CIV/APN/497/97

IN THE HIGH COURT OF LESOTHO

In the matter between

THE EXECUTOR, ESTATE OF
The Late Pusetso Makotoane — **APPLICANT**

and

THE ATTORNEY-GENERAL — **1ST RESPONDENT**
THE DEPUTY-SHERIFF (Mr. Lemena) — **2ND RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi

on the 3rd day of March, 1998.

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

"1- Dispensing with the Rules of Court concerning notices and service of process herein on account of the urgency of this matter.

2- A Rule nisi issue returnable on a date and time determinable by the above Honourable Court calling upon Respondents to show cause, if any, why the following order shall not be made final:

a - Second Respondent be interdicted forthwith from pursuing service, execution, removal and sale in execution of any property in the estate of the late **PUSETSO MAKOTOANE,** pending the administration of the said estate by the executor thereof;

b - First Respondent be directed to lodge his claim against the estate of the late **PUSETSO MAKOTOANE,** if any, with the executor of the aforesaid estate.

c - *Respondents be interdicted from interfering in* any manner whatsoever with the due administration of the estate of the late **PUSETSO MAKOTOANE** and the executor thereof, except by due process of law;

d - Respondents be ordered to pay the costs hereof on an Attorney and Client scale.

e - Further and/or alternative relief

3 - Prayers 2 (a) & © operate with immediate effect as interim orders."

On the 22nd December, 1997 my Brother Mofolo J granted a Rule Nisi as prayed in terms of prayers 1, 2 (a) and (c).

After a few postponements the matter was finally argued before me on the

24th February, 1998. I should mention at the outset that Mr. Ntlhoki who appeared for the Applicant only confined himself to prayer 2 (a) and (c). As will be seen in the course of this judgment this was a wise move indeed in the circumstances of the case.

The story of the litigation in this matter revolves around the fact that (and this is common cause) on the 29th day of January 1996 the Government of Lesotho obtained judgment in the sum of M2,207,810.50 (two million, two hundred and seven thousand, eight hundred and ten Maloti and fifty Lisente) against the late Pusetso Makotoane who was the Applicant's husband. For the avoidance of doubt I should mention that the judgment was obtained during the lifetime of the said Pusetso Makotoane.

Although the Applicant has not told the Court the date on which her husband sadly passed away I am satisfied from the papers before me (again this is common cause) that on the 14th November 1996 the Applicant was granted letters of administration of the estate in question by the Master of the High Court pursuant to the Administration of Estates Proclamation No. 19 of 1935. Presumably, therefore, the Applicant's husband passed away between the 29th January 1996 when judgment was granted against him and the 14th November 1996 when the Applicant was granted letters of administration.

On the 28th February 1997 the First Respondent sued out a writ of execution against the deceased's estate in the aforesaid sum of M2,207,810.50. The Deputy Sheriff's charges in the matter as reflected on the writ itself apparently amounted to the sum of M110,448.55.

On the 10th December 1997 and pursuant to the writ in question the Deputy Sheriff (Second Respondent) duly took an inventory of certain items of movable property of the deceased's estate. Once more this is common cause.

Now in the light of the foregoing factors it is Applicant's contention, if I understand it correctly, that the First Respondent is precluded from pursuing and executing the writ in question by virtue of the fact that it was issued after she had already been appointed executrix of the estate. It is her contention that the First Respondent is obliged to obtain an order of the Court before he can execute the judgment in question.

This is perhaps an appropriate stage therefore to refer to Sections 44, 46 and 47 of the Administration of Estates Proclamation No. 19 of 1935 on which the Applicant so heavily relies for her stance in the matter. It proves convenient to reproduce them in full.

Section 44 provides as follows :

> "Every executor shall, as soon as letters of administration have been granted to him, make, subscribe and transmit to the Master, an inventory showing the value of all the property belonging to the estate; and if he comes to know thereafter of any property which is not contained in any inventory lodged by him with the Master he shall make, subscribe, and transmit to the Master an additional inventory showing the value thereof and shall find such further security as the Master may direct under Section thirty-nine of this Proclamation." (my underlining).

Sadly for the Applicant it is common cause that she has failed to comply with the provisions of this section ever since the 14th November 1996 when she was granted letters of administration to date. This is a delay of more than a whole year and I have no hesitation in holding that the delay was grossly unreasonable and contrary to the letter and spirit of the Administration of Estates Proclamation 19 of 1935 wherein time is of the essence in order to safeguard the interests of creditors. Undue delay in making the necessary inventory and administering the estate will no doubt often result in the dissipation of the estate itself to the prejudice of creditors. That must be discouraged at all costs.

Now, section 46 of the Administration of Estates Proclamation No. 19 of 1935 reads as follows:

> "Every executor shall, so soon as he has entered on the administration of the estate cause a notice to be published in the Gazette and in a newspaper circulating in the district in which the deceased ordinarily resided or if not resident in the Territory at the time of his death in a newspaper circulating in a district where the deceased owned property, calling upon all persons having claims against the deceased or his estate to lodge the same with that executor within such period from the date of the latest publication of the notice as is therein specified, not being less (save as in section sixty-six of this proclamation is provided) than thirty days or more than three months, as is deemed by the the executor proper in the particular circumstances of each case. All claims which would be capable of proof in case of the insolvency of the estate shall be deemed to be claims of creditors for the purposes of this Proclamation." (my underlining).

Once more the Applicant defaulted and failed to cause a timeous notice to be published in the Gazette and in a newspaper as stipulated in the section. It is common cause that the first publication in a newspaper was only made in the MoAfrica Newspaper on the 21st and 28th November 1997 which was, once more, more than a whole year after the Applicant had been granted letters of administration.

Regarding publication in the Gazette it is again common cause that such publication was only made on the 19th December 1997. The Applicant claims that she had no control or final say over the publishers and that the delay was not of her own making. The Court is not impressed. The Applicant has not told the Court what steps she took, if any, to cause the necessary publications to be made and if so when. In the circumstances I am left with the uncomfortable feeling that the Applicant was playing for time. At any rate I am satisfied that the delay in effecting the necessary publications was grossly unreasonable.

This leads me to section 47 of the Administration of Estates Proclamation No. 19 of 1935. That section provides as follows:

> "No person who has obtained the judgment of any Court against any deceased person in his lifetime or against his executor shall sue out or obtain any process in execution of that judgment before the expiration of the period notified in the Gazette in manner provided in section forty-six of this proclamation, and no person shall thereafter within six months after the grant of letters of administration obtain any process in execution of any such judgment without first obtaining an order of the Court." (my underlining).

In my view the underlined words in this section are very crucial and indeed decisive. What this then means is that before this section can avail the executor of an estate the requirements of Section 46 must first be fulfilled namely, the executor must cause a notice to be published in the Gazette and in a newspaper circulating in the district in which the deceased ordinarily resided or where he owned property as the case may be calling upon all persons having claims against the deceased or his estate to lodge such claims with the executor within the time specified in the publication (provided that such time shall not be less than thirty days or more than three months from the date of the publication).

Yet the facts in the instant case have shown beyond doubt, and again this is common cause, that on the 28th February 1997 when the First Respondent sued out a writ in the matter the Applicant had not yet complied with the provisions of Section 46 by causing a notice to be published in the Gazette and in a newspaper inviting creditors to come forward and lodge their claims with her. Accordingly I hold that there is nothing in Section 47 that prohibits a creditor from suing out a writ before the publication in question is made. It is only after such publication has been made that a creditor is obliged to await the expiration of the period notified in the Gazette. Conversely I hold that the granting of letters of administration alone is not sufficient to prohibit a creditor from suing out a writ in execution of judgment against the deceased or his executor.

I am fortified in the view that I take in this matter by the fact that at common law a creditor has the right to institute an action against an executor of a solvent estate. By the same token a creditor under common law has the right to pursue and execute a writ in respect of a judgment he has obtained against a deceased or his executor.

See Davids v Estate Hall 1956 (1) SA 774.

Macdonald, Forman & Co. Ltd V Van Aswegen and Another 1963 (3) SA 173.

Having considered the Administration of Estates Proclamation No. 19 of 1935 as a whole I am satisfied that there is nothing to indicate that the Legislature intended to deprive a creditor of his common law right to pursue and execute a writ in respect of a judgment he has lawfully obtained against the deceased or his executor before the requisite notice and publication referred to in Section 46 of the proclamation. The executrix (the Applicant) in the instant case is in no better position. In fairness to Mr. Ntlhoki he has conceded, and rightly so in my view, that the first part of Section 47 cannot assist his client. It is the second part of the section that gives him some measure of hope and he submits therefore that the First Respondent was prohibited from pursuing the writ in question by virtue of the fact that there is now publication in the Gazette albeit belatedly. As earlier stated it should be remembered that the publication in the Gazette was only made on the 19th December 1997 long after the writ in question had already been set in motion.

In my view, the word thereafter appearing in the second part of Section 47 relates to the situation described in Section 46 namely that the executor must first cause a notice to be published in the Gazette and in a newspaper circulating in the district in which the deceased ordinarily resided or the district where the latter owned property as the case may be before the creditor can be precluded from suing out a writ. But even then the period within which he is so precluded is not unlimited. It is a period of not less than thirty days or more than three months (as is deemed by the executor) from the date of the publication. Accordingly I hold that where there is no such publication within the statutory period stipulated in Section 46 as is the case here, there is no need for the creditor to obtain an order of court

first before pursuing a writ in his favour. I reiterate that the grant of letters of administration alone is not a bar to a creditor suing out a writ in execution of judgment. To hold otherwise would not only be contrary to the letter and spirit of the Proclamation but would also lead to an anomalous situation whereby executors would simply sit back and play for time while holding letters of administration as a weapon of terror so to speak to the prejudice of creditors.

As I see it therefore it was incumbent upon the Applicant as executrix of the deceased's estate to have caused the necessary publications to be made "as soon as" she had been granted letters of administration on 14th November 1996. If she had done that the First Respondent would have been precluded from pursuing the writ in question within six months after the grant of letters of administration. As it is she failed dismally to comply with the relevant requirements of the proclamation and has got only herself to blame. Regrettably this Court cannot come to her assistance.

Which brings me to the question of conflict of interests. Mr. Ntlhoki has rightly conceded, in my view, that there is obviously a conflict of interest in this matter between the Applicant's duty as executrix of the estate and her personal interest in the estate as the wife of the deceased. I have no doubt in my mind that this explains the inordinate delay by the Applicant in complying with the provisions of the Administration of Estates Proclamation No. 19 of 1935 as shown above. She naturally finds herself in a dilemma that if she makes an inventory and advertises for creditors in the Gazette and in a newspaper she may well lose property in which she has clear interest. The anomaly is that the law as it stands presently permits her to act as executrix of her late husband's estate nonetheless. It is for that reason that legislation is necessary to grant power to the Master of the High Court to exercise his/her discretion in fitting cases of conflict of interests to appoint a neutral person

as executor/executrix. Until that has happened however all executors including those with vested interest must realise that they are expected to display utmost good faith and honesty in their discharge of their duties as administrators of the deceased's estate.

In all the circumstances of this case I am satisfied that there is no merit in this application.

Accordingly the Rule is discharged and the application dismissed with costs.

M.M. Ramodibedi

JUDGE

3rd March 1998

For Applicant : Mr. Ntlhoki

For First Respondent: Mr. Putsoane