

IN THE HIGH COURT OF LESOTHO

In the matter of :

'MACICILIA TSOLELE NDLEBE
MAKHOAKHOA NDLEBE

1st Plaintiff
2nd Plaintiff

V

'MADANIEL SOMOZA NDLEBE
SOMOZA NDLEBE

1st Defendant
2nd Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 13th June, 1986.

The plaintiffs herein have sued the defendants for payment of M4864.00 and M167.30, being compensation moneys fraudulently received by the latter following the death of the late Tsolele Ndlebe, costs of suit and/or alternative relief.

In their plea the defendants conceded to have received the M4864.00 and M167.30 but denied to have done so fraudulently as by a decision taken at a family meeting they were nominated the beneficiaries to the estate of Tsolele Ndlebe and, therefore, entitled to receive the compensation moneys. Alternatively the defendants alleged to have incurred funeral and incidental expenses amounting to M2670 as a result of Tsolele Ndlebe's death for which expenses they counter-claimed against the plaintiffs.

It is common cause that 2nd defendant is the son of the late Tsolele Ndlebe's elder brother and 1st defendant his wife. In 1947 Tsolele Ndlebe got married to 1st

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1st plaintiff according to Sesotho Law and Custom. 2nd plaintiff is the only male issue born out of the marriage. In terms of the Provisions of s. 11 (1) of the Laws of Leretholi he is, therefore, the customary heir in the house of Tsolele Ndlebe and the 1st plaintiff.

According to 1st plaintiff her marriage with Tsolele Ndlebe was initially a happy one until the latter, who was working in the Republic of South Africa, stopped maintaining her together with the child. In an attempt to discuss the matter with Tsolele Ndlebe, 1st plaintiff decided to go to his place of work at St Helena, in the Republic of South Africa. She, however, found that Tsolele Ndlebe had left St Helena for Natal, still in the Republic of South Africa. 1st plaintiff had to return home and take employment with one Mrs Martin of Fourisburg in the South African Province of the Orange Free State - about a kilometer from her home. Later on Tsolele Ndlebe, who had lost a finger in a mine accident, returned home bringing with him an amount of £70 as compensation. They stayed together for a while but when he had spent the £70 Tsolele Ndlebe returned for work in the Republic of South Africa. He again stopped maintaining 1st plaintiff and the child. It was then that 1st plaintiff decided to go to Germiston, in the Republic of South Africa, and work for herself and the child.

1st plaintiff obtained work as a domestic servant but in terms of the laws of the Republic of South Africa she had to find accommodation in the location where other black people of that country lived. To qualify for

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a house in the location she had, again in accordance with the law of the Republic of South Africa, to be lawfully married to a man with whom she lived. For that purpose 1st plaintiff and a lover by the name of Wilson Makakole, also a married person who had left his family in Matatiele, concluded an arrangement whereby they went through a civil marriage procedure before a commissioner of Bantu Affairs. In this manner Wilson Makakole and 1st plaintiff were able to obtain a house in the location where they have since lived together as husband and wife.

It is also common cause that when she went to work in the Republic of South Africa 1st plaintiff left 2nd plaintiff at her maiden home. This, according to 1st plaintiff supported by P.W.2, Manamolela Motake, was with the approval of her father-in-law who had no one to prepare food for the child.

It is likewise not disputed that after some years 2nd plaintiff left Lesotho for the Republic of South Africa where he joined his mother, the 1st plaintiff. In order to facilitate his stay and better employment in the Republic of South Africa, 2nd plaintiff assumed the surname of Makakole through which he also obtained a South African passport (Doom Pass). 2nd plaintiff is now a married man and has a number of children. He does not contemplate returning to Lesotho in the near future.

It transpired that in April, 1977 Tsolele Ndlebe passed away in a mine accident. According to him 2nd defendant, who was also working in the Republic of South Africa, went to the place where the plaintiffs stayed

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with Makakole to inform them about the death of Tsolele Ndlebe. The plaintiffs, however, refused to come home for the funeral, 1st plaintiff claiming that as she was married to the family of Makakole she no longer had anything to do with the family of Ndlebe while 2nd plaintiff told him that he was "in the throne" - by which 2nd defendant understood him to mean that he could not come to Lesotho because of his religious commitments.

The plaintiff's version was slightly different. Although they conceded that 2nd defendant did come to their residence and announced the death of Tsolele Ndlebe he made it plain that he wanted only the 2nd and not the 1st plaintiff (who was married to Makakole) to come home for the funeral. For that reason 1st plaintiff felt that she would not be welcome at the funeral of Tsolele Ndlebe and so she did not dare come to attend it. 2nd plaintiff did, however, come home although he arrived 2 days after Tsolele Ndlebe had been buried. This, according to 2nd plaintiff, was due to the fact that he was using a South African passport and had difficulties in obtaining travelling documents which would enable him to enter into Lesotho. As he arrived home late for the funeral 2nd plaintiff could only place a stone on the grave of his father, Tsolele Ndlebe, in accordance with the Sesotho custom.

Notwithstanding the defendants' denial that 2nd plaintiff came home following the death of Tsolele Ndlebe it is significant to note that in her evidence 1st defendant did concede that she saw 2nd plaintiff at home after the funeral had taken place. He, however,

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stayed at the maiden home of 1st plaintiff and did not come to her (1st defendant's) home.

It is clear, therefore, that defendants' denial that 2nd plaintiff came home following the death of Tsolele Ndlebe is based on the fact that 2nd plaintiff stayed at his mother's maiden home and not at their home. That 2nd plaintiff stayed at the maiden home of his mother is, however, no surprise if it were borne in mind that before he went to join her in the Republic of South Africa he was staying at the maiden home of her mother. He must have regarded his mother's maiden home as his home. Moreover, 2nd defendant, and, indeed, as we shall see in a moment, D.W.3, Mpondulo Ndlebe, regarded 1st plaintiff as belonging no longer to the family of Ndlebe but that of Makakole to whom she was married.

Plaintiffs' evidence that the family of Ndlebe was no longer interested in 1st plaintiff seems to find support in the evidence of D.W.3, another member of the family, who told the court that following the death of Tsolele Ndlebe he too went to the place where the plaintiffs were staying with Makakole to announce the news of Tsolele Ndlebe's death to the 2nd and not the 1st plaintiff who was married to Makakole and therefore, belonged to the family of Makakole.

Granted that Ndlebe's family was no longer interested in his mother there seems to be no good reason why 2nd plaintiff would be expected to stay with the defendants when he was at home in Lesotho.

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According to the defendants when the news of the death of Tsolele Ndlebe was received 2nd defendant was unable to come home because of the exigency of his work. He, however, sent an amount of M500 to 1st defendant as contribution towards the burial expenses. After the 2nd plaintiff had given him the impression that he would not associate himself with the burial of Tsolele Ndlebe 2nd defendant again sent, by hand post, an amount of M200 to 1st defendant in order that she might meet funeral expenses. Although 1st defendant told the court that she in addition used some of the money that was in her house she was unable to say how much.

Because at the death of Tsolele Ndlebe 1st plaintiff was married to Makakole and no longer living with Tsolele Ndlebe; 2nd plaintiff had assumed the surname of Makakole with whom he lived in the Republic of South Africa and both plaintiffs did nothing to bury Tsolele Ndlebe whose funeral expenses were borne by the defendants, a decision was taken at a subsequent family meeting nominating the 2nd defendant as the heir to the estate of the late Tsolele Ndlebe.

It is not disputed that following the death of Tsolele Ndlebe certain moneys became payable to his estate as compensation. The 1st and 2nd plaintiffs as the widow and the heir, respectively, of the late Tsolele Ndlebe came to Lesotho to receive the first payment of the compensation money from the mine authority agents in Lesotho. The 1st defendant unsuccessfully challenged the plaintiffs' right to receive the money and it was paid to the plaintiffs. In addition the

/plaintiffs

plaintiffs completed certain forms to facilitate the processing of the second payment of the compensation money.

When the second payment became due the 1st defendant obtained, on the basis of the family decision, a letter from the chief certifying that she was the person entitled to receive that money. It was on the strength of that certificate that she received the amounts of M4864 and M167.30, being compensation to the estate of the late Tsolele Ndlebe. She has kept the bulk of that money in a separation bank account.

The defendants' contentions are that there was no fraud in their act because there was a family decision appointing them the beneficiaries to the estate of the late Tsolele Ndlebe and, therefore, the rightful persons to receive the money; as 1st plaintiff was married to Makakole she was not entitled to the money which rightly belonged to the children of Ndlebe; likewise 2nd plaintiff who had assumed the surname of Makakole and did nothing to bury the late Tsolele Ndlebe had no rightful claim to the money belonging to the children of the family of Ndlebe.

The first question for the determination of this Court is whether or not by going through the civil marriage procedure in the Republic of South Africa 1st plaintiff and Wilson Makakole have, in fact, entered into a lawful marriage. Although there is evidence that at the time the parties went through the civil marriage procedure Wilson Makakole had already concluded another marriage in Matatiele, Republic of South Africa

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it is not clear what type of marriage it was.

The significance of this is that if the marriage were what is commonly called native union in the Republic of South Africa, Wilson Makakole was free to enter into a lawful civil marriage. If, however, the marriage were a civil marriage it is trite law that he could not lawfully enter into another marriage during the subsistence of the previous one.

Be that as it may, there is no doubt, on the evidence, that at the time the parties went through the civil marriage procedure 1st plaintiff was already married to Tsolele Ndlebe, according to Sesotho Law and custom, and the marriage had not been dissolved. That a Sesotho customary marriage vis-a-vi native union is a legal marriage and neither of the parties thereof can lawfully enter into another civil marriage during its subsistence has definitely been decided in Makata v Makata C. of A. (CIV) No. 8 of 1982. It follows from this decision that the question I have earlier posted viz. whether or not by going through the civil marriage procedure in the Republic of South Africa 1st plaintiff and Wilson Makakole did in fact enter into a lawful marriage must be answered in the negative. As there is no evidence that at the time Tsolele Ndlebe passed away his marriage with 1st plaintiff had been dissolved I have no alternative but to come to the conclusion that they were still married to each other and 1st plaintiff is, therefore, the late Tsolele Ndlebe's widow and the lawful beneficiary to the estate.

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In terms of the provisions of section 11 (1) of Part 1 of the Laws of Lerotholi the heir in Lesotho is "the first male child of the first married wife."

As has already been pointed out earlier 2nd plaintiff is the only male child born of the marriage between the late Tsolele Ndlebe and the 1st plaintiff, his first married wife. 2nd plaintiff is, therefore, Tsolele Ndlebe's customary heir in accordance with the provisions of s. 11 (1) of the Laws of Lerotholi, above.

In the circumstances the decision of the family of Ndlebe appointing (during the life time of 2nd plaintiff) 2nd defendant as the heir to the estate of Tsolele Ndlebe was a departure from the accepted rules of custom in this country and for that reason wrong. True enough the defendants may have contemplated no fraud and genuinely believed that they were, on the basis of the family decision, entitled to receive the compensation moneys. This Court is, however, unable to permit an act done pursuant to a wrongful decision of a family meeting. That being so, I come to the conclusion that the defendants had no right to receive the compensation moneys for which they must re-imburse the plaintiffs.

As regards their counterclaim the defendants failed decisively to prove how they could have incurred funeral expenses amounting to M2670. In their own evidence the money sent home by 2nd defendant to meet the funeral expenses amounted to M700. The plaintiffs are quite prepared to refund them to that extend.

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From the foregoing it is obvious that the view that I take is that the plaintiffs succeed in their claim and defendants must re-imburse them the amounts of M4864 and M167.30. In their counterclaim the defendants also succeed albeit in part i.e. to the tune of only M700 for which the plaintiffs must re-imburse them.

I have given serious thought to the question of costs. The fact that this is a family dispute in which both parties have succeeded in their claims has weighed heavily in my mind. I am prepared, therefore, to make an order that the parties bear their own costs.

J U D G E.

13th June, 1986.

For the Plaintiffs : Mr. W. Maqutu
For the Defendants : Mr. M. Matsau.