

IN THE HIGH COURT OF LESOTHO

In the Application of :

'MAPHOMOLANG TLHANKANA

Applicant

v

EMMAH MASILOANE

Respondent

R U L I N G

Delivered by the Hon. Mr. Justice M.L. Lehohla  
on the 25th day of April, 1990.

The applicant obtained a rule nisi on 27th March 1990. In terms of that rule she was entitled to have items specified in paragraph 14 of her affidavit released to the Registrar of this Court pending finality of this application on or after the return date.

Today is the extended return date. Papers were duly filed on behalf of the respondent who intends opposing this application.

Counsel for the respondent raised a point in limine based on the respondent's contention that the applicant has no locus standi in judicio.

The crux of the respondent's contention is that because the applicant is married according to customary law she cannot hold herself as heir in the face of the fact that her deceased husband had male issue consisting of three sons none of whom especially the eldest has been joined in these proceedings.

/Counsel

Counsel for the respondent referred me to paragraph (d) of the notice of motion wherein the applicant prays for an order

"...directing that she be (declared) the sole rightful heir and successor to the estate of the late Potlako Tlhankana."

Because the court was of the view that even though generally a client is held to be an author of all that his legal representative does on his behalf, however in respect of drafting formal documents such as orders prayed client may in certain circumstances be freed from his liability unless it is clear from the averments in his affidavit that the order prayed could not have emanated as nothing betraying this was canvassed therein.

According to Part 1 of the Laws of Lerotholi the heir is the eldest son of the marriage where a man dies and is survived by his widow and children any of whom is male.

Section 12 of this authority deals with circumstances where the heir is a minor..

It was contended for the respondent that nowhere in her affidavit has the applicant indicated that she has brought this application on behalf of the rightful heir who ordinarily should be her eldest son should the son happen to have been a minor when this application was brought before Court.

It was further contended that the applicant has not stated whether it is because there is no male issue in the deceased's family that she has brought this application.

In answer it was submitted on behalf of the applicant that she is free to protect her family's interests in circumstances where her children are minors. Thus it was submitted she decided to protect her interest against encroachment by a member of the Masiloane family. It was contended

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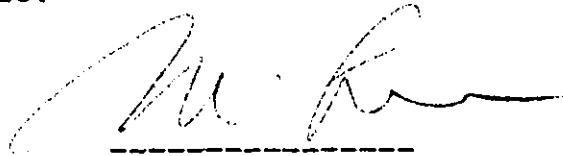
that she could not in good conscience stand by and let the respondent who cohabited with the applicant's husband take her property.

Buttressing this argument the applicant's counsel submitted that under custom when a man dies leaving children who are minors the widow shoulders the responsibility of running the family till the children have come of age. It was pointed out that widows run the estates with the assistance of family members and that in this instance the applicant runs it with the assistance of her mother-in-law. It was further submitted that it is not true that according to custom a woman married under custom is a perpetual minor. It was pointed out that a widow's minority prevails only until the husband's death. I do not agree with this proposition for the simple reason that it is trite custom that once the husband dies the heir steps into his shoes and shoulders the responsibility of looking after the surviving widow out of the produce accruing from the deceased's estate. If the heir is a minor the paternal uncle or uncles take over as guardians. Should these be wanting then it behoves the widow in bringing proceedings to court to disclose the circumstances in which she does so. If the heir is a minor the widow is obliged in law to say the capacity in which she is bringing proceedings before court.

While it could be argued that the applicant's prayer in (d) might be excusable as a product of form or that the scant allusion to the suffering that the applicant feared would befall her and her children might be excusable on the grounds that it could be inferred from paragraph 14 of the applicant's founding affidavit that she brought this application only in a representative capacity, I am left in no doubt that no such excuse could avail in the face of the applicant's averment in paragraph 12 that she was introduced to TEBA not only as the deceased's wife but as the "sole heir and successor in the estate of" her

/late

her late husband Potlako Tlhankana. Thus it is clear to me that in holding herself as the sole heir and successor in the deceased's estate she has overlooked the provision of the law that the heir is the first male child whose interests she can only protect in a representative capacity rather than in the manner that leaves no doubt that she is, as in this case, acting in her personal capacity. The point in limine is upheld with costs on party and party scale.



J U D G E.

25th April, 1990.

For Applicant : Mr Lebusa  
For Respondent : Mr Kambule.