C OF A (CIV) NO.14 OF 1994

IN THE LESOTHO COURT OF APPEAL

In the matter between:

DAVID THEKO KHOABANE MOTEANE **Appellant**

and

MOHLALEFI MOTEANE **1st Respondent**
MOSUOE MOTEANE **2nd Respondent**
LETEKETA MOTEANE **3rd Respondent**
MATJATO MOTEANE **4th Respondent**

HELD AT: MASERU

Coram:

STEYN P
BROWDE JA
KOTZE' JA

J U D G M E N T

BROWDE JA

On 18th March 1993 the Appellant brought an urgent application before the High Court and was granted a Rule Nisi returnable on the 26th of April 1993. The Rule called upon the Respondents to show cause why they should not be restrained from removing, administering, distributing or in any other manner dealing with movable or immovable assets of the late 'Makhoabane Meriam Moteane ("the deceased"). The Respondents were also called upon to show cause why the Appellant should not be

appointed as the sole heir to the estate of the deceased. The Rule was granted on an ex parte basis and operated as an interim interdict pending the determination of the application.

On 21st April 1993 the Respondents filed their opposing affidavits and the matter was subsequently set down for hearing on 29th October 1993. Before the hearing application was made and, although opposed, was granted for the filing of what was called a supplementary affidavit relating inter alia to the fact that the applicant (the present Appellant) was a British citizen. Ultimately judgment was delivered by Kheola CJ who discharged the rule with costs. It is against that order that the present appeal was brought.

One of the grounds of appeal which was raised in his heads of argument but which was not argued by Mr Alberts who appeared for the Appellant was that the learned judge **a quo** erred in allowing the Respondents to file the supplementary affidavit. It is clear that in a matter of this nature the Court hearing the matter has a discretion in relation to the filing of affidavits beyond those normally filed and that in the absence of a misdirection or in the absence of the discretion not having been judicially exercised the Court of Appeal will not substitute its discretion for that of the Court **a quo**. See **James Brown and Hamer (Pty) Ltd v. Simmons** 1963 (4) SA 656 (A) at 660. In his heads counsel submitted that the filing of the further affidavits was prejudicial to the Appellant but a perusal of the additional affidavit show that this is simply not the case. As I have said

it raised the question of the applicant's citizenship and as this was not decided by the learned Judge it is difficult to see what prejudice was suffered by the Appellant. Apart from that issue, the affidavit referred to points of law that would be raised at the hearing - and no possible prejudice can arise from that. Consequently I am of the view that this ground of appeal has no substance. I refer to it only because I think that it is relevant to the outcome of this appeal as will appear later in this judgment.

It is common cause that the Appellant is the eldest son of the deceased and the four Respondents are his siblings, the first Respondent being his brother and the others his half- brothers. It is also common cause that the Appellant has lived in the United Kingdom for many years, that he came to Lesotho for the funeral of his mother and that the family had a meeting on the 14th of March 1993. The Appellant states that the meeting was held in order to determine who was the sole heir in the deceased estate and that at the meeting he claimed that he was the sole heir of all the assets. This claim is based on the fact that the deceased died without leaving a will and it is the contention of the Appellant that according to the "law of custom" he was entitled to be declared the sole heir of his mother. The founding affidavit makes the allegation that the Appellant's uncle Abner Ratoanyana Moteane was at the meeting and agreed with him that he was the sole heir in the estate. In the opposing affidavits much of what the Appellant stated in his affidavit is denied it being alleged that contrary to the Appellant's

assertion he never communicated to the Respondents that the purpose of the meeting was to decide who was the sole heir to the estate and indeed it is denied that the Appellant made such claim at all. It is also denied that the uncle agreed with the Appellant that he was the sole heir since it is stated that it was never a point of discussion.

The effect of the prayers contained in the notice of motion is for the grant of a final interdict since the Appellant sought an order restraining the Respondents from dealing with the movable or immovable assets of the deceased and also sought a declaration that he was the sole heir. That being so the application could only be granted if those facts averred in the applicant's affidavits which were admitted by the Respondent, together with the facts alleged by the Respondent, justify such an order. See **Plascon-Evans Paints v. Van Riebeeck Paints** 1984 (3) SA 623 (A) at 634E-H. The disputes of fact which have been raised in the affidavits are not such as could be described as being **mala fide** nor can it be suggested that they do not raise a real or genuine dispute of fact. I therefore agree with the learned judge **a quo** that the version of the Respondents as to what occurred at the meeting should be taken as the one that is correct. That involves a finding that there was no real dispute nor a decision by the family as to how the estate should be administered.

Mr. Alberts in his argument before us conceded that the appeal could only succeed if we were to agree with his submission

that Section 11(1) of Part 1 of the Laws of Lerotholi is decisive in identifying the sole heir. This provision reads as follows:

> "The heir shall be the first male child of the first married wife, and if there is no male in the first house then the first born male child of the next wife married in succession shall be the heir."

In his judgment in the Court **a quo** Kheola CJ said

> "I do not know what the applicant means by saying he should be declared as the sole heir. If he means that he alone must inherit his late mother's property and exclude all his younger brothers, that cannot be done because the law is very clear that he must share with his brothers"

This conclusion was no doubt based on the wording of Section 14(3) of Part 1 of the Laws of Lerotholi which reads:-

> "If there is any male issue in any house other than the house from which the principal heir comes, the widow shall have the use of all property allocated to her house and at her death any remaining property shall devolve upon the eldest son of her house who must share such property with his junior brothers."

This concept of sharing appears to permeate the laws of inheritance in Lesotho and to accentuate the need for family debate in order to arrive at a mode of succession which will avoid friction within the family itself. I cite for further example Section 14(4) of Part 1 which reads

> "Any dispute amongst the deceased's family over property

> or property rights, shall be referred for arbitration to the brothers of the deceased and other persons whose right it is under Basotho Law and Custom to be consulted. If no agreement is arrived at by such persons or if either party wishes to contest their decision, the dispute shall be taken to the appropriate Court by the dissatisfied persons."

I need hardly point out that the Court is here regarded as a last resort and that family "arbitration" and efforts at reaching an amicable agreement are necessary steps before the Court is approached. In this case, apart from the meeting I have mentioned and at which, according to the Respondents, nothing occurred which could fall within the meaning of "arbitration", there appears to have been no effort to reach the objective of the legislation, namely the management of the assets in the estate for the benefit of the deceased's family.

Kheola CJ also referred, in connection with the Appellant's claim to be the sole heir, to Section 8(2) of the Land Act 1979 (as amended) which reads as follows:-

> "(2) Notwithstanding subsection (1), where an allottee of land dies, the interest of that allottee passes to,
>
> (a) where there is a widow - she is given the same rights in relation to the land as her deceased husband but in the case of re-marriage the land shall not form part of any community property and, where a widow re-marries, on the widow's death, title shall pass to the person referred to in paragraph (c);

(b) where there is no widow - a person designated by the deceased allottee;

(c) where paragraphs (a) and (b) do not apply - a person nominated as the heir of the deceased allottee by the surviving members of the deceased allottee's family.

In relation to the fixed property which is an asset in the estate, therefore, it seems clear that 2(c) above is of application and that once again it is not the Court but the family who must nominate the heir.

I am in respectful agreement with the learned Chief Justice that the appellant appears to have misconceived his remedy. If there is a dispute concerning what is to happen to the assets it is the family that must first do all it can to arrive at an amicable agreement in relation thereto. In this regard I would also refer to the Case of **Maseela vs Maseela** LLR 1971 - 1973 p 132 in which the High Court (de Villiers ACJ) held that where, following the death of the head of a family, there is a dispute amongst his dependants over property or property rights, S. 14(4) of Part 1 applies and the dispute must be referred for arbitration to the brothers of the deceased and such other persons whose right it is at customary law to be consulted before the matter can be taken to court.

Poulter in his work on "Family Law and Litigation in Basotho Society" refers to the appointment of the heir at pages 228 et seq. He points out that while Section 11(1) has the quality of "admirable succinctness" it nevertheless leaves a number of

questions "wide open". The learned author deals with various categories of property in the estate and shows how each has to be dealt with for the benefit of the deceased's family. Finally he states (p 255)

> "It is a cardinal feature of Sesotho law that the heir does not possess unfettered and absolute rights over the estate. He has far-reaching obligations towards other members of the family. The property he has inherited belongs not so much to him as to the family and he must administer it with the family's best interests in mind."

It seems to me, therefore, that the learned Chief Justice was, with respect, justifiably puzzled by what was meant by the Appellant in asking to be declared "the sole heir" as that concept seems to be unknown in the laws of this Kingdom.

In my view it follows from that that Section 11(1) cannot be the sole criterion governing the determination of the rights of the parties in matters of this nature. One has to have regard to the underlying ethos of negotiation and the obligations of the family to honour the principle of mutual co-operation and sharing which Basotho Family Law requires of them. In the light of that, the solution to the problem submitted by the Appellant is far too simplistic. On this ground, therefore, the appeal must fail.

I think I should finally refer to the question of the Appellant's citizenship in regard to which the learned Chief Justice pointed out that in terms of section 6(3) of the Land Act

1979 (as amended) the question whether a person is a citizen of Lesotho who is a Mosotho must be decided by the Minister. This followed from the submission made by Mrs Kikine on behalf of the present Respondents that the Appellant is disqualified from holding title in land in Lesotho in terms of section 6 of the Land Act since that section provides that only a person who is a citizen of Lesotho who is a Mosotho can hold title to land. The submission then followed that the Appellant had lost that right by taking British citizenship since, in terms of the Aliens Control Act of 1966, dual citizenship was not permitted. So whether or not the additional affidavit was properly received by the Court **a quo** this question is a matter of law and is fundamental to the Appellant's right to be declared the sole heir to the deceased's estate which includes fixed property. It would seem to be an exercise in futility to decide this matter on the other issues only to have the Minister decide, as he may well do, that the Appellant is not entitled to hold title to land in Lesotho.

For the above reasons I am of the view that the judgment of Kheola CJ cannot be faulted and that the appeal should be dismissed with costs.

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J. BROWDE
JUDGE OF APPEAL

I agree .....
J.H. STEYN
PRESIDENT

I agree .....
G.P. KOTZE'
JUDGE OF APPEAL

Delivered at Maseru on 5th day of February ~~January~~ 1997.