FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 683/2011

In the matter between:-

CHALI MATETENKI MARIA	First Applicant
CHALI LEEPO MARIA	Second Applicant
CHALI THABISO CHARLES	Third Applicant
CHALI YVONNE LERATO	Fifth Applicant

and

RASELLO MASEFAKO LYDIA	First Respondent
NICOLAS ESAIS JANSE VAN RENSBURG	Second Respondent
SUSANNA MARIA COPPENHAGEN	Third Respondent
DIRECTOR GENERAL DEPARTMENT OF HOME AFFAIRS	Fourth Respondent
MASTER OF THE HIGH COURT	Fifth Respondent
REGISTRAR OF DEEDS BLOEMFONTEIN	Sixth Respondent

HEARD ON: 26 MAY 2011

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 4 AUGUST 2011

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[1] The applicants seek to have the marriage between the first respondent and the late Masakale David Chali nullified; the second respondent removed from the office as executor in the estate of the deceased; the third respondent, an agent of the

second respondent, removed from the same office; the second respondent and his agent replaced by the fourth applicant as an executrix; the second and the third respondents directed to hand over the estate to the fourth applicant and the second and the third respondent directed to pay the costs of this application.

[2] The first respondent, second respondent and third respondent oppose the matter. The fourth respondent abides. So does the fifth respondent. The sixth respondent has filed no papers. I take it, therefore, that the fifth respondent also adopts a neutral stance to the matter.

[3] Masakale David Chali, the deceased, was born at Koppies on 11 December 1960. His mother is MS Matetenki Maria Chali, the first applicant. His father, Mr. Moeti Simon Chali, died in 2005 not long after his son. He matriculated at Bodibeng High School in Kroonstad. His childhood friend, Mr. S.S. Nteso, recruited him to become a police officer. He became a member of the South African Police Service in 1983. He was previously married to Ms Leepo Maria Chali (ex Merahe), the second applicant, in 1984. Three children were born of the marriage, namely: Thabiso Charles Chali, the third applicant, Tiisetso Juliah Chali, the fourth applicant and Lerato Yvonne Chali, the

fifth applicant. The family lived at Edenville. He filed for divorce in the Southern Divorce Court under case number 975 of 2001. The bonds of marriage which subsisted between him and the second applicant were dissolved by a final decree of divorce at Kroonstad on 20 May 2002 (annexure “B”).

[4] He and the first respondent met at Kroonstad during the 1990’s. At the time he worked as the station commissioner at Edenville while she was a teacher at Kroonstad. She took a transfer to De Villiershof Farm School in the district of Edenville in 1991. They started staying together on the farm. He was transferred to Villiers in 2000. The couple moved together from Edenville to Villiers following his promotion to the rank of superintendent. Staying with them at Villiers were two children, namely: his son, Thabiso Charles Chali and her son, Kabelo Benedict Rasello. However, she retained her teaching post at Edenville.

[5] He was promoted to the rank of senior superintendent in 2001 and transferred to Bethlehem. She and the aforesaid boys moved together with him. Her daughter, Tiego Rejoice Rasello joined them. The three children were staying together and attending school there. She was still teaching at Edenville. However, in 2002 she was transferred to Bethlehem where she

taught at Repotlakile Primary School. The couple purchased a residential property known as 19 Opperman Street, Jan Cilliers Park in Welkom. The family moved and stayed there together with the same children. By then Kabelo was a student at Vaal University of Technology. Kabelo and Tiego were learners at local schools. Ms Rasello continued to teach at Bethlehem.

[6] On 1 October 2004 Chali was once again promoted. As a result of his promotion he was transferred to Middelburg in Mpumulanga province where he became a director. Ms Rasello and the children moved together with him. Her children attended school there, but she continued teaching at Bethlehem.

[7] Chali's mother, his father, his brother, Mr. Paulus Chali and his friend, Mr. Sydwell Nteso, travelled to Orkney in North West on 19 March 2005. They were hosted as guests by the Phungwakos, the parents of Ms Rasello. Among others, the following members of her family were present during the visit by his family: her father, Mr. Jameson Phungwako; her brother-in-law, Mr. Semousho Isaac Mosianedi; her sister Ms Ditlhare Maria Mosianedi; her uncle Mr. Teko Frans Phuthi.

[8] Director M.D. Chali died at Machadodorp in Mpumalanga

province on Monday, 23 May 2005. He sustained fatal bodily injuries in a road accident. He was later buried at Kwakwatsi, Koppies where his parents lived.

[9] Subsequent to Chali's death Ms Rasello instructed her attorney, N.E.J. van Rensburg of Podbilski Mhlambi Attorneys, to administer the deceased estate of the late M.D. Chali. On 29 August 2005 the Master of the High Court issued letters of executorship whereby Attorney Van Rensburg, the second respondent, was authorised to liquidate and distribute the estate (annexure "M"). In turn the second respondent appointed the third respondent, Attorney S.M. van Coppenhagen of Honey Attorneys, as his agent. Later on the second respondent resigned from the aforesaid lawfirm, left Welkom and moved to Nelspruit in Mpumalanga where he continued practising law.

[10] By 6 June 2007 Wessels & Smith, attorneys of Welkom, were already acting on behalf of the first respondent. On 23 July 2007 they addressed a letter to the Master of the High Court (annexure "UUU"), to which a sworn statement (annexure "TTT") by the first respondent, was attached. The first applicant *et ali* appointed Hlatswayo Mhayise, attorneys of Vereeniging,

to safeguard their interest in the estate. They were disillusioned by the way the second respondent was administering the deceased estate. The total gross value of the deceased estate is approximately R2 million.

[11] The aforegoing facts were common cause or not seriously disputed. The dispute has five dimensions. The first question in the matter was whether or not the first respondent was lawfully married to the deceased. It was the contention of the applicants that she was not. Her contention was that she was. According to the applicants she was nothing more than an intimate ladyfriend of the deceased gentleman. According to her, she was nothing less than his wife.

[12] It was common cause that the late Chali was previously married to the second applicant and that the couple divorced nine years ago. In her founding affidavit the first applicant asserted that her late son never entered into a second marriage after his divorce. According to the first applicant an entry in the death certificate to the effect that her son was unmarried at the time he died, was correct (annexure “A”).

[13] In my view, the contention was not persuasive. From my

previous experience as an attorney, I have seen many such certificates which were inconsistent with the real and true facts. Sometimes marriage officers do not forward to the head office of the Department of Home Affairs marriage particulars of people. Sometimes the marriage officers do send such particulars, however, the relevant letters or notices to that effect go astray in the post or get misplaced at the head office. At times the responsible officials there inadvertently omit to update the relevant files. It can, therefore, be appreciated why a death certificate is not always an absolutely reliable document concerning the marital status of a deceased person.

[14] In her answering affidavit, the first respondent asserted that she and Chali married each other by custom at Orkney on 19 March 2005 (annexures “OM”, “ON”, “OP” and “OQ”) all of which must be read together with annexure “C”. The applicants attacked the authenticity of the alleged “bohadi” letter (annexure “OM”) the veracity of the three confirmatory affidavits (annexures “OM”, “OP” and “OQ”) as well as the legality of the customary marriage certificate (annexure “C”).

[15] Mr. Hlatshwayo argued, on behalf of the applicants, that the legal requirements for a conclusion of a valid customary

marriage, were not complied with. Mr. Pienaar argued, on behalf of the first respondent, that they were. The second respondent and the third respondent made common cause with the first respondent through the lips of Mr. Louw.

[16] In her first replying affidavit, the first applicant admitted that the averment by the first respondent that the representative of the two families met at Orkney on 19 March 2005 and that the first respondent's parents hosted the parents of the deceased. See also paragraph 3 annexure "E" founding affidavit. However, the versions of the two ladies are mutually irreconcilable as regards the purpose of such visit.

[17] According to the first applicant the purpose of the visit was purely social. At paragraph 18 of her first replying affidavit the first applicant explains it as follows:

> "**AD PARAGRAPH 3.20**
>
> The contents of this paragraph is denied. No customary marriage could take place without my knowledge and the knowledge of the deceased's father."

At paragraph 51 of the first replying affidavit she went further and explained as follows:

"**AD PARAGRAPH 6.7**

It is true that Mr. Sydwell Nteso drove us to Orkney, but not for the payment of lobola.

I and my late husband went to Orkney on the 19th March 2005, to know First Respondent's parents since she was always in the company of the deceased.

We also wanted to know where her parents stay."

[18] But according to the first respondent the two families met to negotiate marriage between her and the first applicant's son. She, therefore, denied that the visit was purely social. She explained the purpose of the visit as follows in her answering affidavit:

"I enclose herewith the lobola letter as **ANNEXURE 'OM'** which was signed at Orkney on 19 March 2005. As the Honourable Court may know, a lobola letter is only signed after the lobola has been paid. In this instance an amount of R14 000 was agreed upon which was paid on 19 March 2005 at Orkney. I was present and the first applicant, Maria Chali signed the lobola letter. Her husband did not sign to (sic) the fact that he was unable to sign and we did not have an ink pad to take his fingerprint."

[19] It is significant to note that Mr. S.I. Mosiamedi travelled from Bothaville to Orkney to meet Chali's delegation (annexure

"ON"). So did his wife Ms D.M. Mosiamedi (annexure "OP"). Mr. T.F. Phuthi travelled from Wolmaransstad to Orkney for the same purpose (annexure "OQ"). When a young man is interested to marry a young woman, his parents customarily send a delegation to the young woman's parents to formally convey the young man's proposal, to negotiate "bohadi", to formally establish relations and to cement the ties between the two families. Once a date for the meeting has been agreed between the respective parents, the young woman's parents customarily invite selected relatives on the side of the young woman to join the young woman's parents during the negotiations. This is precisely what happened here. These facts tend to give credence to the first respondent's version concerning the purpose of the meeting. This is the first point.

[20] The signature of the first applicant appears on annexure "OM". The first respondent averred that the first applicant had to sign the dowry confirmation at Orkney on 19 March 2005, because her husband, Mr. M.S. Chali, could not write and there was no inkpad for him to sign by means of a thumb print. Compare annexure "OM" with annexure "L". The latter annexure tends to support the averment that the deceased's father could not write and that he usually signed by means of a right thumb print.

[21] Although the first applicant acknowledges the signature, she denies that she put her signature on the document at Orkney on 19 March 2005 as the first respondent alleges. She alleges that she was tricked to sign the document at Middelburg on 26 May 2005. She explained her signature on the document as follows:

> "(b) On the 26th May 2005, ... the sister to First Respondent, gave me a paper, the top of the paper was closed with her hands, and she requested me to sign for burial money from Sanlam;
>
> (c) I signed. That is how my signature came on **Annexure OM** on the 26th May 2005."

[22] The annexure was signed by four persons. The first applicant's signature appears as the second from the top. Below her signature two other signatures appear. If her version is correct, it would mean that the first signatory appended his signature; that a space was then left blank for her and that the third and the fourth signatories signed before her. The first applicant should at least have seen these two signatures, because she signed above them, if the top part of the document was deceitfully hidden, as she claimed. It cannot be seriously argued or suggested that those last two signatures were put

after she had signed. Firstly, the two signatories were not at Middelburg on 26 May 2005 and secondly, the document was certified at Middelburg on the same day, while the first applicant was still there.

[23] The three signatories to annexure "OM" confirmed on oath that they appended the signatures on the document at Orkney on 19 March 2005. In the circumstances I find it difficult to believe the first applicant's explanation. She inconsistently said she signed on 26 May 2005 (Thursday) then 24 May 2005 (Tuesday). The explanation of the first respondent makes a whole lot more sense to me than that of the first applicant as regards the purpose of such visit and how the disputed annexure came into existence. I believe her. This is the second point.

[24] The first applicant stated that:

> "We at no stage had any intention to discuss the marriage between Chali and Lydia Rasello."

Notwithstanding her assertion that she and her companions had gone to the first respondent's parental home for a social purpose only of getting to know the first respondent's parents,

the fact remains that during the course of the visit some very serious discussions took place precisely about the marriage between Chali and Lydia (annexure "E"). This is the third point.

[25] Having said that, I hasten to point out that the dowry letter was not free from critique. When the annexure is critically scrutinised, some unsatisfactory features emerge. Firstly, it was undated. This creates a problem in determining precisely when it was signed. Secondly, the past tense was used. It certifies that David Chali's parents **were** at Lydia Rasello's parental home on 19 March 2005 – *vide* paragraph 1: 1 – 3; that Ms Maria Chali and Mr. Simon Chali **were present on that day** – *vide* paragraph 2: 2 – 3) and that specific individuals **were involved** in the bohadi negotiations. Thirdly, the Chali delegation was apparently not given any proof that the agreed bohadi had been paid. As a matter of custom and common sense proof of payment is given by the receiver to the payer.

[26] In this instance, contrary to custom and common sense, the bride's negotiators seemed to have retained the letter. The groom's delegation seemingly went away without any proof that they had fully paid the agreed bohadi in the substantial amount of R14 000. Strangely the first respondent herself kept the

original letter in her possession. On 26 May 2005 she readily had it certified at Middelburg. It then took years to resurface. Lastly, the controversial letter itself does not certify that bohadi had been fully paid. I only ascertained this extraneously from the answering affidavit and the three confirmatory affidavits made five years later. These then are some of the unsatisfactory features about the document.

[27] There was also some mystery about the marriage certificate. It was unclear as to precisely when it was issued by the Department of Home Affairs. The official rubber stamp on the document is very faint. What is certain though, is that it was not issued on 19 March 2005, because the date fell on a Saturday. We all know that the department concerned must have been closed for the weekend on that day. Implicit in this is the conclusion that the certificate was issued on or after Monday, 21 March 2005. The difficulty I have about it is that nowhere in her 52 page answering papers did the first respondent say when she, together with Chali, ever went to the particular office to register their marriage. The omission is not without significance.

[28] The applicant struggled for over five years to get proof of the

alleged marriage. Despite the attorney's request, they were never furnished with the certificate. Great was their disbelief when they eventually got it from Sanlam Life Assurance Ltd on 15 December 2010. The first respondent had proffered no explanation whatsoever, firstly, why she did not provide the applicants, the executor and his agent with proof of the marriage in five long years. Her previous lawyers were not to blame.

[29] The first respondent claimed she gave a copy of the bohadi letter to the first applicant at Middelburg on 26 May 2005. If she also had the marriage certificate by then, which she should have had, the question is why did she not simultaneously give a copy thereof as well to the first applicant. The secretive conduct of the first respondent was deeply troubling. She did not openly play her cards. The inevitable impression she tacitly created was that the marriage certificate did not exist at the time her alleged husband died and for years afterwards.

[30] In the first place the first respondent was originally represented by Podbilski Mhlambi Attorneys of Welkom. Apparently she could not provide them with proof of marriage. In the second place she was represented by Wessels & Smith also of

Welkom. They too could not get any proof of marriage from her. In the third place she was represented by Hewetson Attorneys of Welkom. These attorneys came into the picture apparently about four years after the death which gave rise to this matter. They obtained two vital documents out of the blue.

[31] On 19 August 2009, Hewetson Incorporated, in a letter addressed to Honey Attorneys, wrote:

> "Mnre. Honey & Vennote
>
> Posbus 29
>
> BLOEMFONTEIN
>
> 9300
>
> Geagte Meneer // Mevrou
>
> **INSAKE: BOEDEL WYLE D.M. CHALI**
>
> U skrywe gedateer 9 Julie 2009 verwys.
>
> **Daar bestaan inderdaad 'n huwelik tussen die partye en kan Advokaat Murray se opinie nie korrek wees nie.**
>
> **Vind hierby aangeheg 'n afdruk van die huweliksertifikaat. Die sertifikaat is uitgereik op grond van die bestaan van die geldige lobola-brief, waarvan ons reeds 'n afskrif aan u laat toekom het,** sowel as bevestiging deur beide huwelikspartye se familielede dat 'n huwelik tussen die twee partye voltrek was.
>
> **Ons versoek u derhalwe om die likwidasie en distribusierekening dringend aan te pas, sodat ons kliënt haar**

regmatige deel kan ontvang.

Ons verneem graag dringend vanaf u.

Die uwe

HEWETSON ING

Y. HEWETSON"

[32] The annexure to the letter was a copy of annexure "A" to the founding affidavit. Although it is also faint but the official rubberstamp of the Department of Home Affairs at the bottom of that annexure appears to indicate that the marriage certificate relied upon was issued on 3 September 2009 some four years and three months after the first respondent's alleged husband had died. I have a feeling, and it is a very strong feeling, that the alleged customary marriage was registered *post ex facto* and unilaterally by the alleged wife to the deceased. It is self evident and I do not have to say it at all that marriage cannot be registered posthumously. The validity of a customary marriage does not depend on its official registration. Put differently, official registration of a customary marriage is not an absolutely essential prerequisite for legal recognition of a customary marriage. See section 4(a) Recognition of Customary Marriages, Act 120 of 1998 and **KAMBULE v THE MASTER AND OTHERS** 2007 (3) SA 403 (ECD) at 412 F – G.

[33] In this matter there is a strong suspicion that the marriage on which the first respondent and her attorneys, Hewetson Incorporated, relied upon, was posthumously registered. If I am correct, then annexure "A" or "SC8" was not only irregular and invalid, but fraudulent as well. It takes two to say: "I do." This is trite.

[34] Accepting the version of the first respondent concerning what transpired at Orkney and at Middelburg during the first applicant's visits, as substantially correct but assuming in the first applicant favour that she was not immediately provided with a copy of the dowry letter at Orkney on 19 March 2005; that she did not request for a copy thereof from the first respondent at Middelburg on 24 May 2005 (*vide* par "47" replying affidavit); that her attorneys' early request (annexure "J") for a copy thereof was never met by the first respondent's attorneys, executor or his agent (annexure "L"); that the letter (annexure "OM") together with the customary marriage certificate (annexure "C") were used to claim the proceeds of the life insurance policy from Sanlam Life (Pty) Ltd (annexure "D") and that her attorneys received copies of those two documents, not from the first respondent or the second respondent or the third

respondent, but from Sanlam (annexure “D”) over five and a half years since her son’s death - I nonetheless find it impossible to find that annexure “OM” was a fake document.

[35] Notwithstanding the aforegoing finding, a distinction has to be made between authenticity and validity of the disputed letter and certificate. I have already found in favour of the first respondent that the bohadi letter was authentic. The applicants do not contend that the certificate is not authentic. Therefore I also have no reason to find that it is not. The contention is that the certificate is invalid. To the validity of the certificate I now turn.

[36] In the founding affidavit the first applicant alleged that the first respondent’s parents informed her family’s delegation at Orkney on 19 March 2005 that the first respondent was married to Mr. Rasello.

> “We at no stage had any intention to discuss the marriage between Chali and Lydia Rasello. **The Phomako’s family agreed that Lydia is their daughter and she was married to Mr Rasello at Kroonstad.** The Phomako’s family made a suggestion that it will be good if the two parties can marry. There was an argument

between Chali's father who disagreed with the suggestion basing his argument that Chali has children to look after and normally if a man marry a women who has children from her previous marriage that will create a problem in the family."

The marital status of the first respondent was specifically raised by the Chalis.

[37] Later on she repeated:

"I personally asked the Phomako's family that their daughter **Lydia Rasello was been married before**. And lobola cannot be paid for the second time for the same person. And what makes the situation worse is because **she has two children from Rasello's family**."

[38] In her answering affidavit the first respondent denied the aforesaid allegation by the first applicant. At paragraph 6.6 answering affidavit she stated:

"**6.6 Ad paragraph 11.6 of her affidavit**

I take note of her allegations, but in the light of the above mentioned, first Applicant is clearly not stating the truth under oath."

[39] The first applicant's statement (annexure "E") was not a model

of good draftmanship. It was not very clear as to precisely what the first respondent's parents told the first applicant and her delegation. On the strength of those passages I was hesitant to determine whether they were pertinently told that, as at the time of the discussion of 19 March 2005, the first respondent was still married to the aforesaid man or whether she was previously married to him but already divorced at the time the two families met. Be that as it may, it was not the first respondent's contention that she did not understand the allegation.

[40] The first applicant insinuated that the first respondent was, according to her own parents married to someone else or that she was still married to someone else. The latter insinuation was more serious than the former. For that reason I would have expected the first respondent to have given an elaborate explanation concerning her marital status. She did not. Instead of thoroughly dealing with those two unsavoury insinuations, all she said was that she noted the allegations and dismissed them as untrue. Her comments on insinuations of such grave magnitude were disturbingly brief and empty. They left much to be desired.

[41] It is common cause that in 1984 Chali got married to the second

applicant and that the couple divorced in 2002. By then he and the first respondent were already cohabiting. Both were still married. At paragraph 3.9 of her answering affidavit the first respondent commented as follows on the marital status of Chali.

> "3.9 In 2002, the deceased was divorced from the second applicant. The Divorce Court however, granted custody and control of the third applicant to the deceased."

Here one would have expected the first respondent to say something about her own questionable marital status as well. She did not.

It is also undisputed that since 20 May 2002 until 18 March 2005 he had not remarried. Throughout his life, since his divorce, he was legally competent to marry again.

[42] In the replying affidavit the first applicant pursued the matter further in view of the first respondent's denial of the allegation that she was still a married woman as on 19 March 2005, the date on which she claimed she married Chali. The first applicant replied that the first respondent married Mr. Kabelo

Bernard Rasello at Kroonstad on 20 December 1989 (annexure "OOO"), that the first respondent and her husband purchased a residential property at Kroonstad on 26 June 1996 as husband and wife (annexure "NNN"); that Maokeng City Council issued a residential permit in the name of the first respondent's husband in respect of the aforesaid property (annexure "RRR"); that the first respondent, apparently assisted by her attorney, made a sworn statement in Welkom on 17 July 2007 (annexure "TTT"); that Messrs Wessels & Smith forwarded the aforesaid affidavit by the first respondent, to the Master of the High Court, on 17 July 2007 (annexure "UUU"); and that the first respondent's husband, Mr. K.B. Rasello, died at Witsieshoek on 7 March 2011, less than three months before the hearing (annexure "SSS").

[43] There is one document which is conspicuously absent from the total of sixty annexures which were annexed to the papers – the respondent's divorce certificate. The first respondent averred that:

> "Although I was married at the time I met the late David Masakale Chali, my ex husband and I were separated of (sic) bend (sic) and board as a result of my ex husband residing with another woman in

> Sasolburg. **The only reason why my ex husband and I did not file for a divorce was that we were unable to pay for the costs and expenses thereof.**" (*vide* paragraph 4 annexure "TTT")

What more can be said about the first respondent's marital status as on 19 March 2005, a date on which she persistently said she married her husband, Chali?

[44] On 17 July 2007, just over two years after she purportedly married him, she declared on oath that she never divorced her previous husband, Mr. K.B. Rasello, now also deceased. When this gentleman died four and a half months ago, he and the first respondent were still bound together by the legal bond of marriage. Section 10(1) Recognition of Customary Marriages, Act 120 of 1998, provides:

> "**10 Change of marriage system**
>
> (1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person."

This means that a monogamous customary couple can convert

their customary marriage into a civil marriage.

[45] Section 10(4) thereof provides:

> "(4) Despite subsection (1), **no spouse of a marriage** entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage."

See **KAMBULE v THE MASTER AND OTHERS**, *supra*, at 411 B – E where Pickering J held that a party to a civil marriage is not competent to conclude a customary marriage during the subsistence of such a civil marriage.

[46] Almost four long years ago before these proceedings were initiated, Attorney Schoeman, the first respondent's attorney, wrote to the Master:

> "Geagte Mev. Van Heerden
>
> **BOEDEL WYLE: DM CHALI**
>
> **MEESTERSVERWYSINGSNOMMER: 6274/05**
>
> Ons bevestig dat Mmasefako Lydia Rasello in kennis gestel is van haar **regsposisie** met betrekking tot 'n onderhoudseis aangesien sy nie kwalifiseer as 'n langslewende gade in terme van die Wet op Onderhoud van Langslewende Gades, 27 van 1990, nie en dat dit

ons instruksies is om vir tyd en wyl nie met haar eis voort te gaan nie maar wel voort te gaan met die onderhoudseis van Tiego Rejoice Rasello.

Die uwe

WESSELS & SMITH

PER:"

[47] Consequently the first respondent was, in the eyes of the law, incompetent to marry again during the subsistence of her previous marriage to the late Rasello. It follows, therefore, that her purported marriage to the late Chali, prior to the death of her lawful husband, was absolutely null and void. In the circumstances the applicants have, on a balance of probabilities, made out a sound case for the nullification of the first respondent's purported marriage to the late Masakale David Chali at Orkney on 19 March 2005. It follows, therefore, that the first respondent's marital status disqualified her from marrying Masakale David Chali on 19 March 2005. It is her legal incompetence to marry which invalidates the aforesaid bohadi letter (annexure "OM") as well as the aforesaid marriage certificate (annexure "C").

[48] The advice she was given was good in law. I found the first respondent's answering affidavit to be materially inconsistent

with her previous sworn statement (annexure "TTT"). Moreover, her own attorney's letter (annexure "UUU") also strongly militates against her claim as set out in the answering affidavit that she is the late Chali's widow. In the light of all these I have no hesitation to dismiss the first respondent's answering affidavit as false on this point wherever it is inconsistent with the founding affidavit and her previous sworn statement as well as her attorney's letter.

[49] Therefore, the first respondent does not have a valid claim against the deceased estate as her attorney, Ms Hewetson, reckoned. Elsewhere in this judgment I found that the marriage certificate relied upon was apparently issued on 3 September 2010. The exact date on which it was issued is not particularly significant. The decisive date in the matter was 11 March 2007, the date on which Rasello, the first respondent's husband, died. Prior to that date the first respondent was incompetent to marry. After that date she became competent to marry. By then Chali was regrettably no longer there for her to marry. This settles the first issue.

[50] The next critical question which falls to be determined concerns the issue of Tiego Rejoice Rasello's paternity. According to the

first respondent the late Chali fathered the child. Her claim was disputed by the applicants. The first applicant alleged:

> "... because she has two children from (sic) Rasello..."

[51] In the answering affidavit the first respondent alleged:

> "3.3 On 8 January 2008, a daughter was born out of the relationship, namely Tiego Rejoice Rasello.
>
> 3.4 In August 1992, I showed our daughter to the deceased's mother (first applicant) on a farm between Koppies and Edenville. First applicant replied that our daughter looked just like the deceased."

[52] In the replying affidavit the first respondent replied as follows:

> "**4.**
>
> **AD PARAGRAPHS 3.1, 3.2, and 3.3**
>
> The contents of these paragraphs are unknown to me. I cannot admit or deny same.
>
> However, the particulars of the alleged minor child were requested by my attorney of record, and such information was never provided. **First Respondent is requested to prove that the alleged child is the child of the deceased.**
>
> I am the mother to the deceased, and I was never informed by the

deceased, my son, that he has a child with the First Respondent."

[53] Later on the first applicant questioned the child's paternity further.

"38.

AD PARAGRAPH 6.5.14

Photos are admitted. I deny that I know that Tiego Rejoice Rasello is the deceased's child. If the child was the deceased's son, a ceremony would have been performed after the child was born, to admit him (sic) in my family. If the child was the deceased's son, (sic) he (sic) would use my surname, i.e. the deceased's surname, and not the mother's surname, **Rasello**."

[54] The first respondent was incorrect when she stated that the child was born on 8 January 2008. By then the alleged father had long died – almost some three years eight months earlier. If that was the case I would have had no difficulty to summarily dismiss her claim. It would appear that the correct date on which the child was born, was 8 January1992 – (*vide* paragraph 7 annexure "TTT"). The child is now 19 years of age (annexure "OT"). It is also interesting to note that the birth of this child was officially registered on 22 August 2005 when she was already 13 years of age – (*vide* annexure "OT"). By then the alleged

natural father was three months dead.

[55] It can be inferred from the child's date of birth that she was conceived around 1 April 1991 during the subsistence of the first respondent's marriage which was on 20 December 1989. On 15 December 1992, eleven months after the child's birth, her name was recorded as a dependent daughter of the first respondent's husband, the late Mr. K.B. Rasello (annexure "AAA"). The information was apparently recorded by the township manager of Maokeng City Council on the strength of the information supplied by the permitholder, Mr. Rasello himself, who declared that Mmasefako Lydia was his wife and Tiego Rejoice his daughter.

[56] The applicants have established that the first respondent was lawfully married to the late Mr. Rasello at the time her daughter was conceived. The law presumes the husband to a married woman to be the natural father of all her children conceived during the subsistence of the marriage. See **F v L AND ANOTHER** 1987 (4) SA 525 (W) at 528 B – F per Harms J, as he then was. The presumption favours the applicants. The presumption is, of course, a rebuttable one. Seeing that the first respondent's claim, as regards paternity of her daughter, is

contrary to the primary legal presumption of fatherhood, the onus rested on her to rebut it on a balance of probabilities. I hold the firm view that she dismally failed to rebut the presumption.

[57] There is no admission of sexual intercourse by Chali. Ordinarily such an admission would have created a secondary presumption in favour of the first respondent's claim – see **F v L AND ANOTHER**, *supra*. In these circumstances, where a woman and the alleged natural father have admittedly conducted an intimate relationship for years, I suppose one can reasonably draw a legitimate inference that sexual intercourse has been proven to have taken place. But there are serious questions in this case.

[58] She evasively, vaguely and timidly dealt with the serious allegation made in the founding papers that she had two children by Mr. Rasello. She made absolutely irreconcilable statements on oath concerning her marital status. In one instance she and Chali lived together for 14 years from 1991, but in another instance for only seven years from 1998. She has been shown to be an untruthful person. Her veracity was suspect. Her motives were questionable.

[59] It was the first respondent's case that she and Chali started staying together on a farm in Edenville district since 1991 (3.5 answering affidavit). At the time she and her husband Rasello were estranged and living apart (4 annexure "TTT"). She started cohabiting with Chali in March 1991, conceived and gave birth on 8 January 1992. There were paternity tests carried out which showed that Chali and not Rasello was the father (9 annexure "TTT"). Although 20 annexures were attached to her answering affidavit, no documentary proof of such paternity tests formed part of her papers. The first respondent is a teacher by profession. One would have expected her to have done more in connection with such vital evidence.

[60] I find it difficult to understand how it came about that her husband, who, as she alleged, was staying at Sasolburg with another woman, while she was staying at Edenville with another man, apparently accepted another man's child and caused such a child's birth to be recorded on his residential permit (annexure "RRR"). Moreover, the child goes by the surname of a man who is not really her father, according to the first respondent. I have some serious reservations whether Rasello would have

accepted the child as his biological daughter had the first respondent told him the true facts that he was in fact not the child's natural father. Judging by his conduct one can legitimately deduce that the first respondent probably did not tell him the truth, if her claim can be accepted as true, that he was not but that Chali was the father.

[61] As I have already pointed out, she claimed to have cohabited with Chali for 14 years since 1991. However, annexure "OM" stated that in 2005 the couple had been living together as husband and wife for eight years. Her own document recorded that they have been cohabiting from 1998 and not 1991. This contradiction created further doubts about the paternity of the child. By 1998 the child was already five years old. This is but one of many discomforting and yet material discrepancies in the first respondent's version which cast some serious doubt as to the paternity of the child.

[62] The first respondent relied on four confirmatory affidavits in support of her claim that Chali was the father of her daughter (annexures "ON", "OP", "OQ" and "OR"). Those confirmatory affidavits were deposed to by S.I. Mosianedi, D.M. Mosianedi, T.F. Phuthi and P.J. Morake respectively. The evidence of all

those witnesses was of secondary importance. It is lamentable that the first respondent, for some obscure reasons best known to herself, chose to obtain and file no confirmatory affidavit by Dr. Pitchford, a medical practitioner of Kroonstad, who, according to the first respondent's sworn statement, was intimately involved with the DNA forensic processes to determine the paternity of the child (9 annexure "TTT").

[63] She made no effort whatsoever in her answering affidavit to explain why she could not obtain such a confirmatory affidavit from the doctor or why she could not at least annex such a forensic document which, as lawyers would know, would have been supported by a statutory affidavit made by a forensic analyst.

[64] The applicants have suggested that the first respondent, her daughter and any of the late Chali's brothers should undergo forensic test to resolve the impasse concerning her daughter's paternity. The suggestion is commendable. Of course neither the first respondent nor her daughter can be compelled to subject themselves to such medical examination for the purposes of paternity tests. All the same they have to realise that her daughter's claim against the estate of the late Chali for

maintenance currently hangs in the balance unless they both co-operate to resolve the problem.

[65] From the available evidence I found that the first respondent's averment that in his lifetime, the late Chali maintained her and her children was substantially true and correct. At the time of his death on Monday 23 May 2005, the child was 13 years of age. Assuming in favour of the first respondent that she was indeed the late Chali's daughter, then he would have been legally obliged to continue maintaining her for a further minimum period of five more years until the 8 January 2010, on which date she turned 18 years of age.

[66] Unless the first respondent's daughter, now an adult furnishes the executor with an independent scientifically determined proof indicating on the balance of probability that the late Chali was her farther, she would have failed to prove a valid claim against the executor of his deceased estate. Before the 8 January 2010 she was a minor and largely dependent upon her mother to protect her interest in the deceased's estate. She could not do much on her own. The record shows that her mother takes time to get things done. It is now incumbent upon her as a young adult to stand up and protect her own interests. A lot of

valuable time has already been lost to the detriment of the beneficiaries. Time is now tide. She has very little time to prove her claim, if any. No further inordinate delays should be tolerated by the executor. This settles the second issue.

[67] I have considered the points raised *in limine*. As regards the first point, the second and the third respondents objected to the procedure chosen by the applicants. In the second answering affidavit they alleged that there was a serious dispute which could not and cannot be resolved on papers. I have already shown that there was nothing really new raised in the replying affidavit; that the marital status of the first respondent was, in fact, raised and questioned in the founding affidavit and that the first respondent, on purpose it would seem, evaded to confront the substance of the matter in the answering affidavit. All the applicants really did in their replying affidavit was merely to amplify the original cause of action in order to refute the first respondent's vague and bare denial that she was still a married woman at the relevant time. Therefore reliance on decisions such as **BAYAT AND OTHERS v HANSA AND ANOTHER** 1955 (3) SA 547 (N) at 553C – E and **JOHN RODERICK'S MOTORS LTD v VILJOEN** 1958 (3) SA 575 (O) do not assist her preliminary point. In this matter the applicants did not fall.

They firmly stood by their founding affidavit and the facts they alleged therein. They simply dropped the explosive bomb in their replying affidavit to exterminate and nail her down.

[68] The first respondent made abortive attempts to create an impression that there was a serious factual dispute. In truth and in fact, hers was nothing more than the proverbial storm in a tea-cup. The submissions by counsel for the respondent that the applicants on their own version had knowledge of the alleged customary marriage in 2005 were correct. However, the serious factual dispute did not arise as recently as 2007 as he contended. The dispute surfaced before the late Chali was even buried.

[69] At the heart of the dispute was documentary proof of the alleged marriage, which proof the first respondent was the best person to provide without any undue delay. When the first respondent herself claimed she was the spouse of the marriage which was never openly and customarily celebrated, it became incumbent upon her to allay the suspicions and fears of her deceased husband's family by showing them that her claim was legitimate.

[70] The applicants afforded the respondent a considerable period of time to show them that she was the deceased man's lawful widow, but she awfully failed them. In my view, the applicants were justified, after five years, to select the speedy motion procedure since it was clear and obvious to them that the first respondent had no genuine case and that she was contriving a factual dispute out of nothing. No objective person in the position of the applicants would have reasonably expected that the first respondent, with such hopeless prospects of success, would choose to oppose the application knowing that her opposition was lamentably flawed. She was a teacher and she surely would have known that our law did not countenance the notion of a woman having two husbands at the same time.

[71] The fact of the matter is that the applicants have shown, and the first respondent knew, that there was no lawful marriage between her and the late Chali. Her purported marriage to Chali, even if it had complied with everything else would still have remained *contra bonos mores* on account of her status. This is not a matter where it can be persuasively argued that the applicants should have realised they were embarking upon the motion procedure aware that a genuinely serious dispute of fact was bound to develop as was the case in **ROOM HIRE CO**

(PTY) LTD v JEPPE STREET MANSIONS (PTY) LTD 1949 (3) SA 1155 (T).

[72] I was urged not to grant the relief sought against the first respondent since a persons status was at stake. Accordingly, I was urged to postpone the matter and either direct that oral evidence on the specific issue be heard or that the parties go to a full blown trial.

See **LOMBAARD v DROPROP CC AND OTHERS** 2010 (5) SA 1 (SCA) at 9 para [24] – [26]. I can see no need to do either. Where a dispute of fact arises in affidavits but the matter can expediently be decided on papers without the hearing of oral evidence, the court is entitled to adopt a robust approach and finalise the matter. See **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A). This is one such case. The matter does not warrant any postponement for any of the proposed options. Those options are not opened to the first respondent. She has acknowledged on oath that she was still lawfully married to Mr. Rasello at the time she purported to marry Chali. What useful purpose will oral evidence serve in such circumstances. The central issue of the dispute was precisely her marital status, she on her own

version, has already answered that question. There is nothing further to be elucidated. This is the end of the road. The train stops here. The matter had dragged on for much too long. It is unfair to the legitimate heirs. I cannot worsen their already bad situation. The first point *in limine* falls to be dismissed and I do.

[73] As regards the second point *in limine*, the second respondent and his agent contended that the first applicant had no interest in the relief sought in this matter since she was not an intestate heiress. The first applicant contended that she had an interest in the setting aside of the allege marriage so that the estate of her deceased son could be properly inherited by her grandchildren.

[74] It is indeed so that the first applicant is not a beneficiary. Although she has no financial interest, as a parent, she has an interest in the fair and equitable administration, liquidation and distribution of her son's deceased estate. It has to be borne in mind that, at one stage, she was issued with letters of authority (annexure "G") to take control of the assets of the estate.

[75] The second applicant and the first applicant's son were divorced. Therefore, she had no personal knowledge of the

subsequent private life of her ex husband. The first applicant averred that as the surviving parent, she was the only person with intimate knowledge of her late son's affairs and, I may add, the first respondent's marital status. The second respondent and his agent merely adopted a narrow view of the first applicant's interest in the matter. It would seem that they reckoned that because she has no financial interest she has no interest at all in the matter. The view is incorrect. A party may have substantial interest in the matter before a court although she may not have any direct or any financial interest in the outcome thereof. The first applicant has a legitimate interest in the speedy finalisation of the matter.

[76] The matter before me is indivisible. The first applicant has no separate subsidiary application which can be severed from the principal application and singularly dismissed with costs as the second and third respondent would have it. Each of the applicants is a substantial and legitimate stakeholder even though their stakes differ in kind and degree. The second applicant or any of her children could have been cited as the first applicant and deposed to the founding affidavit as the main deponent and the first applicant's sworn affidavit could have been used as a confirmatory affidavit.

[77] It is of no moment whether the first applicant's sworn statement was labelled a confirmatory affidavit or a founding affidavit. If, and only if, the second applicant and her three children had made common cause with the first respondent would there have been some substance in the objection raised by the executor and his agent. But that is not the case here. The reality in this instance is that they dispute the first respondent's claim and the first applicant beefs them up. I would, therefore, dismiss the second objection.

[78] As regards the third point *in limine*, the second respondent and his agent took the preliminary point that Tiego Rejoice Rasello, as a potential beneficiary or heiress in the deceased estate, ought to have been cited by the applicant as one of the respondent. In the second replying affidavit the applicants denied the suggestion that Tiego was a potential beneficiary or heiress. I agree. I have already dealt with this child's legal position in relation to this deceased estate. Since her mother and the deceased Chali, were incapable to conclude a valid marriage, a child born of their undisputed liaison would, by law, be regarded as illegitimate as far as the father was concerned.

[79] Previously an illegitimate child could not inherit from a natural father according to our common law of succession. **F v L**, *supra*, at 526 D – E where Harms J held that as between a natural father and his illegitimate child no rights and duties, other than the natural father's duty to maintain a child, were recognised. The law of succession has since changed for the better for such children. Since Tiego was born before the legislation change she cannot compete with Thabiso, Tiisetso or Lerato. They are legitimate intestate heir(esses) but she is not and can never be even if forensic paternity test should positively reveal that she is indeed the biological daughter of the now deceased M.D. Chali.

[80] Accordingly, the third preliminary point is overruled. Should she prove the biological bond between her and the late Chali her right to maintenance and not inheritance would be legally recognised. Her prospects of inheriting depended on the legality of her mother's marriage over and above proof that she was Chali's natural offspring. It means that she is a potential claimant and not heiress in the estate. She would be in the same position as a creditor. Today she is an adult. She is probably aware of this paternity dispute. She has not stepped forward to complain about her non-joinder. It seems she is not

interested.

[81] As regards the fourth preliminary point, the second respondent and his agent objected to the hearing of the matter on the grounds that the notice of motion has not been signed by an attorney duly admitted, enrolled and entitled to practise in the jurisdiction of this court.

[82] An attorney is, first and foremost, admitted as an attorney of the High Court of South Africa and not a provincial division. It is one thing if an attorney has no right of appearance, at all in any provincial division of the High Court of South Africa. It is a different thing all together if an attorney has such a right at least in one such division. It was not the case of the objectors that the former was the basis of the objection here. I readily accommodate the letter category of attorneys. The purpose of this objection and the previous ones was merely dilatory than anything else. The notice of motion, so signed, did not prejudice anyone, but sustaining it would have prejudiced many. Mr. Pienaar hardly pursued it in his argument. His stance was correct. I am inclined to dismiss the fourth preliminary point as well.

[83] Let me revert to the second point raised *in limine*. The second respondent and his agent also contended that the second applicant, like the first applicant, had no interest in the relief claimed in the current application. The second applicant and Chali were divorced approximately four and a half years before his death. Therefore, she was not in line to inherit anything from the deceased estate as a surviving spouse. She was not a beneficiary and she did not claim to be one.

[84] Nonetheless, the second applicant has a valid claim (annexure "B") against the deceased's estate which the second respondent has been authorised to liquidate and distribute. It is that proprietary right which she derived by virtue of her marriage to the late Chali, as evidenced by the court order (annexure "B"), which the second respondent and his agent refused to recognise.

[85] On 6 June 2006 the third respondent commented as follows about the claim of the second applicant:

> "**Claim Mrs. Chali** – According to the Final Divorce Order. The Deed of Settlement was incorporated therein. According to the Deed of Settlement the mutual dwelling at 622/623 Edenville will

be sold and divided equally between the parties. According to our records, erven 522/523 Edenville forms part of the estate."

According to the Deed of Settlement erven 622/623 were the only assets to be divided. Mrs Chalie therefore has no claim against the estate. Copy of order and Deed of Settlement herewith.

[86] The aforegoing was a particularly shallow way of dealing with the issue. It did not justify repudiating the second applicant's claim. This is another critical issue in this matter. The discrepancy on the strength of which the third respondent based her repudiation was a single digit '6' in the description of the residential property as per the deed of settlement (annexure "B"). The correct description of the erven was and still is obviously 522/523 and not 622/623. The second applicant and her children today still occupy the same residential property they used to occupy before the divorce on 20 May 2002 (*vide* para 2 founding affidavit as well as annexures "M", "X", "Y" and "Z").

[87] It would take little imaginative mind and investigative effort to ascertain that the deceased Chali, the second applicant and their children had probably never occupied erven 622/623 Edenville let alone owned it. It would follow, as a matter of

logic, that if the couple had never owned the erven in dispute they could never had intended having them sold so they could equally share the proceeds of what was legally not theirs. It is clear and obvious that the attorney who drafted the deed of settlement erroneously described the mutual dwelling as 622/623.

[88] The one property (erf 522) was valued at R60 616 and the other property (erf 523) at R500 000. Their combined value is therefore R560 616,00 well over half a million rand. Accordingly, the second applicant was in danger of losing her share of approximately R280 308,00. The third respondent clearly hastily and recklessly jumped to a questionable conclusion on a very serious matter where the facts had not been properly investigated. It is significant to note that there was no dispute raised by any of the parties on this particular point. The third respondent, on her own, took the point, gave the second applicant no opportunity to explain but decided against her.

[89] This is a substantial and legitimate claim which should not have been repudiated on such flimsy or cosmetic grounds. This makes one understand why the second applicant, backed-up by

her ex mother-in-law, chose to come to court to have the second respondent removed from office. He seems to have blindly endorsed the decision of his agent without seriously and objectively applying his mind to the issues. I would, therefore, dismiss this tail of the second point *in limine*. This also disposes of the third dimension of the dispute.

[90] Now I turn to the fourth issue – the removal of the executor. I do accept that initially the second and the third respondents did not accept the first respondent's claim that she and Chali were lawfully married (*vide* paragraph 1 annexure "SC5", dated 6 June 2007). She correctly sought and obtained a legal opinion. Advocate H. Murray came to the conclusion that there was no valid marriage. The advocate's finding was in the applicant's favour. The second respondent and his agent accepted the legal opinion. Their acceptance constituted a decision by the executor in favour of the applicants. Yet the third respondent gave them no copy of that important written legal opinion (*vide* 26 - 12, third respondent's answering affidavit).

[91] On the 19 August 2007 the third respondent received a copy of the alleged marriage certificate as per annexure "SC8" (*vide* paragraph 27.3, second answering affidavit). Once again such

an important document (annexure "C") was never forwarded to the legal representatives of the applicants Attorneys Hlatshwayo Mhayise. She knew all too well that they desperately needed it. In the second answering affidavit, the third respondent gave virtually no explanation as regards his serious neglect. Since then she held an opinion fundamentally adverse to the interests of the applicants in general and the second applicant in particular.

[92] The third respondent denied the allegation that she and the second respondent were impartial and that they were doing their best to advance the course of the first respondent. The third responded said:

> "31.2 It is quite clear from what I have already stated that neither the second respondent that (sic) nor I **promoted the interests of any particular individual** but have at all times only been intent of administering the estate within the parameters and duties upon us. We can only administer the estate according to the valid information at our disposal. We have at all times requested the third, fourth and fifth respondents to submit their maintenance claims, yet they have failed to do so, themselves causing the finality of the estate

to be delayed unreasonably."

[93] Notwithstanding the aforesaid denial of siding with the first respondent, the third respondent, who had already rejected the claim of the second respondent, strongly submitted not once but a few times - that the first respondent was the heiress. I quote the third respondent verbatim:

> "At par 31.1 I submit with respect that **it is quite clear from annexure "C", that the first respondent is in fact a** (sic) **heir**.
>
> At par 37.1 The contents contained herein relate to legal argument and I do not intend dealing therewith other than to state that annexure "**C**" indicates that **the first respondent is the surviving spouse and therefore a** (sic) **heir of the deceased's intestate estate**.
>
> At par 47.1 The applicants quite clearly did not understand that annexure "**T**" was prepared prior to me being furnished with annexure "**C**". **Annexure "C" changed the picture to the extent that the first respondent now becomes entitled to one half of the deceased estate.**"

[94] The third respondent readily accepted annexure "C" as valid

proof of the disputed marriage. She was obviously satisfied that she has received a marriage certificate in support of the first respondent's claim. She clearly did not interrogate the document. She simply accepted that, by virtue of such document, the first respondent was the legitimate surviving spouse. She knew all too well that the status of the first respondents was a hotly disputed matter. Yet she decided in her favour without affording the legitimate and undisputed beneficiaries an opportunity to express their opinions in the light of annexure "C", a document which, as she said, had changed the picture.

[95] The mere fact that the third respondent could not get the first respondent's marriage certificate from Podbilski Mhlambi and Wessels & Smith in four and a half years would have forewarned any knowledgeable, skilful and diligent executor or attorney that there was something suspicious about a document issued that long *post ex facto*. It is my considered view that the second applicant has probably a valid claim against the deceased estate not as an intestate heiress but as a creditor in terms of a court order. Their decision to repudiate her claim cannot be allowed to stand.

[96] No doubt, the executor and his agent withheld important information from the beneficiaries. Her denial of this evident fact amazed me. Two years ago the third respondent received the bohadi letter before the marriage certificate from Ms Yolandi Hewetson (annexure "SC8"). Like the marriage certificate, the letter was also withheld. Had the applicants not initiated these proceedings, the third respondent would have ignored the second applicant as a creditor but would have allotted half of the distributable surplus of the estate to the first respondent to the detriment of all the beneficiaries and their mother.

[97] The letter coupled with the marriage certificate was a very important document which greatly induced her and her principal to radically change their initial decision concerning the succession status of the first respondent. The executor's subsequent decision to withdraw the initial decision was ill-informed, irregular and invalid. It, therefore, fell to be set aside - **NKOSI v KHANYILE NO AND ANOTHER** 2003 (2) SA 63 (N) per Magid J at 70 F – G. The devolution of a property in a deceased estate is a sentimental, sensitive and emotive process and ought to be determined by someone totally independent of the feuding parties – **NKOSI**, *supra*, at 71 E – F. This disposes of the fourth issue.

[98] In conclusion, I make the following findings as regards the first respondent: that she is not the surviving spouse of the deceased M.D. Chali. It follows, therefore, that she is not a legitimate intestate heiress and that, as such, she has no valid claim. As regards the second respondent, my chief finding is that he was not a totally independent and impartial executor. In the circumstances, it has become undesirable for him to carry on as an executor. Subsequent to the hearing of this matter the parties informed me in writing that all concerned have agreed that he should renounce his appointment. I am indebted to the executor for his gracious decision. By agreement, Mr. S.L. Saffy, a director at Honey Attorneys, was nominated to replace the second respondent as an executor. I invited the parties to do so in order to speed up the process. This disposes of the fifth issue.

[99] As regards the third respondent, she conceded that, she was not an executrix. She correctly commented that if I should decide to remove the second respondent from his *nomino officio* post as an executor her powers derived from the agency agreement would *ipso facto* lapse. She was aware that she would have to relinquish her agency position. It was with a

deep sense loss and sadness that I learned of her death on 10th instant. This disposes of the last issue which was subsidiary to the fifth issue.

[100] Accordingly I make the following order:

100.1 The first respondent's purported marriage to the late Masakale David Chali at Orkney in North West on 19 March 2005 is declared invalid and is hereby set aside as null and void *ab initio*.

100.2 The second respondent is in terms of section 54(1)(a)(v) of Administration of Deceased Estates, Act 66 of 1965, removed from his *nomino officio* post as the executor of the aforesaid deceased estate of the late M.D. Chali and the letters of executorship issued on 29 August 2005 are revoked.

100.3 The second respondent is directed to retrieve from the third respondent's office records, files, cheque book, bank statements or any other document pertaining to the aforesaid deceased estate and to entirely hand them over to the fifth respondent before 15 August 2011 or to deal with them in accordance with the fifth respondent's directives.

100.4 The second respondent shall be entitled to receive

his due remuneration for the work he personally did as well as the work he did through his agent, the third respondent, up to the date.

100.5 The substitute executor is directed to consider the claim of the second applicant afresh.

100.6 The substitute executor shall immediately communicate with the first respondent's daughter, Tiego Rejoice Rasello, within 21 calendar days of his or her appointment by the fifth respondent, and take constructive, effective and efficient practical steps to have the issue of her paternity resolved before 31 October.

100.7 The costs of this application as incurred by the applicants only shall be borne and paid by the executor out of the coffers of the deceased estate.

M.H. RAMPAI, J

On behalf of applicants: Attorney M. Hlatshwayo
Instructed by:
Hlatshwayo Mhayise Inc
VEREENIGING
and
Phatshoane Henney Inc
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On behalf of first respondent:	Adv. C.D. Pienaar Instructed by: Stander & Partners BLOEMFONTEIN
On behalf of second and third respondents:	Adv. M.C. Louw Instructed by: Honey Attorneys BLOEMFONTEIN

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