CIV/APN/265/94
CIV/APN/244/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MASECHABA NTSIHLELE (born MAJARA)	APPLICANT
AND	
RETSELISITSOE KNIGHT NTSIHLELE	1ST RESPONDENT
MINISTER OF DEFENCE	2ND RESPONDENT
ATTORNEY GENERAL	3RD RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu on the 14th day of October, 1994.

On the 13th September, 1994 Applicant brought an application *ex parte*, and the Court made the following interim order:

"1. That a Rule Nisi, returnable on the 23rd

/...

September, 1994 at 2.30 p.m. be issued calling upon the Respondents to show cause, if any, why

(a) the 2nd Respondent, his officials, subordinates and / or agents shall not be restrained and interdicted forthwith from paying or causing to be paid to the 1st Respondent or to any other person such terminal benefits as are payable following the death of the late BOKANG MICHAEL NTSIHLELE pending finalisation of this application

(b) an order shall not be made declaring that the Applicant is the only person who is entitled to receive the said terminal benefits and directing the 2nd and 3rd Respondents to pay or cause the same to be paid to Applicant

(c) the Respondents shall not be directed to pay the costs of this application only in the event of opposing it

/...

(d) the Applicant shall not be granted such further and / or alternative relief as this Honorable Court may deem just

2. That prayer 1 (b) operates with immediate effect as interim order."

First Respondent's answering Affidavit was served on the Applicant on the 20th September, 1994. The Applicant's Replying Affidavit was served on the First Respondent on the 23rd September, 1994. The matter was crowded out and could only be heard on the 27th September, 1994 when it was argued and judgment reserved to 14th October, 1994.

This application is a sequel to CIV/APN/224/94 in which Applicant and first Respondent were before this Court on the right to bury the late Bokang Michael NtŠihlele. Applicant is the wife of the late Bokang Michael NtŠihlele while First Respondent is the father. This time Applicant claims money belonging to the estate of her late husband which is presently in the hands of the Second Respondent who was the late Bokang Michael NtŠihlele's employer. This money is styled as the deceased's terminal

/...

benefits. First Respondent says that he is the one entitled to receive the deceased's terminal benefits, because that was the deceased's wish. According to First Respondent, deceased said First Respondent should receive the said terminal benefits on behalf of deceased's younger brother Teboho.

The problems I have with what First Respondent says about deceased's instructions that First Respondent should receive terminal benefits on behalf of Teboho Nt$ihlele are that -

(1) Teboho Nt$ihlele in his affidavit supporting First Respondent's Answering Affidavit avers:

"I am a Mosotho adult of Wepener Road, near Bereng High School in the Mafeteng district. I am presently employed at the Machabeng High School and staying at Ha Mabote in the Maseru district.

(2) First Respondent does not state when deceased issued this instruction that his terminal benefits should be received by the First Respondent.

/...

If Teboho NtŠihlele was a minor, I could understand why first Respondent could be directed or requested to collect money on Teboho NtŠihlele's behalf. What makes the allegation that First Respondent was ever directed to collect deceased's money on behalf of Teboho NtŠihlele is that the Ministry of Defence is in Maseru where Teboho NtŠihlele's works. There seems to be no reason why First Respondent should have been made Teboho NtŠihlele's agent when First Respondent lives 70 kilometres from where the money was supposed to be collected.

In *Rens v Esselen & Ors.*, 1957 (4) SA 8 at 14A Ludorf J. pointed out that Courts have to be careful of potential beneficiaries to deceased's estate who claim that deceased people made statements favourable to them. Courts have to scrutinise such statements with care as it is easy to conceive of attempts by potential heirs being made to dishonestly gain advantages. In *Johnston v Johnston 1& Another*, 1972 (3) SA 104 at page 106A Macdonald A.CJ said:

> "It is of course, a rule of universal application that a court in all cases, both civil and criminal, exercises care in coming to its decision. A claim against a deceased estate differs only in the need, for more than ordinary care, a need which arises from the fact that the other party to the alleged

> transaction is no longer alive to give his or her version."

In *De Matta v Otto*, 1972 (3) SA 858 at 868A Van Blerk J.A. emphasising the tendency of courts to scan with suspicion claims against the deceased said of a party similar to First Respondent,

> "He gives no details as to when and where he and deceased arrived at this vague and loose arrangement."

The other problem that I find in First Respondent's statement about his late son's intention is that he alleges that deceased actually stated what First Respondent ventures as an opinion to the following effect:

> "My late son deliberately omitted to substitute Applicant's name as the recipient after he married her. He did not trust that she would use the money beneficially."

Kheola C.J. in CIV/APN/224/94 was for the same reason not prepared to accept either party's allegations as to the deceased's wishes on where deceased wanted to be

buried.

By Basotho custom a childless widow is the deceased's heiress. See the *Laws of Lerotholi I* 11 (2) where it is said,

> "If there is no male issue in any house the senior widow shall be the heir, but according to the custom she is expected to consult the relatives of her deceased husband who are her proper advisers."

Applicant is the sole widow of the deceased, therefore she is by custom the heiress.

Mr. Malebanye argued that since the marriage is by civil rites the received Roman Dutch Law of Intestacy should govern this estate. In terms of *Section 3(b)* of the *Administration of Estates Proclamation* of 1935,

> "this proclamation shall not apply—
> "To estates of Africans which shall continue to be administered in accordance with the prevailing African law and custom of the territory: Provided that such law and custom shall not apply to estates of Africans who have shown to the satisfaction of the Master to have abandoned tribal custom and adopted a European mode of life, and who, if married, have married under European law."

In the first place there is no suggestion that Bokang Michael NtSihlele's estate was ever reported to the Master in order for that particular estate to come under the jurisdiction of the Master in terms of the *Administration of Estates Proclamation* of 1935. There is no suggestion that the deceased had abandoned tribal custom and adopted a European mode of life. The only requirement deceased met is that of marrying his wife by civil rights.

It seems to me if the *Intestate Succession Proclamation* 2 of 1953 applied to this estate, Applicant *ex lege* would inherit three quarters of the estate. Half the estate by virtue of community of property and half of the deceased's share of the joint estate by virtue of *Section 1(1)(c)* of the *Intestate Proclamation* No.2 of 1953. All this would only happen after the deceased's debts had been paid because under the received law the heir only inherits the residue. This line of proceeding was not followed in the Answering Affidavit and no evidenciary ground for arguing that the "received" law and the *Intestate Succession Proclamation* of 1953 applied was ever laid.

The intention of First Respondent was to exclude Applicant from getting anything out of her late husband's

/...

estate. His ground for doing this is that deceased named his younger brother Teboho NtŠihlele as his next of kin.

Next of kin if we follow the *Intestate Succession Proclamation* No.2 of 1953 it would seem to me follow this order:

Children
Surviving Spouse
Parent
Brother or Sister.

It seems to me that Applicant as surviving spouse comes before the First Respondent who is the parent of deceased and Teboho as the brother of deceased comes last. Before the *Intestate Proclamation* of 1953, the spouse was not treated as next of kin for purposes of succession, but since 1953 a spouse ranks after children. See *In re Scallan's Estate*, 1954 (3) SA 282 at 290.

It seems to me that much more has been read into annexure "R NN3" than was intended. This is merely an enlistment record where particulars of deceased when he enlisted in the Lesotho Paramilitary Force are recorded. This enlistment record is not a testamentary document. It

/...

is intended to show the name and address of next of kin. It was not intended to be a nomination of a person's heir. This enlistment form was filled on the 23rd October, 1983. Deceased married Applicant on the 7th April, 1989 six years after his enlistment. The view I take is that Applicant on marriage supplanted both the First Respondent and Teboho NtŠihlele as the deceased's next of kin.

Society sees husband and wife as one. This is the reason that spouses are not compellable witnesses in criminal proceedings where one spouse is the accused. The parent and a brother of the accused are compellable witnesses against the accused To suggest that the wife is not the next of kin of her husband goes against public policy in modern times. So long as the marriage subsists they are treated as one. The deceased's immediate family by law is his wife and the children they could have had.

It should be clear that Teboho NtŠihlele was never named or nominated as the deceased's heir or beneficiary to any portion of the deceased's estate. The particulars of enlistment are not intended to have a testamentary effect.

/...

In *Kaphe v Employment Bureau of Africa & Another*, CIV/APN/37/91 (unreported) Second Respondent had been named as the death beneficiary to the deceased's insurance policy. Kheola J. followed Schutz P.'s judgment in *Manthabiseng Ramahata v Thabiso Ramahata*, C of A (CIV) No.8 of 1986 (unreported) involving proceeds of an insurance policy of M6000.00, where he said:

> "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. ... Her rights therefore flow from the contract and the M6000.00 has nothing to do with the deceased estate."

In this case no contract has been alleged and proved between the Ministry of Defence (Second Respondent) and the deceased in terms of which Teboho NtŠihlele or anybody was entitled to receive benefits from that contract. The particulars of enlistment of deceased merely state the next of kin who was to be informed should deceased suddenly suffer injury or die. This column of the particulars of enlistment does not make Teboho the death beneficiary of deceased or an heir or beneficiary in the deceased's estate.

/...

A proper reading of *Kaphe v The Employment Bureau of Africa & Another* reveals that in the dispute between the wife of deceased and deceased's parent, the wife's status as next of kin of the deceased was not in dispute. The case revolved on the fact that deceased's parent had been nominated as death beneficiary by deceased in the insurance policy.

The fact that Applicant and her late husband had a turbulent marriage even if believed would not help First Respondent. The reason being that quarrels are the rough and tumble of marriage. There is a tendency to challenge the marriages of deceased persons when it turns out that the widow is likely to get deceased's terminal benefits that involve a great deal of money. Dealing with this problem W.C.M. Maqutu in *Contemporary Family Law of Lesotho*, page 110 .....:

> "If there is a great deal of money which is being paid as compensation for the death of the deceased, the parents of the men sometimes say the women are not married and want to lay their hands on the money. There have been cases where the parents of the men at first recognise the women as wives of the deceased, but when the women refuse to share compensation money with them, they then allege there were never any marriages between their sons and the women. In the case of

> *Deke v Qhoai* - CIV/APN/125/88 (unreported) this is exactly what happened. The crisp question is really whether the boys father is entitled to accept the woman as a daughter-in-law only when it suits him or not."

The Court has to be careful not to allow the judicial process to be misused.

The case before me seems to fit this description, that is:

> "Of late, cases have increased where skirmishing over succession begins with the right to bury. The people who have the right to take possession of the deceased's body and bury are seen to be deceased's heirs. It is not unusual these days for the deceased's body to be used as a pawn in the legal battle for rights of succession. This is done by bringing an urgent application before the High Court claiming the deceased's body for burial from rivals." *Contemporary Family Law of Lesotho*, page 190 (supra).

This case followed the above pattern. We had CIV/APN/-224/94 for the body of deceased. Now we have the present application for money belonging to the deceased's estate.

Mr. Malebanye says because Applicant failed to attend deceased funeral after failing in her application for

possession of the deceased's body, she should lose her rights of succession. I am not sure this should happen because the behaviour of First Respondent made it impossible for Applicant to attend the funeral. Applicant wanted to bury her husband but First Respondent seized the body and during the Court proceedings that followed First Respondent said such unpleasant things about Applicant that relations had soured considerably at the time of deceased's funeral. Applicant wisely stayed away to avoid possible unpleasant incidents that might have marred the funeral.

Kheola C.J. in CIV/APN/224/94 is according to both sides alleged to have said that in view of the dispute of fact as to what the deceased's wishes were regarding the burial site, the First Respondent's version be preferred and the deceased be buried in Mafeteng. I have not seen the judgment. I do not understand Kheola C.J. to have been laying a general principle. He was merely doing what was convenient at the time. There must have been other factors that led Kheola C.J. to that ruling, as there is no judgment these factors are not available. In *Human v Human*, 1975 (2) SA 251 at 252H Cloete A.JP dealing with what deceased may have said about the place of burial

/...

said:

> "But this evidence of the wishes of the deceased is not in proper testamentary form and does not dictate the legal position which is binding on the parties. At most, as proof of his desire is of mere sentimental importance."

In that situation the person with a duty to bury has to prevail. That being the case the widow cannot unless more evidence is available be said to have lost her rights of succession.

The need for each of the people involved to know his or her rights and how far to carry them will facilitate the resolution of this family misunderstanding. The widow of deceased (Applicant) is obliged to co-operate with her late husband's family. Co-operation is a two-way process. This means First Respondent cannot and ought not to override the rights of Applicant. It is unfortunate that because First Respondent had an exaggerated notion of his rights, he created a situation that strained relations between Applicant and First Respondent to the extent that she failed to wear mourning cloth for her late husband.

We will never know for certain if this was because of Applicant's querulous and overbearing nature. I am not in a position to decide whether indeed First Respondent is inventing the unhappiness and strained relations that might have led to a divorce between the parties had the deceased lived. In any event there are legal ways of disinheriting a person. The way First Respondent went about things is highly suspect. I have already held that even if Applicant is, as First Respondent describes her, very few marriages (if at all) are ever a bed of roses.

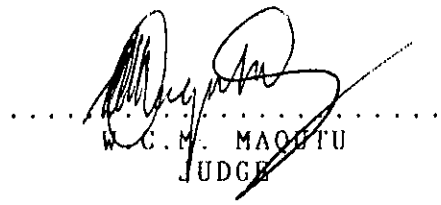
I therefore make the following Order in confirming the *Rule Nisi*:

(a) Second Respondent and his officials are restrained from paying or causing to be paid to First Respondent terminal benefits of the late Bokang Michael NtŠihlele.

(b) Applicant is by Basotho custom the heiress to the Estate of the late Bokang Michael NtŠihlele and that the said terminal benefits form part of the said estate.

/...

(c) First Respondent is directed to pay the costs of this application.



.....
W.C.M. MAQUTU
JUDGE

For Applicant : Mr. S.S. Mafisa
For 1st Respondent: Mr. S.Malebanye