CIV/APN/284/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

BATEBANG JASE	1ST APPLICANT
KATILE FLORINA JASE	2ND APPLICANT

AND

CHALAKANE MARIA JASE	1ST RESPONDENT
CHIEF M. MAAMA	2ND RESPONDENT
OFFICER COMMANDING RLDF	3RD RESPONDENT
ATTORNEY - GENERAL	4TH RESPONDENT
LESOTHO NATIONAL INSURANCE	5TH RESPONDENT
METROPOLITAN LIFE	6TH RESPONDENT
LESOTHO BANK	7TH RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 27th day of October, 1994.

On the 22nd September, 1994, Applicant brought an urgent application *ex parte* and an Interim Court Order was made in the following terms:

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"1. That a rule nisi hereby issued returnable on the 26th September 1994 calling upon the Respondents to show cause, if any why;

(a) The first Respondent shall not be interdicted from holding herself out as the heir to the estate of the late Paseka Vincent Jase;

(b) The First Respondent shall not pay over to the deputy Sheriff all the money's paid out to her from the estate of the late Paseka Vincent Jase; as well as the latter's savings books;

(c) The Deputy Sheriff shall not be allowed by the 1st Respondent to make an inventory of all the property of the late Paseka Vincent Jase.

(d) the 1st Respondent shall not hand over all the Insurance contracts belonging to the late Paseka Jase and mentioned in paragraph 6 of the affidavit of Katile Jase.

(e) The 1st Respondent shall not account to this Honourable Court all the money's paid out to

her from the estate of the late Paseka Vincent Jase.

(f) The 1st Respondents shall not hand over a certain Motor Vehicle Registration AE 314 to the Messenger of this Court pending the outcome of this application.

(g) The 2nd Respondent shall not be interdicted from making any further letter introducing the 1st Respondent as the person entitled to the assets of the late Paseka Vincent Jase.

(h) The third and 4th Respondents should be ordered to disclose to this Honourable Court all the money's due to the estate of the late Paseka Jase through latter's employment.

(i) The third and 4th Respondents should not be interdicted from paying out the money mentioned in prayer "H" to the 1st Respondent.

(j) The 5th Respondent should not be ordered to disclose to this Honourable Court the amount

of money due to the estate of the late Paseka Vincent Jase shall through a Policy he had contracted with them and all the money, if any, paid out the 1st Respondent.

(k) The 6th Respondent shall not disclose the number of Policies contracted by late Paseka Vincent Jase as well as the names of the beneficiaries and the money's if any, paid out the 1st Respondent.

(l) The 6th Respondent shall not be interdicted from paying out to the 1st Respondent the proceeds from the policies mentioned in paragraph (k).

(m) The 7th Respondent should not disclose to this Honourable Court all the savings accounts, if any, held by the late Paseka Vincent Jase and to disclose the amounts, if any paid to the 1st Respondent.

(n) The 7th Respondent should not be interdicted from paying out any money's from the accounts

held by the late Paseka vincent Jase.

(o) directing that the forms of service provided for in the rule be dispensed with.

(p) Further or alternative relief.

(q) 1st and 2nd Respondents should pay the costs of this Application.

2. That prayers, 1 (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) (n) operate immediately as an interim Court Order."

This was followed by applications for committal, for contempt of Court and for rescission of judgment.

The application for committal for contempt was not pursued because of the attitude of the Court. On the 24th October, 1994 Rescission of judgment was granted and the parties were ordered to proceed with the merits.

This application is one of the results of the death of Paseka Vincent Jase. It is common cause that First Applicant

Batebang Jase is the minor son and heir of the late Vincent Jase. Batebang Jase is four years seven months. It is also common cause that Second Applicant is the divorced wife of the late Paseka Vincent Jase and that custody of all the four minor children of the marriage including First Applicant was awarded to her. The mother of the late Paseka Vincent Jase is the first Respondent, of this there is no dispute.

The Second Respondent is Chief Maama Maama. The Third Respondent is the Officer Commanding Royal Lesotho Defence Force. The Fourth Respondent is the Attorney General. The Fifth Respondent is Lesotho National Insurance Company. The Sixth Respondent is Metropolitan Life and the Seventh Respondent is the Lesotho Bank.

What is really in issue is who is the heir and in whose custody should the deceased's estate be, now that the heir is a minor below five years of age. Other issues such as the maintenance of other children out of the deceased's estate also come into the matter. In terms of the divorce order the late Paseka Vincent Jase was maintaining the four minor children of the marriage at M100 per month per child.

To compound the matter, (as Mr. Ramodibedi argues) First

Respondent also claims to be the deceased's dependant although she seems to have taken control of all the deceased's estate.

This case involves conflict between Basotho custom and the "received" Roman-Dutch law as practised and applied by our courts. This is a grey area in which the principles of both laws conflict. To confound the confusion even Basotho custom is by no means consistent. It varies from case to case. Even though African society was male-dominated in matters of guardianship, there were no fixed and inflexible rules. The received Roman dutch law favours males over females in marriage just as Basotho custom does.

What compounds the problem further is that while husband and wife are alive the termination of their civil marriage is governed by the "received" Roman Dutch law. Over the years their way of life *stante matrimonio* has never been looked into and considered. Yet when they die their way of life comes into the spot-light in order to determine whether their deceased estates are to be governed by Basotho custom or the "received" Roman-Dutch law. Deceased estates of Africans in general are assumed to be governed by Basotho custom. The way of life is only considered if one of the potential litigants wishes the deceased's estate to be governed by the "received"

Roman Dutch law. In that even such a party will report the estate to the Master of the High Court. Only then will the Master apply the way of life test to determine which law will govern the estate. We are here faced with guardianship of deceased's children when custody has already been awarded to the mother (in accordance with the received Roman-Dutch law) at the time of divorce.

In *Bereng Griffith v 'Matsebo Seeiso Griffith* 1926 - 53 HCTLR 50, one of the points the Court had to decide was whether a woman by Basotho law and custom was "incompetent to be guardian of a child or to administer any estate; but that on the contrary she is herself under guardianship". Lansdown J. at page 55 said

> "A custom has, however, 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 child a minor, has become controller of and administrator of the affairs of her House, subject, it is true to the advice of the male head of the family..."

From what Lansdown J. said (over fifty years ago) it is clear that women had by 1943 acquired in Basotho traditional society the capacity to be guardian over their own children. Lansdown J. made the above remarks in general terms. He then said in

matters of chieftainship uncles are distrusted because they often seize the minor heir's inheritance for themselves. Because of that very reason the mother is usually appointed guardian and regent until the heir becomes of age.

In the case with which I am dealing, the grandmother of the heir has seized control of the deceased's estate for her sole benefit claiming she is one of the deceased's dependants. The mother of the heir who is the Second Applicant is left with the burden of maintaining the deceased's offspring. And the maintenance order against their late father is being disregarded. This is one case where all the suspicion that leads to the guardianship being awarded to the mother of the heir exists as a fact. The behaviour of the First Respondent has made the greed and selfishness of relatives of the minor heir a present danger rather than a matter of speculation.

This case differs from a majority of cases where the deceased leaves a minor son as heir because the mother of the heir has been divorced. Second Respondent is no more the deceased's widow because they divorced. Second Respondent is therefore no more a member of deceased's family.

This Court is the Upper Guardian of all minors.

According to Voet 27·2·1· it was the praetor or magistrate who decided where a minor ought to be brought up or stay. Voet 26·4·2 dealing with guardianship says:

> "But in a competition between mother and grandmother the cause of the mother is the stronger in guardianship for the reason that she is also preferred in intestacy."

In the case before me the mother has divorced the father therefore has no right of succession. Here we have the sole interests of the minor, not the right of succession. This Court has already made the mother the custodian parent of the heir as a minor because that was in the minor child's interests.

According to *Spiro Law of Parent and Child* 3rd Edition at page 4 originally the upper guardian of all minors was the *princeps* or ruler of a small city state. It could well be that such powers in Basotho custom were exercised by the chief acting with the advice of the chief's court. Today all these powers have been taken by the courts. The only difference between Roman Dutch law and Basotho customs is that a family matter used not to get to the chief before the family dealt with it. It is still one of the cherished principles of Basotho custom (especially in matters of succession) that the

dispute must first be handled by the family before it goes before the chief.

The problem I have in this case is that Chief Maama Maama, the Second Respondent, has appointed first Respondent as an heiress without the authority or the involvement of the family. Consequently annexure "D" that he wrote is invalid. In any event the heir is the first born son of the deceased according to Basotho law and custom. The family on this matter is bound by law and custom just as the Chief is. Therefore annexure "D" is an irregular document. A minor is involved here and this Court must protect him from despoliation by First and Second Respondent acting in concert. I therefore declare that the First Applicant Batebang Jase a minor is the heir. The Court in *Ramatekoa v Ramatekoa* C of A (CIV) No. 5 of 1980 (unreported) found it would be a waste of time to refer a matter to the family when it could decide the matter straight away. Schutz J.A (as he then was) put the matter as follows:

> "To my mind it is in the best interests of justice that the conclusion that the holding of a family council should not have to be regarded as an invariable precondition to the institution of action. One should conceive of situations where a family meeting would be pointless, for instance where the family has already clearly expressed a view, and one of the parties is determined to challenge that view..."

During divorce proceedings the Court awarded custody to Second Applicant. Second Applicant is now the sole surviving parent of Batebang the First Applicant. In that custody, Batebang has to remain, because Kheola J. (as he then was) in *Ntsane Mosuhli v Tseliso Selematsela* CIV/APN/14/90 (unreported) said:

> "It is very clear that before the Court can award custody of a minor child to a third party, special circumstances or good cause must be shown. It must be shown that the parent is not a fit and proper person to be awarded such custody."

The right of Applicant to custody is not in being questioned by the Respondent. Nevertheless custody of children is a portion of the father's powers of guardianship. The order awarding to the mother, custody of the minor heir, took away a major portion of the father's powers of guardianship leaving him with the power to administer the minor's property, business affairs and the power to give a guardian's consent where this is required by law. It was for this reason that Tindall J.A. in *Calitz v Calitz* 1939 AD 56 at page 63 said:

> "The exact effect of granting custody to the mother has never been decided as far as I am aware. Whether an order deprives the father of the management of the minors property need not now be decided; it certainly gives the mother sole control over the person of the minor."

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Historically the rights of the father to guardianship including custody of his children have always been superior to those of the mother. In modern times courts handle this part of family relations with sensitivity because children (who are human beings) are involved. It seems to me that Tindall J.A. in *Calitz v Calitz* at page 62 agreed with what de Villers C.J. said in summing up the powers of the father and mother in *Van Rooyen v Werner* (9 SC 425) where he said:

> "He is the natural guardian of his legitimate children... During his lifetime he alone is entitled to appoint tutors to take his place after his death during his children's minority. ... Coming next to the mother, her rights of control over the person and property of her legitimate children do not arise until the death of the father."

In the case before me the death of the father of First Applicant and the other children has occurred. Should not the Second Applicant be in full control of the persons of her children and their property? It was for this reason that it was held in *Bloem v Vucinovich* 1946 AD 501 that the father who had on divorce been awarded custody could not exclude the mother from personal control of the minor by will in appointing a guardian for the minor child.

I have already criticised First Respondent's utter

disregard of the minor children of her deceased son. I note with concern that all she was concerned with in having annexure "D" made and taking M4558.95 compulsory savings belonging to the deceased's estate and M5000.000 from Metropolitan Life was First Respondent herself, her blind daughter Ntsoaki Jase and four minor children by First Respondent's unmarried daughters. I was extremely uncomfortable with the way First Respondent pretended she was claiming the moneys as a dependant when annexure "D" clearly shows her primary claim was as an heiress. The letter in fact puts First Respondent as heiress/dependant/minor in need of upbringing. This letter annexure "D" is a form in which First and Second Respondents were supposed to delete what was inapplicable. This they did not do. The feeling I was left with was that First Respondent did not have the interests of the children of the deceased at heart although she is their grandmother.

I have noted that First Respondent has other sons such as Makhele Jase who was also like the deceased in the Royal Lesotho Defence Force. Makhele Jase from his affidavit struck me as fair-minded. I doubt if he could neglect his mother, the Second Respondent, as we are made to believe. This is not a matter I am obliged to investigate. I cannot ignore what

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he said against his own mother the First Respondent concerning her treatment of First applicant and other children of deceased. He informs this Court that these children were refused their own father's blankets and spoken to very rudely at the time their father had just died. When this is taken together with the First Respondent's own affidavit that shows a complete disregard of deceased's children, the Court has to feel very worried because deceased's children have such a grandmother.

Miss Ramafole referred me to Wille's *Principles of South African Law* (7th Edition) by Gibson at page 77 dealing with the rights of the minor children to maintenance which says:

> "Upon the death of the father his estate is liable for the maintenance of the minor. This liability constitutes a debt which is preferent to inheritances and legacies..."

In *Glazer NO v Glazer* 1962 (2) SA 548 Ludorf J. says this statement of the law (if we follow old authorities) may be incorrect. The deceased's liability to pay maintenance ought to come to an end. When we take into account the fact that deceased's children used to have *legitim* out of the deceased's estate, this view should be correct. The decision *Carelse v Estate de Vries* (1906) 23 SC 532 was based on a misinterpre-

tation of Groenewegen. Nevertheless because this case was followed several times Ludorf J. considers it binding. Steyn C.J. in *Glazer v Glazer* 1963 (4) SA 694 at page 707A agrees there was an error (as Professor Beinart has said *Acta Juridica* 1958 page 92) but concludes:

> "I shall assume that this error notwithstanding, these decisions have passed into settled laws."

For Lesotho since our cut-off point from Cape Law was May 1884, I am not sure we are obliged to follow this error. This case is not one of maintenance of a minor out of the deceased's estate. It is one of guardianship, control and administration of a minor heir's property forming part of the deceased estate.

Guardianship here seems to be *de facto* in the hands of the Second Applicant as the mother of the minor child Batebang who is the First Applicant. In fact the mother is suing on behalf of her minor son. This is an area in which the rights of guardianship of the mother of the heir both under Basotho custom and the received Roman Dutch law are undefined and unclarified. I feel the words of Price J. in *Myers v Leviton* 1949 (1) SA 203 at 209 are appropriate i.e.; —

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> "I should be very sorry to see the Court tie its hands by laying down rigid and artificial rules, which would certainly in many cases make it impossible to make just, equitable and rational orders, having regard to the infinite variety of circumstances that must arise from time to time. The law should as little be rigid as it should be vague. When too close a definition of the application of principles is attempted, the only effect is to produce a kind of rigidity and formalism that is characteristic of primitive law."

The marital relations of the deceased and his divorced wife, the Second Applicant, have been governed by the received law. Both Applicants and the First Respondent have assumed and prepared their papers on the assumption that Basotho customary law applies Succession is governed by the way of life test in terms of *Section 3(b)* of *The Administration of Estates Proclamation* of 1935. See *Thomas C. Mokorosi v V.H.T. Mokorosi & 4 Ors.* 1970 LLR 1. The estate has not been reported to the Master of the High Court nor is there an intention to do so. The estate itself is a small one by modern standards although it is worth tens of thousands of Maloti.

Schreiner J.A. in *M.B. Khatala v F.B. Khatala* 1963 - 66 HCTLR 97 at 100 BC said:

> "In the absence of express provision to that effect there is no good reason for holding that all marriages under the provisions of the Marriage Proclamation carry the conse-

> quences of a marriage governed by Roman Dutch law... It is enough to say that where, as Basotho living, 'according to Basotho custom'... their intestate succession rights after the death of one of them are governed by Basotho Law."

Having chosen the law that governs the deceased's estate we can now deal with the question of guardianship. The remarks of Lansdown J. about relatives of deceased swallowing the heirs patrimony apply with full force. The grandmother here wants everything for herself and (so she tells us) her blind daughter and other grandchildren of hers. The deceased's children (whose father's estate is being seized) do not even cross the mind of First Respondent. In Basotho custom it is because of such behaviour that the mother of the heir is often considered as the best person to be the heir's guardian. As Lansdown J. has observed in *Bereng Griffith v Mantsebo Seeiso Griffith* 1926 - 53 HCTLR 50 at page 54:

> "A custom has however, grown up and is now, I find, frequently, though not universally, practised under which a wife, on the death of her husband leaving his son a minor, has become controller and administrator of the affairs of her house, subject it is true, to the influence and advice of the male head of the family, namely the father-in-law if he is still alive, or, if not his senior surviving adult son ..."

It seems one of the natural advisers with whose advice Second Applicant is already acting according to Basotho custom is

Makhele Jase. He is the uncle of the heir and so far Second Applicant has been conforming with Basotho law and custom. I therefore hold that Second applicant as the mother is the appropriate person in the circumstances of the case to be the guardian and controller of the deceased's estate on behalf of her son the First Applicant.

First Respondent has no right to have taken the property which forms part of the late Paseka Vincent Jase's estate. The divorce of her late son does not entitle her to seize the inheritance of the children of her late son. With people like First Respondent I feel it would be unsafe (and therefore not in the minor child's interest) to refer the selection of the guardian of First applicant to the Jase family according to Basotho custom. Following the decision of *Ramatekoa v Ramatekoa* C of A (CIV) No.5 of 1980 (unreported). I consider the Court not to be bound to refer the matter to the Jase family unless this would serve a good purpose. This Court has a discretion in the matter.

Schutz J.A's remarks in that case meet the facts of this situation:

"A further consideration that weighs with me is that it is

> most unlikely, in the light of the protracted litigation that a family council will serve any useful purpose."

This of course does not mean the uncles of the heir should abdicate their responsibility in assisting the mother of the heir to discharge her duties as guardian. The special facts of the situation have made an urgent determination of this aspect paramount in the interests of the minor.

I therefore confirm prayers 1(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n) and (0) of the *Rule Nisi*.

Applicants have asked me specifically not to make an order as to costs. Therefore I am not making an order as to costs.

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W.C.M. MAQUTU
JUDGE

For Applicants : Miss M. Ramafole
For Respondents : Mr. M.M. Ramodibedi