

IN THE HIGH COURT OF LESOTHO

IN the matter between:-

VALENTINA MALERATO KAPHE applicant

and

THE EMPLOYMENT BUREAU OF AFRICA LIMITED 1st respondent
(Commonly known as TEBA)

MATJABAKA KAPHE 2nd Respondent

JUDGEMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 15th day of July, 1991

Most of the facts in this case are common cause. They are that applicant is the wife of the late Tjabaka Kaphe who died on the 13th June, 1990. They were married according to Basotho customary law but later went through a church wedding on the 23rd December, 1982.

The second respondent is applicant's mother -in-law. Three children born of the marriage are in the custody of the applicant.

The applicant received a death report (Annexure C to her founding affidavit) on the 16th June, 1990 in which her name and the fact that she was the deceased's next of kin and deceased's wife had been cancelled and the second respondent had been shown as the deceased's next of kin.

The applicant was introduced to Chief Mohale Mopeli as the next of kin of the deceased who died in the mines on the aforesaid date. Chief Mopeli wrote a letter of introduction to the first respondent stating that the applicant was the next of kin. When the applicant and second respondent arrived at the offices of first respondent one employee of the respondent Selonyane and his colleagues put the second's thumbprint on the letter of introduction. Their reason for doing so was that according to their records the second respondent was the deceased's next of kin. An amount of M2,000.00 was given to the second respondent as deceased's burial expenses.

In September 1990 a dispute arose because it appeared that applicant's husband was treated as if he was not married. The applicant went to one Thabo Kokome, an employee of the first respondent. When he checked the records he found that the applicant's name had been cancelled without any explanation and that of the second respondent substituted. She avers that she has been to the first respondent who through Selonyane refuses to give her explanation. She asked for access to the records because there is on the face of things an irregularity, but first respondent refused to allow her access to the records. Her suspicion has been further increased by the fact that her Chief handed to her in July, 1990 a death report from the

first respondent in which she is shown as the next of kin of her husband (See Annexure E).

It will be observed that Annexures C and E were written and signed by the same person. She finds first respondent's failure to give her information suspect. She avers that consequently she has no option but to come to this court to help her find the truth by directing first respondent to allow her full access to the records in order to protect her interests and those of her minor children whose sole custodian she is.

The applicant avers that although Mr. Selonyane informed her that money earmarked for the maintenance of the children is there and that she must bring a letter of introduction of the children, he now refuses to hand over the money.

It is common cause that apart from the M2,000.00 for burial expenses another large sum of money was given to the second respondent as the death beneficiary. Applicant avers that sum of money belongs to her late husband's estate. The first respondent ought to account for this and all other monies belonging to the deceased's estate.

In his answering affidavit Leonard Moeletsi Selonyane avers that he is the representative of the first respondent stationed at its Maseru office. He admits that Applicant and second respondent came to his office but he denies that he caused the second respondent's fingerprint to be put on a letter introducing applicant as next-of-kin. The only document upon

which second respondent's fingerprint was imposed was a letter from first respondent's headquarters (Annexure "LMS1") and also on a letter received from the District Secretary (Annexure "LMS2"). He avers that the records reveal that the second respondent is the beneficiary of a fatal accident and illness insurance policy scheme and not as a next-of-kin. He admits that the sum of R2,000.00 was paid to the second respondent in accordance with Annexure "LMS1".

He avers that it is not true that an explanation was not given to the Labour Commissioner. Upon receipt of Annexure D to the founding affidavit he telephoned Mr. Nkopane and explained the situation to him. He informed him that applicant must complete the relevant form in which she makes claim to a pension in terms of the South African Workmen's Compensation Act. The applicant duly completed the relevant form (See Annexure "LMS4"). The completed form was duly sent off to Rand Mutual Assurance Company Limited who has now accepted the applicant's claim (See Annexure "LMS5"). The letter was received on the 25th February, 1991 after these proceedings had been instituted.

He also refers to Annexure "LMS6" which are copies of the cheques which were sent to the first respondent by Rand Mutual Assurance Company Limited. He confirms that these cheques have been deposited and that the proceeds thereof should go to the applicant but, in the light of the present application which she has instituted, payment will be deferred until the entire matter has been decided upon this Court.

Mr. Selonyane denies that he refused to give an explanation to applicant and says that on several occasions a full explanation was given to her and also to the Labour Commissioner. He admits that he refused her access to the records of the first respondent because she is not entitled thereto even if she is the next-of-kin. The fact remains that (Annexure "LMS7") in terms of which the second respondent was appointed.

Mr Thabo Kokome deposes that it is true that the applicant came to him. He is a clerk employed by the first respondent. His functions are to handle claims for deferred pay. He has no authority to deal with anything relating to insurance benefits or payment of pensions. He deposes that when applicant came to him he checked the records and the only record he checked was the employment recordcard (Annexure "TK1"). He denies that having checked the records he found that applicant's name had been crossed out in the records of the first respondent. Thereafter he paid the applicant a sum of M527.00 as deferred pay.

Mr. Letlama Matlole is a clerk employed by the first respondent. He deposes that his duties include, inter alia, the completion of death reports relating to the death of mine labourers. He is the person who wrote out Annexure "C" to the founding affidavit and he is the person who made the correction thereon. He says that when it was brought to his notice that applicant's husband had died he extracted his employment record

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card (Annexure "TK1") and noticed that the applicant's name was entered thereon as being the wife of the deceased miner. He immediately proceeded to complete the death report (Annexure "C"). Very soon thereafter the first respondent received a telefax message (Annexure "LM1") on which the name of the second respondent was disclosed as the death beneficiary of the deceased miner. He thereupon immediately deleted the name of the applicant and wrote in the name of the second respondent. When he did so he omitted to insert a carbon between the original and the remaining copies of the death report. This explains how Annexure "C" shows the crossing out and insertion of another name and why Annexure "E" does not disclose same. The latter annexure is the copy sent to the Labour Commissioner for his records.

Mr. Neil Russell Rae is the Lesotho Manager of the first respondent. In his answering affidavit he explains that when a miner is recruited he is required to complete a Service Contract and at the same time to appoint a beneficiary who will upon his death receive certain benefits resulting from the Chamber of Mines Fatal Accident and illness Insurance Scheme. The scheme is administered by the Rand Mutual Assurance Company Limited.

Clause 3 (3) and (b) read as follows:

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- "(a) For the purposes of this Clause 3 "beneficiary" shall mean a person nominated as a beneficiary in respect of the benefit under this policy by the employee in writing received by the employer.
- (b) The employee may at any time revoke his nomination of any beneficiary without such beneficiary's consent by notifying the employer of his wishes in writing. Each nomination of a beneficiary by the employee shall be deemed to revoke all prior nominations by the employee unless the contrary intention appears from the terms of the nominations."

Mr. Maqutu, attorney for the applicant, has submitted that though the applicant is entitled to claim under the South African Workmen's Compensation Act, she ought equally to be entitled to the benefit under Annexure "LMS7" because her late husband never nominated the second respondent as his death beneficiary. Applicant is the beneficiary ex lege.

He has submitted that the name "Matjabaka" has been fraudulently inserted to replace that of the applicant on form "LMS7". It is in different handwriting from the rest of the document. Clearly showing this insertion was suspect. Service contracts that were executed prior to "LMS7" all indicate 'Malereko as the beneficiary. (See Annexures "G", "H" and "I" to the replying affidavit of the applicant). He submits that M. MAHULA who is alleged to have signed the employment contracts has had his name printed and his signature on "LMS7" differs from that on Annexures A and J. He submitted that the onus of proving absence of forgery is on the respondents.

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It will be noticed that in her founding affidavit the applicant's main complaint was that the first respondent, through its employees, had crossed out her name on the records and had inserted the name of the second respondent on its records regarding her late husband. She deposed that Mr. Kokome had told her about the crossing out of her name on the records. Mr. Kokome has denied this and has alleged that when the applicant came to him the only document he needed to do his work was Annexure "TK1" which has no cancellations of the applicant's name. I have checked Annexure "TK1" and have found that the name of the applicant has not been crossed out.

It is common cause that on one death report there is a crossing out of the name of the applicant but there is no such crossing out on another copy which was received by the applicant through her chief. Mr. Matlole has explained in detail how the omission to cross out the name of the applicant came about. He forgot to put a carbon when he made the alteration after receiving the telefax which indicated that the death beneficiary was the second respondent.

It seems to me that whatever the mistakes Mr. Matlole made when he reported the death of the applicant's husband cannot change the original document which was signed by him when he was recruited. That document is Annexure "LMS7", the service contract. It shows that the applicant's husband appointed his mother, the second respondent, as his death beneficiary. The entire document was

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Completed in capital/block letters except the name of the second respondent as death beneficiary which is in cursive handwriting. It was suggested on behalf of the applicant that space was left blank and was subsequently completed after the applicant's husband had signed the document.

It is not clear when this fraud is alleged to have been done. What is clear is that the service contract was signed on the 28th March, 1990 and that on the 13th June, 1990 when he died the records of the Rand Mutual Assurance Company Limited indicated who the death beneficiary was. I am sure that the service contract would have been queried by the Labour Agent who signed it on the 28th March, 1990 if a blank space was left where death beneficiary ought to have been shown. If cursive handwriting was not to be used the labour agent would have queried the form. But the service contract seems to have been accepted by all the parties including the Rand Mutual Assurance Company Limited as correct.

I have scrutinized the employment contract and have noticed no trace of any erasure in the space provided for the name of the death beneficiary. However, I cannot finally decide this serious allegation of fraud on affidavit.

Mr. Koornhof, attorney for the first respondent, submitted that the applicant alleges fraud on the part of the employees of the first respondent. The onus to prove such a serious allegation is heavy and cannot be discharged by a way of affidavit. I agree with that submission because I find no reason why the employees of

the first respondent suddenly decided to defraud the applicant with whom they had not had any misunderstanding and against whom they had no grudge. It is not enough to rely on an obvious mistake in an attempt to establish fraud. The difference between Annexures "C" and "E" has been fully explained by Mr. Matlole.

I do not agree with the submission that the applicant's late husband did not appoint death beneficiary in writing because a separate document was necessary for that document. It could be that it would have been ideal but that does not mean that there was no compliance with clause 3 (3) (a) of the insurance policy. The service contract is in writing and it was in that contract form that the applicant's late husband nominated his mother in writing as his death beneficiary.

It was submitted on behalf of the applicant that in the three contracts of service preceding the present one the applicant's late husband had appointed the applicant as his death beneficiary. Clause 3 (3) (b) of the policy authorises the miner to revoke his nomination of any beneficiary without such beneficiary's consent by notifying the employer of his wishes in writing. That is exactly what the applicant's husband did. It is also a term of the insurance policy that each nomination of a beneficiary by the employee shall be deemed to revoke all prior nominations unless the contrary intention appears from the terms of the nomination. The applicant has failed to show such contrary intention.

Mr. Koornhof has submitted that the applicant raises certain issues which can only be resolved by oral evidence. He refers to paragraphs 5.2 (b), 5.4 and 5.5 which read as follows:-

- "5.2 (b): In the above premises the fact that the crucial section nominating a beneficiary was left blank and filled in unexplained circumstances without any signature or initialling does not conform with the principles governing insurance policies..
- 5.4 The difference of writings in "LMS7" has not been explained has it been explained who filled it up and why the writings on "LMS7" are different. None of the people who were present when "LMS7" was thumb printed have made affidavit.
- 5.5 It is definitely not clear that Second Respondent was nominated beneficiary as Messrs Rae, Selonyane and Matlole suggest because on the face of LMS7" the portion nominating beneficiary was filled by an unknown person in a different handwriting. That being the case "LMS7" was not all Filled and interpreted at the same time."

I have said that there is no evidence that the crucial section nominating the beneficiary was left blank. I have said that the mere fact that the section was filled up in cursive handwriting does not necessarily mean that it was filled up at a later stage and by a different person.

It is quite correct that the people who were present when Annexure "LMS7" was thumbprinted have not made any affidavits. Prayer 1 (d) of the Notice of Motion directs the first respondent to disclose all the papers signed by the deceased on the basis of which the death benefits were given. In reply to this the first respondent disclosed the following documents:

1. A telefax (Annexure "LM1").
2. A service contract (Annexure "LMS7").
3. The letters Annexures "LMS1" - "LMS5" (inclusive).
4. Employment Record Card (Annexure "TK").

In her replying affidavit the applicant alleges that a number of the documents disclosed by the first respondent were fraudulently filled up.

It seems to me that having received the answering affidavit and its annexures the applicant ought to have reconsidered her position instead of raising serious issues in a replying affidavit. She could have applied that the matter be converted into a trial or she could have instituted an action while the interdict remained in force. I am of the opinion that this is an application in which the applicant should have realized when launching it that a serious dispute of fact was bound to develop. In her founding affidavit she accuses the first respondent's employees of fraud by deleting her name in their records and substituting that of the second respondent. She deposes that Mr. Selonyane refused to give her an explanation. she should have realized that she could never admit that he refused to serve a person he was expected by his employer to help. They could not accept any fraudulent behaviour.

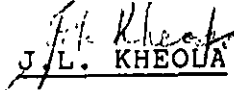
Now on the question of law Mr. Maqutu submitted that clause 3 (3) (4) of the insurance policy is void in so far as it is contra bonos mores the traditions of the Basotho Society. Such benefits must be part of the deceased's estate. I think the law

was settled by our Court of Appeal in 'Manthabiseng Ramahata v. THABISO Ramahata, C. of A. (CIV) No. 8 of 1986 (unreported)' at pp. 4-5 where Schutz, P. said:-

"The Judge rejected the Appellant's contention that she was entitled to the M6,000 not by virtue of her marriage, but by virtue of her nomination as death beneficiary. The learned Judge a quo opined that any claim would be governed by the Republican Insurance Act 27 of 1943, that there was no similar statute in Lesotho, and that the death benefits would pass to the son's deceased estate. I do not agree with this reasoning at all. In passing I would point out that foreign law cannot be disregarded where it is the proper law in a case. If it be such it will ordinarily be given effect to.

This case is a simple one. The Appellant has established a stipulatio alteri (contract for the benefit of a third party) between the son and the insurance company: See e.g. Croce v. Croce 1940 TPD 251. The institution of stipulatio alteri, by virtue of being part of the Roman Dutch Law, also forms part of the law of Lesotho. The contract is to the effect that she is entitled to accept the benefit of this contract and the evidence is that she has in fact done so. Her rights therefore flow from contract and the M6,000 has nothing to do with the deceased estate. For these reasons the appeal succeeded."

In terms of Rule 8 (14) of the High Court Rules 1980 the rule nisi is discharged with costs.


J.L. KHEOLA
JUDGE

15TH July, 1991

For Applicant - Mr. Maqutu
For 1st Respondent - Mr. Koornhof