

IN THE HIGH COURT OF LESOTHO

In the matter between:

MAMPHO SENATSI (born Jase)

Applicant

and

LECHAENA SENATSI

1st Respondent

MATUMELO SENATSI

2nd Respondent

THABISO SENATSI

3rd Respondent

RALISAMANE SENATSI

4th Respondent

MALETSABISA LEROTHOLI

5th Respondent

PLANT AND VEHICLE POOL SERVICE

6th Respondent

MINISTRY OF WORKS

7th Respondent

ATTORNEY GENERAL

8th Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola  
on the 22nd day of March, 1994.

This is an application for an order in the following terms:

1. That a Rule Nisi be issued returnable on a date and time to be determined by the above Honourable Court calling upon the Respondents to show cause why:-
  - (a) The first, second, third and fifth respondents shall not be directed *omnia ante* to restore applicant's marital home and property to applicant.
  - (b) Sixth and Seventh Respondents shall not be restrained from handing over to Second Respondent (the first wife of the late Thabo

Ernest Senatsi) the deceased's salary and other monies that are in Sixth Respondent's possession as the Applicant is the wife that Deceased registered with Sixth Respondent.

(c) Sixth and Seventh Respondents shall not be directed to pay the terminal benefits and monies belonging to the late Thabo Ernest Senatsi to the Second Respondent only if the Second Respondent obtained an order authorising them to do so from a Court of competent jurisdiction.

(d) Respondents shall not pay costs.

2. That prayers 1 (a) and (b) operate as an interim interdict.

In her founding affidavit the applicant deposes that she is the wife of the late Thabo Ernest Senatsi who died on the 15th day of January, 1993. The second respondent is the first wife of the late Thabo Ernest Senatsi (deceased). The second respondent lived in the Republic of South Africa because she had deserted the deceased for a period of twenty three years. She came to Lesotho on the 22nd January, 1993 to attend the funeral of her husband. After the death of her husband the applicant handed to the respondent i.e. 1st to 5th respondents a letter dated the 4th August, 1992 in which the deceased had written to the members of his family (See Annexure "A" to the founding affidavit)>

In that letter the deceased requested that if he died his

first wife and her son Tumelo should be treated as ordinary people and not as his relatives if they decided to attend his funeral. He requested that if he died before he built his own house his body must be kept in his parent's house in which he lived with the applicant. When Annexure "A" was shown to them the respondents (1st to 5th) rejected it as being a forgery. They said that it was not written and signed by the deceased.

The applicant further deposes that the fifth respondent ordered that all the deceased's clothing be taken out of the applicant's residence which is the deceased's parents' home. The respondents complied with the fifth respondent's instructions and took out the deceased's clothing from his parents' home and conveyed them to the house where he lived with the second respondent.

On the 24th January, 1993 the respondents (1st to 4th) expelled her from her marital home when she said that she would not allow her house, in which the deceased wanted his body to lie before burial, to be used as a kitchen. She fled to her maiden home. The respondents cleared the house of all furniture including her clothing and personal effects and put them in the houses of the neighbours. She alleges that she was in peaceful possession of her marital home when the respondents took it from her by force.

The applicant avers that at a meeting held in the offices of the District Administrator between herself and the respondents, the fifth respondent told the District Administrator that she was not the wife of the deceased. The rest of the respondents agreed with the fifth respondent that she was not married to the deceased. After much wrangling the body of the deceased was released from the mortuary. It was put in the house of the second respondent. On the 25th January, 1993 the fifth respondent introduced the second respondent as the heiress entitled to receive the deceased's money from the sixth respondent. In the staff records and particulars in the custody of the sixth respondent the deceased had put the name of the applicant as his wife entitled to receive his dependant's benefits (See Annexure "B" to the founding affidavit). The applicant and the deceased have a minor child Mpho, a girl of three years of age whom she ought to bring up.

In the answering affidavits the respondents allege that the applicant was not married to the deceased. She is therefore not entitled to any relief based on her relationship with the deceased because there was no lawful marriage between them. The house in which they lived belonged to the deceased's late parents. She had the right to stay in that house. The respondents admit that the personal clothes of the deceased were removed from that house and taken to deceased's marital home as

is customary the clothes of the deceased are put next to his coffin during virgil.

The respondents deny that the applicant was expelled from the house in which she lived with the deceased. They allege that as a guest of the deceased she was never in peaceful possession of the house. It was the deceased who was in peaceful possession of that house.

The requisites of a spoliation order are:

- (a) that the applicant was in possession of the property; and
- (b) that the respondents deprived him of possession forcibly or wrongfully against his consent.

(See *Nino Bonine v. De Lange* 1906 T.S. 120).

It is trite law that in spoliation proceedings the Court is not concerned with the lawfulness of the applicant's possession. The applicant must show not that he was entitled to be in possession, but that he was in *de facto* possession at the time of being despoiled (See *Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa*, 8th edition by Erasmus, at page 97 and the cases quoted there).

The respondents are wrong to believe that because the applicant was not lawfully married to the deceased (according to their version) she had no right to live in that house after the death of the deceased. They actually say that it was the deceased who was in possession of the house. It is common cause that the deceased and the applicant lived in that house as man and wife. They have a child born of that association even if it was not a lawful marriage according to the version of the respondents.

The correct state of affairs is that when the deceased died the applicant remained in peaceful possession of the house and the property in it. The question of whether a lawful marriage existed between the applicant and the deceased is irrelevant in the present spoliation proceedings. She has proved that she was in de facto possession of the house and the property therein when she was allegedly expelled by the respondents.

The respondents have denied that they expelled the applicant from the house she occupied with the deceased. In her replying affidavit the applicant has not again addressed the issue of expulsion. I am of the view that this is the most important issue in regard to prayer 1 (a) of the Notice of Motion. The respondents version is that the applicant left the house on her own free will. There is therefore a serious dispute of fact

which cannot be resolved on paper. The applicant should have realized when launching her application that a serious dispute of fact was bound to develop. Or at least when all the affidavits were filed she realized that there was a serious dispute of fact but she insisted on seeking a final order on the papers as they stand. I think this is a proper case where the application should be dismissed.

The plaintiff claims the terminal benefits of the deceased on the ground that the deceased appointed her as his wife entitled to receive his dependants benefits. She relies on Annexure "B" which is described as "Staff Personal Record and Particulars. It will be noticed that in paragraph 6 the name of wife of employee (in full) is required. The deceased supplied the name of the applicant as his wife. In paragraph 8 the father's (guardians) name (in full) is required. The deceased supplied the name of Arone Senatsi. In paragraph 10 the name of employee's next-of-kin is required. The applicant supplied the name of the applicant.

It seems to me that Annexure "B" cannot be described as a document appointing a particular person as a death beneficiary. In the famous case of Ramahata v. Ramahata, C. of A (CIV) No.8 of 1986 the appellant had been formally appointed as a death beneficiary. The words "death beneficiary" were there on the

form used by TEBA for that purpose. The insurance policies specifically provide for the appointment of a death beneficiary. As I have said above the Annexure "B" on which the applicant relies is not a form used to appoint a death beneficiary and she was not at all appointed as such. The deceased decided to supply her name as his wife and next-of-kin. He failed to mention that he was a polygamous man.

I am of the view that the applicant has failed to prove that she is the person entitled to receive the terminal benefits of the deceased. What should happen is that the deceased terminal benefits must go to the deceased's estate and must be shared amongst his heirs according to law.

In the result the rule is discharged with costs.

  
J.G. KHEOLA  
JUDGE

22nd March, 1994.

For Applicant - Mrs Kotelo  
For Respondents - Mr. Mohapi.