CIV/A/1/88

IN THE HIGH COURT OF LESOTHO

In the matter of :

FIHLANG SEPHUPHUTHOANA ..... Appellant

and

MOCANGELA MATOETOE ..... Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 12th day of August, 1994.

The appellant and the Respondent were Defendant and Plaintiff, respectively, before the local court of Phahameng in the district of Mokhotlong. The

Respondent (hereinafter referred to as Plaintiff) sued the Appellant (hereinafter referred to as Defendant) for the return of 57 small stock and the progeny thereof, allegedly "mafisaed" to the latter by 'Matsokolo Matoetoe.

In his defence the Defendant conceded that 'Matsokolo had "mafisaed" small stock to him. Later on, she, however, gave them, as a gift, to her daughter, 'Mamakhooa who was his wife. Defendant denied, therefore, that he still had in his possession 'Matsokolo's small stock whose return Plaintiff could lawfully claim from him.

The local court heard and decided the case in favour of the Plaintiff. The Defendant was unhappy with the decision against which he lodged an appeal to the Central Court of Salang. The Central Court upheld the appeal and set aside the decision of the local court. Plaintiff was dissatisfied with the Central Court's decision against which he appealed to the Court of the Judicial Commissioners. In its judgment, the court of the Judicial Commissioners upheld the appeal and accordingly confirmed the decision of the central court. It was against that judgment that the Defendant applied for, and was granted, leave to appeal to the High Court on the following points of law:

(a) whether under customary law a widow can, without prior knowledge and consent of her guardian, give instructions regarding the disposal of her livestock after her death (see section 12(2) of laws of Lerotholi Part I).

(b) whether Exh "A" is a genuine and legal document."

Very briefly, it was common cause from the evidence that Plaintiff was the son of the late Sehloho, the younger brother of 'Matsokolo's husband, Lekoa. 'Mats'okolo was, therefore, Plaintiff's grandmother i.e. the wife of the elder brother of his father.

During his lifetime Lekoa owned, inter alia, a number of small stock which, following his death, became the property of his widow, 'Mats'okolo. When he passed away, Lekoa was survived by his wife, 'Matsokolo, a son by the name of Choaotsa and two daughters viz. Nts'ebo and 'Mamakhooa. Choaotsa later went to work in the Republic of South Africa and his exact whereabouts were unknown. Nts'ebo and 'Mamakhooa had since married away in the families of Lekhutle and Sephuphuthoana, respectively.

In 1968 'Matsokolo 'mafisaed" the small stock to the Defendant who was the husband of her daughter, 'Mamakhooa, and, therefore, her son-in-law. In

support thereof the Defendant handed in Exh. "B", a bewys covering the animals at the time they were "mafisaed" to him by 'Mats'okolo.

Later on, 'Mats'okolo became ill. She consequently went to live with 'Mamakhooa who nursed her at her home until she passed away in 1981.

According to Defendant, shortly before she passed away in 1981 and in consideration of what 'Mamakhooa had done for her, 'Mats'okolo gave written instructions regarding the disposal of her livestock. The instructions were embodied in a document which the Defendant handed in as exhibit "A" and part of his evidence. According to exhibit "A" 'Mats'okolo made a gift of all her livestock to 'Mamakhooa so that she ('Mamakhooa) might be able to care for her ('Mats'okolo) and her children. On his return, her son, Choaotsa would find the livestock with 'Mamakhooa.

In the contention of the Defendant the animals that the late 'Mats'okolo had originally "mafisaed" to him were no longer in his possession. They were in the possession of his wife, 'Mamakhooa. Plaintiff could not, therefore, properly sue him, in his own right, for the return of those animals. Defendant

further told the court that Plaintiff and the family of Matoetoe did nothing to assist the late 'Mats'okolo. They did not even contribute anything towards her funeral which was the sole responsibility of his family. Moreover, 'Mats'okolo admittedly had a son, Choaotsa, who was her heir. Although he went to work in the Republic of South Africa, a long time ago, and his exact whereabouts were unknown, there was no evidence that Choaotsa was deceased. The presumption was, therefore, that he was still alive. That being so, Plaintiff had no right, at all, to sue for the return of the animals.

In reply Plaintiff's evidence was that, following the death of Lekoa, the family of Matoetoe held a meeting at which he was appointed the guardian of 'Mats'okolo, a fact which was, however, denied by the defendant. When in 1968 she admittedly "mafisaed" the small stock to Defendant and later went to Defendant's home to be nursed by 'Mamakhooa, 'Mats'okolo did so after consultation with him as her guardian. According to him, in 1970 Plaintiff fetched the small stock from the Defendant. He, however, "mafisaed" them again to the Defendant in the same year, 1970.

It is worth noting that when in 1968 'Mats'okolo "mafisaed" her livestock to defendant their movement was admittedly covered by bewyses (Exh "B"). Although

he told the court that in 1970 he fetched the animals from, and again "mafisaed" them to, defendant, Plaintiff produced no bewyses covering their movement to and fro. I consider it incredible that Plaintiff could have moved the animals to and fro, as he wished the court to believe, without any bewyses.

Be that as it may, Plaintiff went on to tell the court that when 'Mats'okolo passed away in 1981 he was at his place of work in the Republic of South Africa. He could not, for that reason, attend her funeral. Plaintiff denied, therefore, the evidence that he and the family of Matoetoe did nothing to assist 'Mats'okolo.

Regarding Plaintiff's claim that, following the death of Lekoa, the family of Matoetoe held a meeting at which he was appointed the guardian of 'Mats'okolo one would expect that there were minutes of that meeting. No such minutes were, however, produced to substantiate Plaintiff's claim.

Be that as it may, according to Sesotho law and Custom guardianship of widows is governed by three situations. Firstly the situation where the widow has a male issue who is already married and, therefore, a major; secondly the situation where the widow had a male issue who is not married and, therefore, a minor;

and thirdly the situation where the widow has no male issue at all.

In the present case the court was clearly dealing with a case falling under the second situation, viz. where the widow ('Mats'okolo) had a male issue (Choaotsa) who was not married and was, therefore, still a minor. That granted it is significant to observe that S.12 (1) of Part I of the Laws of Lerotholi provides:

> "12(1) When a man dies leaving an heir who is a minor, the person appointed as guardian of the heir and administrator of the estate shall keep a written record of the administration of the estate, and this record shall be open to inspection by the paternal uncles, and other relatives of the heir as are permitted to do so by Basuto Law."

Again, Plaintiff failed to produce any written record of his administration of the estate of the late Lekoa to substantiate his claim that, following the death of the latter, he was, indeed, appointed the guardian of 'Mats'okolo and, therefore, the administrator of her late husband's estate. Plaintiff's evidence that the family of Matoetoe had appointed him the guardian of 'Mats'okolo was, in my

view, unconvincing. Even if I were wrong in this view and it was held that, following the death of Lekoa, the family of Matoetoe did appoint Plaintiff the guardian of 'Mats'okolo, it is worth noting that the question whether, in the circumstances of this case, Plaintiff could lawfully be appointed the guardian of 'Mats'okolo was authoritatively decided in the case of Bereng Griffith v. 'Mants'ebo Seeiso Griffith 1926 - 1953 H.C.T.L.R. 50 where Lansdown, J. held at p. 51:

> " ... the widow of a man who has died childless, or leaving only female children or minor males, is the heiress to the estate, but that in the last mentioned case, when the eldest son is not yet of man's estate, she while entitled to maintain herself and her family out of the property, is under obligation to hold and administer it for the benefit of the eventual heir, and that though by Basotho custom she should consult the adult members of her late husband's family, such consultation does not place her under guardianship".
> (my underlining)

I have underscored the word "not" in the above cited quotation from the decision in Bereng Griffith v. 'Mants'ebo Seeiso Griffith, supra, to indicate my view that on the authority thereof the appointment of Plaintiff as the guardian of 'Mats'okolo, if it did take place as Plaintiff wished the Court to believe, was contrary to Basotho law and custom. It was, for that reason, unlawful. The courts of law could not,

therefore, consider themselves bound by the unlawful decision of the family of Matoetoe to appoint Plaintiff as the guardian of 'Mats'okolo.

As regard exh. "A", the so-called written instructions of 'Mats'okolo regarding the disposal of her livestock, Plaintiff disputed the validity thereof on the ground that it did not emanate from 'Mats'okolo. The court of first instance considered the evidence and observed that the contents of Exh. "A" were ambiguous inasmuch as they purportedly made a gift, to 'Mamakhooa, of the livestock which remained the property of Choaotsa who would find them with "Mamakhooa when and if he returned home from his place of work in the Republic of South Africa. Exh. "A" itself was signed by a certain Macione Kao. It did not bear the signature of 'Mats'okolo at all. Nor was it witnessed by any person. The court found that Exh. "A", upon which defendant relied for his contention that 'Mats'okolo had given, to 'Mamakhooa, all her livestock which were, therefore, no longer in his possession but in the possession of 'Mamakhooa, was not a genuine and lawful document. I may add that if it were held that Exh. "A" was a genuine and lawful document and by that document the late 'Mats'okolo gave all her livestock to 'Mamakhooa, that would, in my opinion, have the effect of depriving Choaotsa, the undisputed heir to the estate of 'Mats'okolo, of his

vested interest in the estate.

There was, therefore, nothing unreasonable in the court finding, as it did, that Exh. "A" was not a genuine and lawful document. The reply to the second point of law viz. "whether exh. "A" is a genuine and lawful document", upon which leave to appeal was granted by the court of the Judicial Commissioners must, in my view, be in the negative. Assuming the correctness of my view, it must be accepted that 'Mats'okolo never gave any written instructions regarding the disposal of her livestock which, therefore, remained in the possession of the defendant since the time they were "mafisaed" to him in 1968.

Having decided that 'Mats'okolo never gave written instructions regarding the disposal of the livestock, the subject matter of this dispute, it is obvious that the first point of law, viz. "whether under customary law a widow can without prior knowledge and consent of her guardian, give instructions regarding the disposal of her livestock after her death" does not arise. To deal with it now will be nothing but academic exercise.

What was of importance in this case was whether or not Plaintiff could lawfully sue, as he did, the defendant for the return of the livestock, the subject

matter of this dispute. That was basically the question of whether or not Plaintiff had locus standi to sue the defendant. The late 'Mats'okolo had a male issue, Choaotsa, who was her heir. Although he went to work in the Republic of South Africa, a long time ago, and his exact whereabouts were unknown, there was no evidence that Choaotsa was deceased. The presumption was, therefore, that he was still alive.

I shall assume, for the benefit of Plaintiff, that at the time these proceedings were instituted, Choaotsa was still unmarried and, therefore, a minor who ought to have been under the guardianship of some one in the family of Matoetoe. As Poulter puts it at page 265 of his work Family Law and Litigation in Basotho Society "...the general rule is that the choice of a guardian is a matter for the deceased's family to decide ..." I have already found that there was no convincing evidence that the family of Matoetoe had appointed Plaintiff to be the guardian of 'Mats'okolo. Nor was there any suggestion that, following the death of 'Mats'okolo the family of Matoetoe held a meeting at which Plaintiff was appointed the guardian of Choaotsa. In the absence of any such evidence Plaintiff could not be heard to say he was the guardian of 'Mats'okolo's heir, Choaotsa, and, therefore, had locus standi to sue the defendant for the return of the livestock, the subject matter of

this dispute. That was the prerogative of the late 'Mats'okolo's heir or a person who would be lawfully appointed, by the family of Matoetoe, as a guardian of the heir if such heir was still a minor.

In the premises, I come to the conclusion that this appeal ought to succeed. It is accordingly upheld with costs to the defendant who is ordered to keep possession of the animals until the return thereof is claimed by the rightful person.

B.K. MOLAI

JUDGE

12th August, 1994.

For Appellant : Mr. Nathane

For Respondent : Mr. Monapathi