CIV/APN/217/90

IN THE HIGH COURT OF LESOTHO

n the Application of :

'MANTAHLI MATETE ..... 1st Applicant
'MASETHUA MATETE ..... 2nd Applicant

and

ATTORNEY GENERAL ..... 1st Respondent
'MANKHASI FATIMA MATETE ..... 2nd Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice B.K. Molai
on the 26th day of February, 1991.

On 30th August, 1990 the applicants herein
iled, with the Registrar of the High Court, an urgent notice
f motion in which they moved the court for an order
amed in the following terms :

"(a) dispensing with the period of notice required by the rules on the grounds of this application;

(b) Directing second Respondent herein to desist forthwith from receiving the benefits due to the late Major Serobanyane Matete from Lesotho Government to the exclusion of the minor children of the late Major Serobanyane Matete by the previous marriage and second applicant herein;

(c) Directing that the said benefits be apportioned equally to second Respondent and her child with the late Major Serobanyane Matete, the children of the previous marriage of the late Major Serobanyane Matete and second applicant herein;

2/ (d) Directing .....

(d) Directing first Respondent to hold in such benefits until the apportionment referred to in paragraph (c) hereof has been made;

(e) Directing Respondents to pay costs only in the event of opposition of this application;

(f) Granting applicant further and/or alternative relief as this Honourable court may deem fit."

It is significant to mention that although brought to the High Court on the basis of urgency the application was never moved as such. Instead the papers were served on the Respondents in the ordinary manner and the application was moved only when it came for argument before this court.

The 2nd Respondent intimated her intention to oppose the application. The 1st Respondent did not file notice of intention to oppose and it may safely be assumed that he is prepared to abide by whatever decision will be arrived at by the court.

Affidavits were duly filed by the applicants and the second Respondent. The facts that emerge from the affidavits are, briefly that prior to his death on 26th May, 1990 Serobanyane Matete (herein after referred to as the deceased) was the Chief of Moshemong. He was, however, employed as a Major in the Royal Lesotho Defence Force and another person had to be appointed the Acting Chief of his area of jurisdiction.

3/ It is common .....

It is common cause that the deceased was lawfully married to the first applicant. There were three children born of the marriage viz. 'Mantlibi, a girl born on 1st March, 1974, Kemole, a boy born on 6th June, 1978 and Tsepe, a boy born on 24th September, 1982. The marriage between the deceased and the first applicant was, however, legally dissolved on 13th April, 1987, and the latter awarded custody of the minor children of the marriage. Following the dissolusion of his marriage with the first Applicant the deceased and the second Respondent lawfully married each other. One male issue was born of this second marriage. The children born of his two marriages, the second Respondent and the second Applicant, who is his own mother, were, therefore, dependants of the deceased at the time of his death.

It is further common cause that as a result of the deceased's death some benefits will accrue to his estate from the Lesotho Government e.g. Graguity, Compulsory Savings, etc. It is these benefits that are the subject matter of prayers (b) and (c) in the notice of motion. There is no averment in the affidavits indicating whether the deceased died testate or intestate. Regard being had to the fact that he was a chief over one of the remote areas in the country I shall assume that the deceased died intestate and his estate falls to be administered in accordance with Basotho laws and customs.

4/ Assuming .....

Assuming the correctness of this assumption, it is important to bear in mind that the deceased was not a polygamist. He married the second Respondent after his marriage with the first applicant had been legally dissolved. That being so,his marriage to the second Respondent did not constitute a second house. The question of distributing the benefits amongst several houses of the deceased does not, therefore, arise.

For purposes of inheriting his estate, the deceased is survived by his widow (the second Respondent) and the male issues by the first and the second marriages. In my view, the second applicant simply does not feature in this matter. She is merely a dependant to be maintained by whoever steps into the shoes of the deceased.

It is common cause, from the papers before me, that at the time of his death the deceased had the eldest son, Kemole, who was, therefore, his heir. When these proceedings were instituted in 1990 the heir was about 16 years and still a minor. Consequently, there was the need for the family council to appoint someone as a guardian who would control and administer the deceased's estate on behalf of the minor heir. There is, however, no indication that the second Respondent has already been appointed such a guardian. Regard being had to the fact that she is the only widow of the deceased it can, however, be safely assumed that she will be appointed the guardian. As Lansdown, J. put it in Bereng Griffith v 'Mants'ebo Seeiso Griffith H.C.T.L.R. 1926 -1953 50 at p.54 et seg.:

5/ "custom, ...

> "Custom, had ..... grown up and is now, I find, frequently, though perhaps not universally practised under which a wife, on the death of her husband leaving his eldest son a minor, has become the controller and administrator of the affairs of her own House, subject, it is true, to the male head of the family namely the father-in-law if he still be living, or, if not, his senior surviving adult son, now head of the kraal or village in his place, or in some cases of the adult male members of the deceased husband's family collectively."

Further down on page 55 the learned Judge went on to say:

> "I accept, therefore, the evidence of those witnesses who state that, in the case of woman chief or headman, the official position has always carried with it guardianship of her House, subject, of course to the limitation that the heir of such property is the son for whom she is acting..."

That, in my opinion, is the correct exposition of the customary law. As it has already been stated earlier, the deceased was not a polygamist who had more than one houses. His marriage to the second Respondent after the dissolution of the first marriage between him and the first Applicant did not constitute a separate house. If and when appointed by the family council, the second Respondent will, therefore, be the guardian over all the deceased's children, including the heir, Kemole, on whose behalf she will be entitled to control and administer the estate.

Assuming the correctness of the assumption that the second Respondent is the proper person to be appointed the guardian with power to control and administer

the deceased's entire estate, it seems to me it would be totally improper for the court to order that she should desist from receiving the benefits due to the deceased from the Lesotho Government.

However, the salient question that immediately arises for the determination of the court is whether, as the guardian or otherwise, the second Respondent can lawfully share or apportion, amongst the deceased's children or dependants, the property that is due to accrue to the estate or, for that matter, the estate itself. I fail to see how the second Respondent can apportion the property to the deceased's dependants and at the same time be able to controland administer it on behalf of the minor heir, Kemole. it seems to me, if the property were to be appotioned in the manner suggested by the applicants that would be a sure way of taking it out of the control and administration of the guardian to the detriment of the minor heir.

In my view, the sharing or appotionment of the property forming part of the deceased's estate is the prerogative of the heir at the time he reaches the age of competency. I am fortified in this view by Patrick Duncan in his work SOTHO LAWS AND CUSTOMS (1960 Ed.) at page 13 where the learned author has this to say on the issue:

> "This sharing of the estate is the task of the heir."

7/ From .....

From the foregoing, it is obvious that the view that I take is that this application ought not to succeed. It is accordingly dismissed. This being a family dispute I would make no order as to costs.

B.K. MOLAI
JUDGE.

26th February, 1991.

For Applicant : Mr. Pheko
For Respondent : Mr. Matete.