

IN THE LESOTHO COURT OF APPEAL

In the matter between :

ALINA 'MABATAUNG MOFOLO

Appellant

vs

HENRY FRANCIS TSEKO NTSANE
THE COMMISSIONER OF LANDS
REGISTRAR OF DEEDS

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

HELD AT MASERU

Coram :

Mahomed P
Ackermann J.A
Browde J.A.

J U D G M E N T

Browde J.A.

The appellant brought an application in the Court a quo for an order appointing the appellant curator-ad-litem to one Chaka Sibidla "the son and heir" of the late Elizabeth Sibidla. The appellant also sought an order against the second and third respondents directing them to cancel and expunge from their records certain leases which were apparently registered in the name of the first respondent. In her founding affidavit the appellant alleged that during her lifetime the deceased was the registered owner of the "buildings and other improvements" erected on sites numbers 6 and 51 Sea Point in the Maseru Reserve and that as long ago as 2 April 1980 the first respondent had instituted

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proceedings in the High Court claiming the sites referred to from the deceased. That application is, according to the appellant, still pending and she sought an order dismissing it for lack of prosecution.

Only the first respondent opposed the application and the learned Judge a quo, with respect, justifiably assumed that the second and third respondents were prepared to abide by the decision of the Court.

The problem faced by the appellant in regard to the appointment of a curator-ad-litem stems from the fact alleged by her in her founding affidavit that Chaka Sihidla was, after the death of his mother on 2 May 1986, "fetched by his father and is living with him in the Republic of South Africa". In his answering affidavit the point in limine was raised by the first respondent, that the father of Chaka was "alive and well" and that there was no conflict of interest or even potential conflict of interest between the father and his son. The allegation was made that "applicant could easily have informed Chaka's father of these proceedings". In reply to those averments the appellant in reply contented herself with saying -

"I do not know where in the Republic of South Africa Chaka's father is. He has shown no interest in his late wife's affairs or estate".

Having regard to that rather bald assertion I think that Mr. Pheko, who appeared for the first respondent, was justified in submitting that in light of the fact that Chaka's father and natural guardian is, so it would appear,

/still

still alive the appellant ought to have made efforts to trace him and ought only to have approached the Court if such efforts proved fruitless. In Ex-parte Insolvent Estate Karodia 1925 TPD 294 Greenberg J (as he then was) held that

"the Court will ordinarily only exercise its authority in appointing a curator-ad-litem to a minor when such minor has no guardian".

An exceptional case may be that in which the interests of minor and guardian conflict, but there is no such suggestion in this case. I would refer also to the case of Wolman and Others v. Wolman 1963(2) SA 452 (AD) to which Mr. Pheko made reference. At 459 the following was said by Hoexter J.A. :

"Generally speaking the guardian of a minor is the proper person to represent him in Court (Grotius 1.8.4)..... It is only when a minor has no guardian that he must be represented in Court by a curator-ad-litem".

In my view, therefore, the appellant could not succeed in her application unless she could satisfy the Court, which she did not attempt to do, that she had explored all reasonably possible avenues to find Chaka's father or, of course, that the father was no longer "alive and well" as the first respondent alleged he was.

Quite apart from the above it is not clear on the papers exactly what Chaka's interest in the sites is. Until that is clarified the Court is not in a position properly to decide whether a curator-ad-litem is required at all.

In the result I believe the learned Judge a quo

/was.....

was correct in his refusal to appoint a curator-ad-litem. We are here, however, dealing with alleged interests of a minor and it seems to be an appropriate case to invoke the provisions of Rule 8(15) of the High Court Rules which reads :

"(15) The Court hearing an application whether brought ex-parte or otherwise may make an order thereon, save as to costs if any, but grant leave to the applicant to renew the application on the same papers supplemented by such affidavits as the case may require".

It is necessary to point out that the application in the High Court could and should have been brought ex-parte without the necessity for service on the respondents. The first respondent had no interest in whether or not a curator was appointed to Chaka and his views concerning such appointment are irrelevant. The application however also asked for relief which did affect the rights of the first respondent who was, therefore, entitled to file papers in answer to the founding affidavit and to brief counsel both in the Court a quo and on appeal.

The order I make is as follows :-


The order of the Court a quo is set aside and the following is substituted :

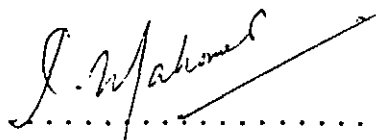
No order is made on the application and the applicant is given leave to renew the application on the same papers supplemented by such further affidavits as the applicant may wish to file in support of her application.


As far as costs are concerned the appellant must pay the costs of the first respondent both in the Court a quo and

/on

on appeal.

(Signed) : 
J. BROWDE
JUDGE OF APPEAL

I agree (Signed) : 
I MAHOMED
PRESIDENT

I agree (Signed) : 
L.W.H. ACKERMANN
JUDGE OF APPEAL

Delivered at MASERU this 26th day of July, 1991

For the Appellant : Mr. Sello

For 1st Respondent : Mr. Pheko