noted.

38. **AD PARAGRAPH 66-70**

I admitted the contents hereof.

THE APPLICABLE RULES OF CUSTOMARY LAW

I have no personal knowledge of the law. What I say below is based on the advice received from my Legal Representative.

39. **AD PARAGRAPH 71-96**

39.1 Succession follows the principle of primogeniture., which means that a man is succeeded by his frustration by his firstborn. In African customary Law in South Africa which recognises patrilineal succession, a man is succeeded by his firstborn son in a particular house.

39.2 Succession is a duty that cannot be relinguished or ceded. Ason has to take up all the responsibilities associated with the status position to which he succeeds. The general successior in particular has the duty to care for all members of the family and to perform rituals on behalf of the family to maintain the blessing and goodwill of the family ancestors.

39.3 At present, the situation is regulated by Section 23 of the Black Administration Act. Section 23 provides, among others, the following:

(a) All movable property allocated to a house or wife in a customary marriage is inherited according to the rules of original indigenous law; this property cannot bequeathed by means of a will.

(b) All other property may be disposed by means of a will: persons who have

contracted a civil marriage, but never a customary marriage, unmarried men and women in so far has they are indivual holders to the property.

39.4 Section 23 af the Black Administration Act regulates the inheritance of property by persons living under customary law as follows :

(a) All movable property belonging to a black and allotted by him or accruing under black law or custom to any woman with whom he lived in customary union, or to any house, shall upon his death divolve and be administered under black law and custom.

(b) All land in a tribal settlement held in an individual tanner upon quitrent conditions by a black shall divolve upon his death upon one male person, to be determined in accordance with the tables of succession to be prescribed under Subsectio 10.

39.5 Government Notice R200 of 1987 contains regulations promulagated in terms of Section 23 of the Black Adminstration Act. It gives statutory recognition to the principle of male primomogeniture. Regulation 2 prescribes how the estate of a deceased African must divolve in the cases where Section 23 (1) and (2) of the Black Administration Act does not apply.

39.6 The Rule of African Customary Law which generally excludes african womaen from intestate succession is recognised by s23 of the Black Aministration Act 38 of 1927 in the regulations framed thereunder, especially regulation 2, promulgated on the 6 February 1987 in Government Gazette Notice R200, and which makes law and custom applicable to the devolution of the estate of a deceased black person.

39.7 Section 1.1 of the Law of Evidence Amendment Act 45 1988 provides as follows :
(i) Any Court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readley and with suffecient certainty :provided that indegenoues law shall not be oppossed to the principles of public policy or natural justice.

39.8 Succession was originally of a universal nature. This meant that the successor acquired benefits and duties. When a family head died his powers and duties passed to the general successor and to the house successors in more or less direct proportion to the rank of each house.

39.9 The indigenoues law of succession and inheritance is complex and varies among the different African groups. The official version of customary law of succession conflates the idea of succession to status inheritance of property, while the indigenous laws give ample evidence of distribution of property to individuals.

39.10 In the official customary law the indigenous position of women was largely distorted and married women were relegated to the position of legal minors. As minors they had no pwers to deal with property; in extreme cases they were considered not to own any property.

39.11 If, on the other hand a man and a woman do not enter into a customary union, the woman remains a member of her own family and she falls under the guardianship of her guardian in her own family. illegitemate children do not inherit from their natural father if he dies intestate. The ratinale for this is that they have no rights against their natural father or his family whether during the lifetime of their natural father or after his death.

39.12 The disqualification of the Applcant's two daughters to inherit from the deceased in the present matter flows therefor from their status as a illigitemate child and not from the fact that they are girls and that the system of primogeniture is applied in customary law.

39.13 Therfore it cannot be said that their is unfair discrimination on the grounds of sex or gender.

CONCLUSION

WHEREFORE I humbly request this Honourable Court to dismiss the relief sought by the Applicant with costs.

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MABOYISI NELSON MGOLOMBANE

I CERTIFY THAT on the ..... day of.....2003 and in my presence at ..... the Deponent signed this declaration and declared that s/he:

1. knew and understood the contents hereof;

2. had no objection to taking this oath;

3. considered this oath to be binding upon his/her conscience and uttered the words, "I swear that the contents of this declaration are true, so help me God".

Before me

_____
COMMISSIONER OF OATHS
full names :
capacity :
address:
(**Please initial each and every page at the foot thereof!!!!)**