CIV\APN\314\93

IN THE HIGH COURT OF LESOTHO

In the Application of :

EDNA 'MALESOLI LESOLI	1st Applicant
MOTLATSI LESOLI	2nd Applicant

v

ELIOT LESOLI	1st Respondent
LUARA 'MATLALANE LESOLI	2nd Respondent
THINYANE LESOLI	3rd Respondent
PULENG BOCHELI	4th Respondent
'MAPHOKA LESOLI	5th Respondent
TLALANE LESOLI	6th Respondent
MASTER OF THE HIGH COURT	7th Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 25th day of April, 1994

Following an ex-parte application moved on 23rd July 1993 the two applicants who are mother and son; the mother being the daughter-in-law of the Testator (the late Alfred Molefi Lesoli) who was predeceased by his only male off-spring Lemphane Lesoli leaving his widow and orphan son the 1st and 2nd applicants respectively obtained an interim order or interdict before Molai J on 26th July 1993.

In terms of the interim order it was ruled that :

1. Periods of notice required by the rules on grounds of urgency be dispensed with;

2. A Rule Nisi be issued returnable on 30th August 1993 calling upon the respondents to show cause if any why -

(a) The purported last will of Alfred Molefi Lesoli should not be declared invalid for being irregular on the face of it and contradictory in its contents.

(b) The first respondent should not be restrained forthwith from carrying out the testator's instructions under the purported last will of Alfred Molefi Lesoli pending determination of this application.

(c) The seventh respondent should not be directed to withhold the letters of administration, if any, of the first respondent, pending determination of this application.

(d) Directing the Master of the High Court to appoint a provisional administrator of the deceased Alfred Molefi Lesoli's Estate wherever it may be situated pending determination of this application.

(e) Directing that this application be served upon the 4th and 6th respondents in the normal way and that the 3rd and 5th Respondents be served by registered mail provided a proper address of service is obtained.

(f) Directing that these papers as well as the interim order be served upon the testators Attorneys, Messrs T. HLAOLI & CO., Nkhatho Centre, Aerodrome Road, Maseru for their information.

(g) Directing the first respondent or any of the beneficiaries under the said purported last will, being the second, third, fourth, fifth and sixth respondents to surrender to the bequests have already been given to them by the first respondent, for

proper administration in terms of the existing law.

(h) Directing the first and seventh respondents to recognise the first will of Alfred Molefi Lesoli dated 22nd August 1988, and give effect to it.

(i) Directing that the costs of this application be paid out of the deceased Alfred Molefi Lesoli's Estate in due course.

(j) Granting applicants further and\or alternative relief.

3. Prayers 1, 1(b) (c) (e) as amended and (f) as amended to operate with immediate effect as interim interdicts pending the determination of this application.

Yesterday after perusing the papers and hearing arguments this Court discharged the interim order or interdict with costs and stated that reasons would follow.

These now are the reasons.

It is common cause that the Testator was born in 1907 and died on 21-4-1993 aged 85.

There are before Court two Wills namely Annexture ML1 signed and executed at Matatiele by the Testator before two witnesses on 22nd August 1988 and Annexture ML2 signed and executed in the presence of witnesses namely Khathatso Mabulu and Clark Poopa on

unspecified date and place but registered on 19-3-1991 and filed on that day with the Registrar General under number 12\91.

The 1st applicant in an endeavour to show that the second Will cannot be said to be valid sets out in paragraph 13 of her founding affidavit that :

> "(a) On the face of it it is not stated when and where the Testator executed or wrote the second Will. All that is visible is an indication as to when and where this instrument was registered, that being 19th March, 1991 at the eighth respondent's offices.
>
> (b) Clause 2 of the said purported Will is clearly contradicted by, and is inconsistent with Clause 7, in that the two properties listed in Clause 2 are bequeathed to me and my son Motlatsi, while under Clause 7 the same two properties are bequeathed to me and my children. I have already stated that I have five children alive apart from Motlatsi who is mentioned in Clause 2. It is difficult to discern from the aforegoing the real intentions of the testator who alone could have resolved the issue and he been alive. It is further hard to understand how the Testator could have made such glaring contradictions if he made this Will in his sound and sober senses particularly because he purportedly executed this Will before a lawyer, one of whom acted as a witness thereon.
>
> (c) The signatures of the Testator on every page are not only different,

> but they are not the Testator's signatures as I know his signature very well. I annex a letter he once wrote to me for the Court's examination of the signature thereon, and it is marked 'ML3'."

The 2nd respondent who is the Testator's wife responds to the above averments as follows : See Paragraph 6 Ad para 13

> "First applicant is ill-advised herein and I reply as follows to the various allegations.
>
> (a) There is no need to state when and where the will is made as that has nothing to do with the validity thereof.
>
> (b) Whilst I accept that there is an apparent conflict in the two clauses under reference, it is clear that the intention of the testator was to bequeath these two properties to applicants. The Will was drawn by the deceased's attorneys. It is obvious that it was a mistake common to both. It would be absurd to suggest that the attorneys as well were not in their sound and sober senses when they made this mistake. I am advised that this apparent conflict would not invalidate the Will.
>
> (c) The deceased was my husband. I am familiar with his hand-writing and signature. The signatures appearing on each and every page of the second Will are in his own hand-writing. First applicant is not honest to deny that such signatures are not(sic) those of the deceased. I admit "ML3" is in the deceased's own hand-writing. CIV\APN\204\90 clearly shows what applicants' real intentions are. They all along have been after material things. I am advised that applicants ought to have disclosed this fact to this

> Honourable Court that even during his life time they were after the deceased's property".

From 2nd respondent's averments it would seem sufficiently established that although in 1991 the testator was ill he nonetheless was in full possession of his mental faculties and suffered from no ill effects that could be said to have affected his sobriety of mind and soundness of his senses. In this regard she relies on a Judgment of the High Court wherein the 1st applicant tried in vain to persuade that Court in CIV\APN\204\90 that because the late Alfred Molefi Lesoli was sick he was unable to run his own affairs. Judgment was delivered on 15-11-91.

The 2nd respondent holds in question the applicants' failure to disclose this fact to this Court. She further states that she lived with the deceased and was in no doubt that despite his illness the deceased was in full and sober senses in 1991. She stresses that the second Will which is effectively the last Will was registered in March 1991.

It is the Court's opinion that in this regard the second Will cancelled any previous Wills or Testaments. The Court is of the view that the Testator was aware of any of previous Wills hence his declaration in ML2 Clause 1 revoking, annulling and cancelling any Wills, codicils and other acts of a testamentary nature "heretofore". Taken along with the fact that the Testator

declared this to be his last Will and the fact that he declared that he was in his sound and sober senses when he executed this Will in the presence of witnesses who are not charged with any ill-motive or selfish interest in the Will it cannot hold that there is such defect in the Will as to warrant declaration of its invalidity.

The guiding principle in matters of this nature is to be found in the Law of Succession in South Africa by Corbett et al where in their invaluable comments at page 81 of the 1st Edition of their 1980 works they set out that onus lies with him who wants to impugn a Will. The learned authors go further to state that presumption is in favour of the validity of the Will.

Mr. Nathane's submission that on the face of it the 2nd Will is regular seems therefore vindicated particularly because the contrary has not been proved. Thus there can be nothing untoward in taking this 2nd Will as regular.

The applicants' query as to the validity of this 2nd Will seems to be based on the allegation that signatures appearing on the two Wills seem to be different. In my humble view this is a matter that could be resolved through the assistance of expert evidence. The Court cannot be expected to decide by merely looking at the respective signatures that the signatures were not made by one and the same person. The onus for this falls on the

applicants who have not discharged it.

Even assuming that these signatures are different the onus still rests on the applicants to prove that they were not made by one person. No such evidence has been advanced in these proceedings. On the contrary there is evidence of witnesses who witnessed the signing of the 2nd Will by the Testator. Regard being had to the Testator's approximate age in 1991 when he signed the 2nd Will a possibility cannot be excluded that his hand might not have been as steady as it could have been several years before when he signed the 1st Will. Such possibility cannot serve as a ground that he did not append his signature on the 2nd Will.

An averment buttressed by a strong submission by Mr. Mafantiri the applicants' counsel is to the effect that if indeed the Testator signed the 2nd Will in 1991 he couldn't have been in his sound and sober senses because his mind was affected by illness and old age. His wife denies this. Furthermore there doesn't seem to be any evidence that as at the time the Testator appended his signature to the 2nd Will his mental faculties were affected by such illness and old age to the extent that he was not in his sound and sober senses. It would therefore be a very dangerous principle to equate old age to loss of memory.

At paragraph 14.2 the 1st applicant vehemently avers that the Testator suffered from temporary loss of mind. It is however

incumbent upon her to say that at the material time the Testator was suffering from such loss of memory as she asserts. None is at hand though.

In an attempt to give substance to the allegations that the Testator was not in his full and sound senses the applicants have attached Annextures and rely particularly on Annexture ML3. It is argued on their behalf that because ML3 is incomprehensible this serves to indicate the Testator's state of mind. In response to this Mr. Nathane argued that without any knowledge concerning the Testator's standard of education it would be idle to speculate on the style of the Testator's expression of his thoughts on paper when no standard can be relied upon to support the view that a man of his calibre is not to be expected to express himself as the Testator has done. It was further submitted that the Court has not been supplied with samples of his written materials prior to ML3 in 1990. Thus ML3 and ML4 cannot furnish proof that the Testator was not in his sound and sober senses.

The applicants further raised a point that the 2nd Will does not show where and when it was made and thus there is even a possibility that it was made before the 1st Will. In this connection I think their argument is self-defeating because they cannot advance such an argument without acknowledging that the signatures in that Will, different as they may appear from those in the one which they say is valid, were nonetheless appended by

the Testator himself. Thus it would be absurd to say if those signatures were effected before the Will they rely on were by the Testator then they should necessarily belong to someone else if they were effected during 1991 or any time after 22nd August 1988 which is the date when the 1st Will was signed.

Although it would make things easier if a Will reflected where and when executed the requirements for the validity of a Will are set out at 37 and 38 of the works referred to earlier as

(1) The Will should be in writing.

(2) It should be signed at the foot or end thereof by the Testator or by some other person in his presence or by his direction.

(3) The Testator's signature must be made or acknowledged by him in the presence of two or more persons present at the same time.

(4) Witnesses must attend and sign the Will in the presence of the Testator and may do so by appending their marks.

It would seem therefore that the ground advanced by the applicants cannot hold water for a moment in the light of the statement of law set out by the learned authors.

The applicants further averred and to that extent enjoy the support of their Counsel's submission that the 2nd Will is incapable of enforcement because of inconsistencies in Clauses 2 and 7.

Clause 2(a) and (c) bequeath to the two applicants jointly "trading store situated at Qhoali Ha Setsena Quthing and a truck No. H 0288"

Yet Clause 7 allots the same items to Edna 'Malesoli Lesoli and her children" We are told that besides the 2nd applicant Edna has five more children.

It would seem therefore the two applicants are not excluded from sharing with the 5 children the items of property reflected in Clause 7 namely Qhoali Store and the truck H 0288.

To this extent Clause 7(a) and (b) is a qualification on Clause 2. Thus my interpretation of this state of affairs is that Clauses 2 and 7 in so far as the items of property in question therein are the same, are not mutually destructive. A wholesome construction to be put to these clauses is that provisions of Clause 7 because they come after those of Clause 2, should be regarded as paramount should there be any query that there is some conflict between Clauses 2 and 7. However I see none when consideration is had of the fact that it seems the clear intention of the Testator was that items (a) and (c) under Clause 2 should be shared by applicants with all the children while the rest of other items in that clause are to be shared exclusively between the applicants.

Thus although at first glance there would seem to be some inconsistencies in the particular items pointed out in the respective clauses the apparent inconsistency is not so fatal as to flaw the entire Will. Courts should so interpret Wills as to give effect to them and not to give to them any destructive interpretation.

Finally the applicants couldn't seriously have approached this Court with an application of this nature based on Motion proceedings without foreseeing that there would arise disputes of fact which in fact arose from the word go.

For these reasons the application was discharged with costs.

J U D G E

25th April, 1994

For Applicants : Mr. Mafantiri

For Respondents: Mr. Nathane