

IN THE HIGH COURT OF LESOTHO

In the Matter of:

ALINA 'MABATAUNG MOFOLO

Applicant

and

HENRY FRANCIS TSEKO NTSANE  
THE COMMISSIONER OF LANDS  
REGISTRAR OF DEEDS

1st Respondent  
2nd Respondent  
3rd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 20th day of February, 1991.

The applicant herein has filed with the Registrar of the High Court a notice of motion in which she moves the court for an order, against the Respondents, framed in the following terms:

- "(a) Appointing the Applicant curator-ad-litem on behalf of one Chaka Sibidla the son and heir to Elizabeth Sibidla.
- (b) Directing the 2nd and 3rd Respondents to cancel and expunge from their records leases numbers 13281-511 and 13281-512 registered in the name of Francis Tseko Ntsane the 1st Respondent herein.
- (c) Dismissing civil application 45 of 1980 with costs for lack of prosecution.
- (d) Directing the 1st Respondent to pay the costs of this application on an attorney and client scale and, jointly and severally with the 2nd and 3rd Respondents, only in the event of the 2nd and 3rd Respondents opposing this application."

The 1st Respondent intimated his intention to oppose the application. No notice of intention to oppose was filed by the 2nd and 3rd Respondents. It may safely be assumed, therefore, that the 2nd and 3rd Respondents are prepared to abide by whatever decision will be arrived at by the court.

Affidavits were duly filed in support of the case for both the applicant and the 1st Respondent. It is common cause from the affidavits that, at all material times, a certain Bright Ntsane was the owner of sites numbers 6 and 51 at Seapoint, Maseru Urban Area. Following the death of Bright Ntsane on 30th September, 1966 the sites were, on 2nd July, 1971, registered in the name of his Estate and transferred to his widow, Juliana Ntsane.

It is further common cause that Bright Ntsane had no children. He had sisters, two of whom were Elizabeth 'Mantsane and the present applicant, married by civil rites in community of property to Jimmy Sibidla and Mofolo, respectively. According to him, the 1st Respondent, a son of Bright Ntsane's younger brother, had been adopted by Bright Ntsane who, as it has already been stated, had no children or male issue. He (1st Respondent) is, therefore, the only son and rightful heir to Bright Ntsane whose widow, Julian Ntsane, had, on 14th May, 1972, contrary to Sesotho law

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and custom transferred the two sites to Elizabeth 'Mantsane Sibidla without his (1st Respondent's) knowledge or consultation of the family of Ntsane. The transfer was for that reason, irregular and of no legal force.

It would appear that following the death of Juliana Ntsane on 12nd January, 1976, the 1st Respondent instituted, before the Maseru Local Court, a civil action (CC 78/79) in which he claimed, against Elizabeth 'Mantsane Sibidla and her husband Jimmy Sibidla, the return of the two sites. On the papers before me, it is not clear how the case was decided by the Local Court. However, the 1st Respondent was obviously unhappy with the decision against which he appealed to the Central Court of Matsieng. The Central Court gave what appears to be an absolution from the instance on the grounds that it had no jurisdiction to entertain a case involving sites registered under title deeds.

The 1st Respondent then approached the High Court and sued Elizabeth 'Mantsane Sibidla under CIV/APN/45/80 in which he moved the court for an order directing her, inter alia, to return the two sites. Whilst CIV/APN/45/80 was still pending before the High Court, Elizabeth 'Mantsane Sibidla passed away. She is survived by two daughters, a son Chaka Sibidla and the husband Jimmy Sibidla who is naturally her heir. Following the death of Elizabeth 'Mantsane Sibidla, her son, Chaka Sibidla, remained in the custody of the applicant until his father, Jimmy Sibidla, took him away. They are now living in the Republic of South Africa.

In the mean time the 1st Respondent has caused transfer of, and obtained leases for, the two sites in his name. The applicant has now instituted the present application in which she prays for the orders mentioned in the notice of motion. As Regards prayer (c) in the notice of motion viz. that this court should dismiss CIV/APN/45/80 it is significant to observe that the present applicant was not a party in that application. I find it totally unacceptable that the court could dismiss CIV/APN/45/80 at the instance of the present applicant who was admittedly not a party in that application.

The only salient question that remains for the determination of the court is whether or not the applicant can, in the circumstances of this case, be properly appointed curator-ad-litem on behalf of the boy, Chaka Sibidla. According to Bill's South African Legal Dictionary (3rd Ed.) at page 197 curtor-ad-litem is defined as:

".....a curator appointed by the court to protect the interests of some party to a legal proceeding who is unable or is alleged to be unable, to protect his own interests. A minor who has no guardian must when suing or being sued have a curator-ad-litem appointed to conduct the suit upon his behalf."

(my underlinings)

The words I have underscored in the above definition leave no doubt in my mind that in order that the applicant may be properly appointed curator-ad-Litem on behalf of the boy, Chaka Sibidla, this court must be satisfied on two aspects. Firstly that the boy is

5/ involved .....

involved in a legal proceeding i.e. he is suing or being sued and secondly that he has no guardian. In the present case there is no indication that the boy, Chaka Sibidla, is involved in any legal proceeding i.e. he is neither suing or being sued by the Respondents or any body for that matter. As it has already been stated earlier in this judgment, following the death of his mother Elizabeth Mantsane Sibidla, the boy Chaka Sibidla went to live with his father in the Republic of South Africa. He has, therefore, a guardian, who is his own natural father, to look after his interests.

It may be mentioned, at this stage, that after both parties have closed their arguments it appears that a document entitled "Further Argument" was filed with the Registrar of the High Court and placed in the judge's file on behalf of the applicant. No leave of this court was sought and obtained to file such document. In the circumstances, I consider the filing of this document an irregularity prejudicial to the 1st Respondent's case. I have ignored it.

From the foregoing it is obvious that the view that I take is that the answer to the question I have earlier posted viz. whether or not the applicant can, in the circumstances of this case, be properly appointed curator-ad-litem on behalf of the boy, Chaka Sibidla, must be in the negative.

That, in my opinion, is sufficient to dispose of this application. I accordingly dismiss it with costs.

B.K. MOLAI

JUDGE

For Applicant : Mr. Ngakane  
For Respondent : Mr. Mohapi.

20th February, 1991.