

IN THE HIGH COURT OF LESOTHO

In the Application of :

QOKOLO ISRAEL TSHABALIRA RAKOTO

Applicant

v

'MARELEBOHILE KATIBA
LESOTHO REPRESENTATIVE OF TEBA LTD

1st Respondent
2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla on the
26th day of April, 1994

The Applicant Israel Rakoto obtained a rule nisi against 'Marelebohile Katiba and Lesotho Representative of Teba Ltd first and second respondents respectively, wherein it was ordered that the application be heard on an urgent basis and that the Rules of Court as to periods of notice be dispensed with - further that such order should call upon the respondents to appear on 22nd June, 1990 to say why an order in the following terms shall not be granted :

- (a) declaring that the applicant is the rightful heir of the late Ben Motseare Rakoto (alias Katiba) or alternatively, the lawful guardian of his minor son Relebohile aged 9 years, and that as such he is entitled to inherit or, alternatively, to administer the estate of the said late Ben Motseare Rakoto (alias Katiba).
- (b) Declaring that the first respondent is not a fit and proper person to have custody of the

minor children of the late Ben Motseare Rakoto (alias Katiba) and ordering her to deliver the said children, Relebohile aged 9 years and Mantoa aged 8 years to the custody of the applicant.

- (c) (i) Ordering the first respondent to account to the applicant for all the assets of the late Ben Motseare Rakoto (alias Katiba) in her possession or under her control and to deliver all such assets to the applicant.
- (ii) Interdicting and/or restraining the first respondent from disposing of the said assets of the late Ben Motseare Rakoto (alias Katiba) in any way to any person without the written consent of the applicant pending the outcome of this Application.
- (d) Interdicting and/or restraining the second respondent from delivering any monies or other assets belonging to the estate of the late Ben Motseare Rakoto (alias Katiba) to the first respondent or to any other person not authorised in writing by the applicant pending the final end and determination of the Application.
- (e) Ordering the first respondent to pay costs of this Application if she opposes it.
- (f) Granting the applicant such further and/or alternative relief as the above Honourable Court may deem fit.

The Court, on perusal of the papers filed albeit pretty haphazardly, was able to glean even from the heads of argument kindly submitted by respective counsel today that the applicant had a wife and during the subsistence of his marriage with that wife a son was born namely the late Motseare.

But before the divorce proceedings between applicant and his wife could be finalised, the wife went and lived with the Katiba family and in the process the son who was a minor at the time adopted the name Katiba. Of course the divorce between his parents was finally granted and then he grew up and eventually got employment with the main branch through its Lesotho Representative of Teba the second respondent which is a recruiting agent. Thus the late Ben Motseare landed himself a job in the mines.

It is stated that he time and again visited his father and the father's family namely the Rakoto's. But it was never quite clear upto what stage the Rakoto family felt that the son should be kept in no doubt what family he belonged to.

As a result of that in terms of Para 7 of the Founding Affidavit, a family meeting is said to have been held wherein the son was to be informed that in fact he doesn't properly belong to the Katiba family but to the Rakoto one. Indeed from what argument one has gathered during the submissions by counsel it looks like the son went along with this suggestion and indeed it appears that in terms of annexure "D" attached to CIV\APN\92\90 which has slight bearing on the present proceedings the son wrote a letter to his father and used the name Ben Rakoto in signing that letter as far back as July, 1989.

But amazingly enough three or four (definitely less than four)

months after he had made his father believe that the message had properly sunk wherein he was told what his surname was we find that on 20th September 1989 he signed a contract between himself and TEBA wherein he stipulated that should he die, the benefits accruing in terms of this contract from his service with TEBA should be bestowed on his wife Marelebohile Katiba. This appears on Annexure "L" in which he signed himself Katiba in the process.

So from here one realises that the deceased only made believe that he had changed his surname as advised by the resolution of the Sekoto family into Rakoto while in fact he stuck onto the surname which his mother had persuaded him to adopt or made him think it proper that he should survive under. This is the same name he used during his life time and during the subsistence of his marriage with his wife whom he has now left as a widow. This is the name he was using before getting married to the first respondent. But throughout all this period he had pretended to the Rakoto family that he had abandoned it in favour of the Rakoto name.

Then in this posture of events one asks oneself in the light of a contract filed signed and - on the face of it - observed to be valid, whether in fact the applicant has got any title whatsoever to sue or institute proceedings as he has done against the respondents especially the first respondent for the relief that has been set out in the Notice of Motion and summarised earlier in the terms set out in the Rule Nisi that was granted.

In the first place the circular issued by the second respondent and to which the deceased son Motseare was party in the sense that this affected his terms of employment shows that the benefits arising out of this contract are not an asset in the deceased estate of any person. So then, clearly this circular circumscribes (and there is a circumscription imposed on all employees or people who contract with TEBA) as to the full impact extent and meaning of the type of benefits which arise from their contract of employment with TEBA. The benefits arising do not constitute any assets, and cannot become an asset in the deceased estate. So in that event clearly it seems that the applicant would not be entitled to claim anything from this "stipulatio alteri" under the guise that he is in charge of the deceased estate.

The deceased estate is excluded from terms circumscribed by this circular which applies to employees of TEBA to dispose as they like with benefits accruing from their employment with TEBA. In that circular (again that is circular No.12 of 1989) at page 7 clause 3A, a beneficiary is defined and is said to mean a "person nominated as a beneficiary in respect of the benefit under this policy by their employee in writing received by their employer". So, in the case before me a beneficiary has been nominated in the name of second respondent 'Marelebohile Katiba. Strong argument was advanced relating to the fact that when the deceased stipulated as he did, the question of his intention should be looked into

namely that it was on the basis of the fact that the first respondent was his wife and therefore it was on this basis that there was this stipulation in her favour; and that if as she insists that she is Katiba and not Rakoto then she should be deprived of benefits accruing from this contract because she could only be seen to have legitimately received such benefits if by virtue of her marriage she remained a Rakoto. In brief the argument says if she rejects the Rakoto surname then she is not entitled to the benefits bestowed on her by her husband in terms of a contract with TEBA. But this argument is very difficult to follow in view of the fact that the husband himself as shown earlier maintained that he was Katiba and considered himself and his wife as the Katiba's - so if indeed the wife's point of reference was her late husband who survived under the name of Katiba, and if notwithstanding this - she rejected the name Katiba then she wouldn't benefit under this contract which was stipulated for the benefit of 'Marelebohile Katiba and no one else. To that extent I don't agree with the argument advanced counter to clear provisions of the contract and particulars reflected therein.

There is also Judgment of the Court of Appeal which clearly clarifies a position where an employee working for a company such as the second respondent chooses who should benefit in the event of his death; that such a person becomes a beneficiary by virtue of the stipulation and nothing else; and if there is satisfaction as to the identity of such a person it doesn't matter what the name

is and what the relationship she has with the deceased.

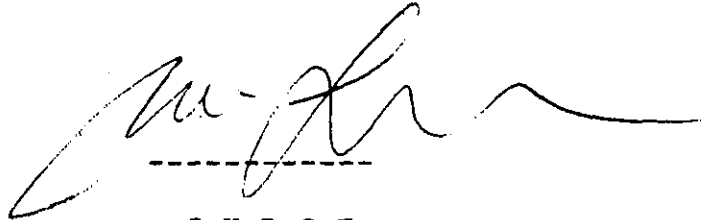
Once the identity has been established then the benefit should devolve on him or her. See C. of A (CIV) No.8 of 1986 Ramahata vs Ramahata (Unreported) at pp 4 and 5 where Schutz P, as he then was said -

"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 ; See e.g. Croce vs Croce 1940 TPD 251. The institution of stipulatio alteri by virtue of being part of the Roman Dutch Law, also forms part of the law of Lesotho. The contract is to the effect that she is entitled to accept the benefit of this contract, and the evidence is that she has in fact done so. Her rights therefore flow from contract and the M6 000 has nothing to do with the deceased estate. For these reasons the appeal succeeded".

In like manner the fact that the 1st respondent was married to the deceased and might have been awarded the benefit by reason of that fact does not affect the position in law as ably explained above by Schutz P, as he then was.

Having said this much then, there is no doubt that it would be wrong to confirm this Rule. In the circumstances the Rule is discharged with costs and all the prayers dismissed except, of course the one which was granted at interim stage thus treating

this application on basis of urgency and dispensing with the requirements of the Rules of Court as to periods of notice.

A handwritten signature in black ink, appearing to be 'M. Tsotsi', written over a horizontal dashed line.

J U D G E

26th April, 1994

For Applicant : Mr. Monyako

For Respondents: Mr. Tsotsi