IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) 10/98

In the matter between:

'MATHATO TABEA MURIEL LEFOSA	**Appellant**
and	
'MANEO DORIS NTSOAKI MOOKI	**First Respondent**
MOSIUOA LEFOSA	**Second Respondent**
KUPA BOOI	**Third Respondent**
LELOKO LEFOSA	**Fourth Respondent**
MOHAU LEFOSA	**Fifth Respondent**
SETS'ABI LEFOSA	**Sixth Respondent**
TUMISO LEFOSA	**Seventh Respondent**

JUDGMENT

Date of hearing: 29 July 1998

Date of judgment: 31 July 1998

GAUNTLETT, JA

Commencing his judgment in the court *a quo*, Mofolo, J noted that **"[t]his application was much confused in the beginning"**. Regrettably that state of affairs

subsists.

The appellant is the substantially successful applicant in the court below. She instituted motion proceedings as a matter or urgency in 1995 for declaratory and interdictory relief arising from her marriage by civil rites to one Thabo Joshua Lefosa ("the deceased") in Bophutatswana on 8 December 1976, who had died on 28 June 1995. A dispute arose when the deceased's father, the second respondent, would not permit the applicant (she testified) to bury the deceased **"in my own right"**, and furthermore permitted the first respondent (a person with whom the deceased had formed a relationship in 1994 and by whom he had subsequently had a child) to put on a mourning cloth. It was further the appellant's case that during their marriage, she and the deceased constructed a residential house at Mapelent, near the Maqalika Dam in the district of Maseru, and that they also had a house at Thaba Nchu (where the appellant was employed, while the deceased was self-employed in Maseru operating a workshop). In addition, the deceased during his lifetime had acquired two motor vehicle registered in his name, as well as a licensed firearm. On 27 August 1995 a meeting of the deceased's family was convened at which the family resolved inter alia that the house at Mapeleng be inherited by the first respondent, and that the motor vehicles be sold and the proceeds be divided between the three children born of the marriage between the appellant and the deceased (the eldest of whom at the time the application was heard in the court below, one Thato Lefosa, may have become a major) and the child born of the

liaison between the deceased and the first respondent.

The relief the appellant sought was premised upon four principal contentions:

(a) that at the death of the deceased, the marriage by civil rites between him and the appellant still subsisted;

(b) the first respondent was "**nothing but the concubine of my husband and hence has no rights in the estate of my late husband**";

(c) Thato Lefosa was the eldest son of the appellant and the deceased, "**and the rightful person to inherit in the estate of his late father**";

(d) That as the survivor of the marriage between the deceased and herself, the appellant is "**the rightful widow and the lawful guardian of our son and [has] the absolute right to administer the said estate**".

A tortuous procedural course ensued, in the course of which the court below decided not to refer the application to trial and also admitted certain further affidavits tendered on behalf of the first respondent. It refused to confirm paragraph 1(b) of the rule nisi previously granted, declaring the appellant "**the rightful widow and heir of the [deceased] or alternatively, the lawful guardian of his**

minor son....and that as such she is entitled to inherit or, alternatively, to administer the estate of the [deceased] for the benefit of [the] said Thato Lefosa".

The court added:

"Even should the said Thato Lefosa not have reached the age of majority, the court hereby emancipates him".

It also made no order as to costs.

For the rest, it made final the rule nisi (excluding of course paragraph (b)), which had issued in these terms, calling upon the respondents to show cause why:

"(a) The rules pertaining to the ordinary modes and periods of service shall not be dispensed with;

(b) Applicant herein shall not be declared the rightful widow and heir of the late THABO JOSHUA LEFOSA or alternatively, the lawful guardian of his minor son THATO LEFOSA aged twenty (20) years, and that as such she is entitled to inherit or, alternatively, to administer the estate of the said late THABO JOSHUA LEFOSA for the benefit of said THATO LEFOSA.

(c) The purported marriage between the Ist respondent and the late THABO JOSHUA LEFOSA shall not be declared null and void and of no force and effect or alternatively the 1st respondent shall not be declared not to be the rightful person to inherit and/or to administer the estate of the said THABO JOSHUA LEFOSA;

(d) The family resolution adopted by 2nd, 3rd, 4th, 5th, 6th and 7th respondents purporting to declare 1st respondent as the rightful person to inherit and/or to administer the estate of THABO JOSHUA LEFOSA shall not be declared

null and void and of no force or effect;

(e) The Sheriff of this Honourable Court or his deputy thereof shall not seize, remove and keep safely in the custody of this Honourable Court the two motor vehicles namely metallic blue Jetta bearing registration nos. PVW 0891 presently in custody of Ist respondent and a white Toyota Cressida bearing registration nos. XL 3113 presently in the custody of 6th respondent, wherever they may be found pending the outcome of this application;

(f) The respondents and or any of their agents shall not be restrained from alienating dealing with, disposing of, transferring and encumbering in any manner whatsoever any movable or immovable property whensoever it may be situated forming part of the estate of late THABO JOSHUA LEFOSA;

(g) 1st and 2nd respondents shall not be ordered to account to the applicant for all assets of the late THABO JOSHUA LEFOSA in their possession or under their control and to deliver all such assets to the applicant;

(h) 6th respondent shall not be ordered to surrender a certain firearm which belonged to late THABO JOSHUA LEFOSA which its further particulars are not available to applicant to this Honourable Court or alternatively the Commissioner of Police pending the outcome of this application.

(i) The respondents or any one of them shall not pay the costs of this application only in the event of opposing same;

(j) The applicant shall not be given such and/or alternative relief as this Honourable Court may deem fit".

During the course of the judgment, the court held that "**there was also a purported marriage between the first respondent and the deceased, but..... this was a nullity** the court [declaring] the marriage null and void *ab initio*". The court furthermore held (after an *excursus* inter alia into French and Scots law) that this relationship did not constitute a putative marriage either.

In her notice of appeal, the appellant (wrongfully described as the respondent in the notice of appeal) states that, **"being dissatisfied with certain parts of the said High Court judgment"**, appeals on seven grounds. They are the following:

"1. The learned judge *a quo* misdirected himself or erred in law in holding that since Applicant lived at Thaba Nchu there was an element of desertion against unchallenged and uncontradicted evidence to the contrary.

2. The learned judge *a quo* grossly misdirected himself and/or erred in law in holding that there was a putative marriage without an iota of evidence to that effect and consequently erred in legitimising the 1st Respondent's illegitimate child.

3. The learned judge *a quo* misdirected himself and/or erred in law in admitting 1st Respondent's 'supplementary' affidavits which gave 1st Respondent unfair second chances.

4. The learned judge *a quo* misdirected himself and/or erred in law in making a "contempt order" which has no effect i.e postponing sentence thereof.

5. The learned judge *a quo* misdirected himself and/or erred in law in failing to pronounce himself on the issue of serious contempt and yet throughout his judgment held the view that there had been contempt which had never been purged.

6. The learned judge *a quo* misdirected himself and/or erred in law in deciding not to make an order as to costs in a case highly deserving of such order due to the numerous second chances afforded 1st Respondent and the serious contempt which 1st Respondent did not even attempt to purge.

7. The learned judge *a quo* misdirected himself and/or erred in law in appointing the District Administrator for the Maseru District and Thato Lefosa as Administrators of the late Thabo Lefosa's estate without issuing specific directions as to the devolution of the estate, especially after legitimising Neo Lefosa".

It needs to be said immediately that in several respects, this appeal proceeds on the mistaken premise that the appeal competently lies against findings in a judgment. This is not so. It is trite that an appeal only lies against a judgment or order, in the sense analysed in Dickinson and Another v Fisher's Executors **1914 AD 424 at 427** and Holland v Deysel 1970 (1) SA 90 (A) at 92C-93 pr. (See further **Herbstein and Van Winsen Civil Practice (4th ed 1997) 849-850, note 163).** Thus if a party considers that orders have been granted for the wrong reason, or even more generally, that there are certain findings made in the course of a judgment to which the party objects, it has no entitlement on that basis alone to institute an appeal. The crisp test is: did the court err in making the orders which it granted ? **"There can be an appeal only against the substantive order made by a court, not against the reasons for judgment"** (Administrator, Cape v Ntshwaqela **1990 (1) SA 705 (A) at 715D**, per Nicholas, AJA).

So viewed, no appeal can lie in the instant matter on the basis of the first ground. As regards the second, the court below made no order legitimising the first respondent's child. Nor, for that matter, does it anywhere in its judgment hold in terms **"that there was a putative marriage"**. In fact, the court was concerned to quote various passages from the first respondent's own affidavits, and concluded thereafter that the first respondent **"knew [full] well that there was a valid marriage between applicant and [the deceased]"**, and that accordingly she did not enter into the relationship with the deceased with the ignorance and good faith required to

constitute a putative marriage (" ..... this court has not gathered the impression that first respondent was taken for a ride; she instead stolidly tread into a no-go area"). The court however went on to say en passant in the judgment that the first respondent's child, Neo, was "declared legitimate". No order was sought as regards this declaration, nor was any such order made in terms. Before us both the appellant and first respondent joined forces in objecting to what the court did in this regard. To the extent that it is necessary I would formally state that there is no basis on these papers for this declaration that Neo was legitimate, and it is set aside.

As regards the third ground of appeal, this, like the first, rests upon a misconception of the true subject matter of an appeal. It is not demonstrated how the reception by the court *a quo* of the further affidavits is in any way related to the particular relief against which the appellant seeks to appeal. In this instance, too, the approach seems rather to have been to trawl through the judgment, and to record in the notice of appeal any features considered objectionable. For the reasons already stated that is no proper basis for an appeal. In any event, in admitting the affidavits the court below exercised a discretion. This discretion is a wide one (see High Court Rule 8(6) and (12): James Brown & Hamer (Pty) Ltd v Simmons N.O. 1963 (4) SA 656 (A) at 660D-F)., and it has not been demonstrated in my judgment that in so acting the court adopted an approach which would entitle this court to interfere.

The same holds good for the fourth and fifth grounds.

The issue of costs raised by the sixth ground is more appropriately left for last.

The only substantive ground of appeal in my view is that raised by ground seven. Paraphrased more appropriately, the appellant appears to contend that she herself should have been declared (as she sought in terms of the notice of motion, and as the rule nisi had provided) **"the rightful widow and heir"** of the deceased or alternatively the lawful guardian of Thato Lefosa, **"and that as such she is entitled to inherit or, alternatively, to administer the estate.... for the benefit of [the] said Thato Lefosa"**.

In my view, the appellant's criticisms of the order made instead by the court *a quo* are generally justified. There is in the first place no indication that the order granted in this regard by the court below was one sought by either party. It is at odds with the formulation sought by the appellant in the notice of motion, and (counsel appearing before us confirmed) it was sought neither by way of alternative relief in the application nor by way of cross-application. Moreover, it was an order which imposed important rights and obligations on both Thato Lefosa and the functionary described as **"the administrator of the district of Maseru"** without properly identifying the latter, or hearing either, neither of whom were themselves joined in the application. The court, moreover, is clearly uncertain as to whether or not Thato Lefosa had even reached the age of majority at the time it in this way bestowed these rights and obligations on him. It compounded its difficulties by

purporting to emancipate him - again, in the absence of any relief seeking that result by any party joined in the application, and without the appointment of a curator ad litem to assist the youth.

For these reasons, the order made by the court below substituting prayer 1(b) as incorporated in the rule nisi must in my view be set aside.

The difficult question is what order, if any, should be substituted for it. That sought in paragraph 1(b) of the notice of motion is itself equivocal: it raises an alternative. The first claim - that the appellant itself should succeed to the deceased's estate is contradicted by her own averment that Thato is the true heir (a conclusion evidently supported by section 11(2) of the laws of Lerotholi; according to which the widow only succeeds on failure of male descendants: see Bennett Sourcebook of Customary Law for Southern Africa (1991) 801. The alternative requires the court to appoint the appellant as administrator "for the benefit of" Thato, simply by virtue of the fact that she as his surviving parent was his guardian.

Should that order, in either version, be granted, and if not, is the appellant entitled to it in another variant ?

In argument before us the parties accepted that the key question is whether the marriage between the appellant and the deceased by civil rites in Bophutatswana on 8 December 1976 was valid. The first respondent contended that it was not. The mere fact that the appellant has appealed against "certain parts" of the judgment of the court *a quo*, essentially paragraph 1(b) of the rule nisi in the form substituted in the final order, and the order as to costs, does not set the first respondent free to attack other findings of the court *a quo* against which neither an appeal or cross-appeal had been noted (cf. Shatz Investments (Pty) Ltd v Kalovyrnas 1976 (2) SA 545 (A) at 550; Holmdene Brickworks v Robert Construction 1977 (3) SA 670 (A) at 692C).

The finding by the court *a quo* that the appellant and the deceased were lawfully married in 1976 accordingly stands.

The first respondent accepted (in the heads of argument filed on her behalf) that in such circumstances the subsequent customary marriage between the deceased and her is invalid (see further Poulter Legal Dualism in Lesotho (1979) er; Bennett Sourcebook of African Customary Law (1991) 451-2; Mokhutu v Monyaapelo CA CIV 1/76, reported in (1977) 10 CILSA 210; Mohale v Mohale CIV/A/109/1982; Maqutu (1983) CILSA 374; Bennett Application of Customary Law in Southern Africa (1985) 199-200.

The result in my view is that the appellant is entitled to an order declaring her the widow of the deceased, given the controversy in this regard. As it concerns status, although by now he has attained the age of 21, it may also not be inappropriate to grant an order declaring the appellant to be Thato's natural guardian until the attainment of his majority. But it is not evident to me that sufficient averments have been made in the papers to establish her entitlement to the further provisions of paragraph 1(b) of the notice of motion and rule nisi. This is the more so in view of the fact that while a widow in her position, married in community of property, may in her own right be entitled to one half of the estate (see especially the leading authority, Maqutu Contemporary Family Law in Lesotho (1992) 208-210), but no case is made out entitling the appellant to administer the deceased's own estate, to which she says Thato is the heir. This further relief in any event again impacts on the interests of Thato, who may still have been a minor at the time the court below dealt with the matter and who, it has been pointed out, was not properly represented in the proceedings. He is in any event now on any approach plainly no longer a minor, and no practical purpose would now be served by our making an order on the alternative basis sought in terms of paragraph 1(b). The fact that a live, appealable issue exists at the time of judgment does not mean that on appeal the court will grant relief in terms which have since become academic (Lendalease Finance Ltd v Corp. de Mercadeo Agricolo 1976 (4) SA 464 (A) at 486-487A).

Finally there is the question of costs. No reasons at all were given by the court below for its decision not to make any order as to costs in this matter. That is a matter of regret, as it accordingly becomes necessary to consider whether, notwithstanding the absence of reasons, the court below exercised its discretion in this regard properly. The fact of the matter is that the appellant was obliged to seek relief by virtue of the appropriation of assets by the first respondent to which the latter had no entitlement. It was fundamentally to protect and to secure those assets, and to address the wider concerns of status, that the applicant instituted these proceedings. When the first respondent was defiant, it was also necessary to institute the contempt proceedings in relation to which the first respondent consented to an order. She has been substantially successful in both respects. The first respondent, on the other hand, did not conduct herself well in the litigation.

While it is no inexorable rule, as a matter of general principle, in the absence of other cogent considerations, costs generally follow the result . In my view, it has to be concluded that the court below did not properly exercise its discretion in this regard, and that it is necessary for its order to be substituted.

The second respondent joined with the first respondent in the court below, filing an affidavit "in opposition of this application". He has however not opposed the appeal.

The appeal succeeds to the following extent:

1. The order of the court *a quo* is substituted by this order:

" 1.1 **The rule nisi granted on 8 September 1995 is confirmed and made final, save that paragraph 1(b) thereof is amended to read:**

'The applicant, pursuant to her marriage by civil rites to the late Thabo Joshua Lefosa on 8 December 1976 in community of property at Themba, Moretele, Bophutatswana, is declared to be the widow under civil law of the late Thabo Joshua Lefosa and that, until his attainment of the age of 21 years, she is the lawful guardian of Thato Lefosa".

1.2 The first and second respondents are directed to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

1.3 The first respondent is to pay the costs of the contempt proceedings."

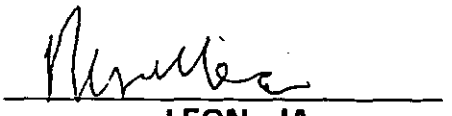
2. The first respondent is to pay the costs of the appeal".

GAUNTLETT, JA

I agree. It is so ordered.

BROWDE, JA

I agree.



LEON, JA

For the appellant:

For the first respondent:

C of A (CIV) NO.8 OF 1998

IN THE LESOTHO COURT OF APPEAL

In the matter between:

LESOTHO ELECTRICITY CORPORATION : **APPELLANT**

and

MOKHACHANE MOSHOESHOE **RESPONDENT**

Before:
BROWDE, A. J.A.
GAUNTLETT, J.A.
SHEARER, A.J.A.

JUDGMENT

SHEARER, A.J.A.

The appellant is a body corporate established in terms of section 3 of the Electricity Act No. 7 of 1969. In 1993 the respondent, a house owner, applied for and was supplied with electricity by the appellant at his residence in Maseru. From 1993 until the events which gave rise to the present matter he consumed electricity, and duly paid for it.

Members of the appellant's staff were always allowed on to the premises to check the meter and they duly did so, and on every occasion the meter reading was recorded on a card which was kept in the meter box on the respondent's premises. It was on the basis of those readings that a charge was made for the electricity which charge was subsequently paid by the respondent. It is common cause that the meter in question was secured by three seals with appropriate identifying numbers. In his Founding Affidavit the respondent concedes that "if the seals are cut or are broken that is a sure sign that the consumer has interfered with the equipment of the appellant."

On the 4th of February 1998 the witness, Mohapi, went to the premises of the respondent to inspect the meter. There he checked whether the meter was still in order, by investigating whether the meter disc was moving to record the consumption of electricity in the house. It was not moving at all. He found the respondent,s servant in the house and discovered from her that the electric refrigerator was switched on. He asked her also to switch on the stove and some other lights in the house, and he checked whether the meter was moving as it undoubtedly would if it were in working order. He discovered that it was not moving at all. He drew the servant's attention to this and told her that the consumption was not being recorded. He also observed that the seals, with a serial number commencing 3, on the meter had been removed and replaced with some that bore a serial number with a 7. This was not appropriate for that area, and they must inevitably have been placed there by somebody other than an employee

of the appellant.

On the following day he met the respondent at the appellant's premises. Mohale, another employee of the appellant, was present. He explained to him what had happened and what the reasons were for the disconnection which had by then been effected. The disconnection had been effected on the previous day. At that time a notice was delivered to the respondent indicating the reason for the disconnection and it appears, though somewhat illegibly, from the manuscript at the bottom of this notice, that reference was made to the seals.

Mohale gives an account of what happened at the meeting on the 5th of February 1998. According to him they went to the dwelling of the respondent where Mohale explained what the problem with this meter was, including that the vital disc had been removed from its proper place. Mohale continues "with regard to the seal I say that the original seals had been removed and replaced by those that were seen there. Applicant took the seals and refused to hand them over to me when I had intended to replace them with the correct ones. The seals are still in his possession and the meter was left unsealed". There was no effective denial to this allegation in the respondent's Replying Affidavit, which in general made unspecific denials of the accounts given by the two employees of the appellant.

The appellant brought as a matter of urgency an application for a *rule nisi* directing the respondent to restore *ante omnia* the electricity which it had disconnected at the applicant's residential site. That application was granted and on the return day came before Mofolo, J. who found in favour of the respondent's

contention that the maxim *audi alterem partem* applied, which required that the appellant had to afford the respondent a proper hearing before disconnecting the electricity supply. The learned Judge made no order as to costs because, as he said, 'while respondent was entitled to disconnect electricity it went about it in the wrong way'.

A perusal of the relevant legislation indicates that the appropriate provisions are section 26 (4) of the Electricity Act No.7 of 1969 which reads:

> *'every meter shall be sealed by the Corporation with a seal having its distinguishing brand or mark impressed thereon.....'*

and section 31(1) (a) (vii) which provides

> *'the Corporation may discontinue the supply of the electricity -*
>
> *(a) to a consumer who interferes or attempts to interfere with the Corporation's main fuses operators or seals'.*

There are regulations, made in terms of the Act and the powers given under the Act, that appear in Legal Notice No.16 of 1970 and are described as 'Electricity Regulations 1970'. Regulation 17 provides 'no person shall in any manner or for any reason whatsoever tamper or interfere with any meter or service use or service mains or supply mains belonging to the Corporation' and the commencement of section 8 (a) provides 'the consumer shall be responsible for and liable to make good to the Corporation any damage that may occur to any meter....'. This must be

read in conjunction with Regulation 11 (a), the relevant portion of which reads 'the Engineer shall have the right to disconnect at any time without notice any installation on premises..... where any of these regulations are being violated'. In Regulation 2(2) 'Engineer' is defined as meaning the "person for the time being holding the office of Chief Engineer of the Lesotho Electricity Corporation or any other person duly authorised to act on his behalf ". In the violation of a regulation - the particular regulation which provides against tampering or interfering with any meter - it matters not that the respondent may himself have been innocent of this conduct, as the regulations make it plain that he is responsible.

Now the common law right to a hearing exists unless it is excluded either expressly or by necessary implication. In the present matter the use of the words "without notice" is an incontronvertible indication that such is excluded

It follows that there was nothing amiss with the disconnection and that the appeal must be allowed, setting aside the rule originally granted in this matter. It follows from what I have said that the respondent was not entitled to succeed in the lower court and accordingly the order made by the learned judge is altered to one setting aside the rule but ordering the respondent to pay the costs in the lower court. The costs of appeal will follow the result and the respondent is ordered to pay those costs.

D.L.L. SHEARER
ACTING JUDGE OF APPEAL

I AGREE

J. BROWDE
JUDGE OF APPEAL

I AGREE

J.J. GAUNTLETT
JUDGE OF APPEAL