CIV/APN/305/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:

SOPHIE LELAKA SELEBELENG	**1ST APPLICANT**
ZAKIA KOMPONAKAE SELEBELENG	**2ND APPLICANT**
MOLEFI LUCAS SELEBELENG	**3RD APPLICANT**

AND

MOSILI 'MAMONNAMOHOLO HLALELE	**1ST RESPONDENT**
MASTER OF THE HIGH COURT	**2ND RESPONDENT**

JUDGMENT

Delivered by the Honourable Chief Justice Mr. Justice J. L. Kheola
on the 4th day of September, 2000

The rule has already been confirmed in terms of prayers 2(a), (b), (c) and 4. It was confirmed on the 4th September, 2000. What follows are the reasons for judgment.

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

1. That the rule be dispensed with on periods and modes of services.

2. That a rule nisi be issued calling upon the respondents to show cause (if any) on the 18th August 2000 why the following order shall not be made absolute.

(a) Ordering the 1st respondent to allow the deceased Thaki Elias Selebeleng and Ramalebo Johannes Selebeleng to be buried from their home at

Borokhoaneng in the city of Maseru and that all arrangements and funeral ceremony should be conducted from their said homes.

(b) Interdicting the 1st respondent disrupting and or threatening to disrupt the applicants in arranging and conducting the funeral from Borokhoaneng.

(c) Setting aside and declaring as void the will of the late Alice 'Mamosili Selebeleng in so far as it bequeaths all property of her joint estate with the late Molefi Selebeleng..

3. Ordering that prayer 2(a) and (b) should operate with immediate effects as interim relief.

4. Ordering the 1st respondent to pay the costs of this application.

5. Granting the applicants such further and or alternative relief as the court may deem fit.

The first applicant is the widow of the late Thaki Elias Selebeleng. He died in the Republic of South Africa on the 27th July, 2000. His wish was that he should be buried in Lesotho from his home at Borokhoaneng Qoaling.

His younger brother, Ramalebo Johannes Selebeleng died here in Maseru on the 21st July, 2000. Their two dead bodies are still lying in the mortuaries in Lesotho and in the Republic of South Africa.

The second applicant alleges that he is the head of Selebeleng family because his late father was the elder brother of Molefi who is the father-in- law of the first applicant.

The third applicant is the heir of the late Thaki Selebeleng. He is the first born

son of the first applicant.

The first respondent is the daughter of the late Alice Selebeleng who was the second wife of the late Molefi. The two deceased persons are the step-sons of the late Alice and are therefore the step-brothers of the first respondent.

It is common cause that the property at Borokhoaneng-Qoaling was jointly owned by the late Molefi and Alice because their marriage was in community of property. The late Molefi predeceased the late Alice. He died intestate.

In her founding affidavit the first applicant avers that the late Thaki was working in the Republic of South Africa when he met his untimely death. The late Ramalebo was residing with his friends in Maseru and was unemployed. They have both not been buried because as the second applicant was making arrangements for their burial, he met some difficulties in that the first respondent refuses to let the deceased be buried from their home at Borokhoaneng-Qoaling as she claims that she has been given that property by her mother by Will. She avers that her late husband stated that he would like to be buried in his home in Lesotho and not in South Africa where he was merely working.

The first applicant avers that the first respondent ought to have followed certain procedures before she could assume ownership of the Borokhoaneng property under the will of her mother. As the executor and next of kin of her mother, she ought to have filed

a death notice and an inventory of the property with the Master of the High Court. She also ought to have sought the Letters of Administration from the Master of the High Court as she has been appointed the sole heir and executor under her mother's will. She has failed to do so and thus she is not yet legally entitled to the estate because she has not satisfied the statutory requirements which would enable ownership of the bequeathed property to pass to her.

She avers that the will of the late Alice 'Mamosili Selebeleng is invalid in law in so far as it disposes of all the property of her joint estate with the late Molefi Selebeleng who died intestate. As he was married in community of property with the late Alice, she (the late Alice) ought to have declared the estate and given the late Molefi's sons their share of the estate and taken hers. Alice was entitled to half of the estate plus a child's share. The children of the deceased get a child's share. She avers that she and her late husband did not insist on the late Alice to give them their child's share immediately because it would have meant that she would have been without a home as the indivisible estate would have had to be liquidated.

She avers that as Ramalebo died intestate and was still a bachelor, the family of Selebeleng has appointed the third applicant as his heir; that the matter is urgent because they have to bury the deceased. It is now three weeks (on 11th August when the affidavit was sworn to) since the late Ramalebo passed away and two weeks since her husband passed away.

In his supporting affidavit the second applicant avers that he is working in the Republic of South Africa, at the University of Qwaqwa in the department of Sesotho. He is the head of family of Selebeleng. His father was older than the late Molefi. He is therefore responsible together with the first applicant to see to it that the deceased are buried. When he learned of the death of the deceased persons he approached the first respondent to make arrangements that the deceased be buried in Lesotho from their home at Borokhoaneng. They had not built any house of their own. The first respondent informed him that she would not allow them to conduct the burial services from the late Molefi's home, as that is her property now. They requested the chief of the area to intervene but the first respondent produced a will which was read to them before the chief. He submitted that the site did not belong to her mother alone as she was married in community of property, however she could not hear of that. The Chief even suggested that they should cooperate and bury the deceased persons and later dispute the ownership of the property.

In his affidavit the third applicant avers that he is the first born son of the late Thaki Selebeleng. He was born on the 5th May, 1980. He is presently attending school at 'Mamelodi Technical College. He avers that he has read and understood the founding affidavit of the first applicant and the supporting affidavit of the second applicant and he wishes to support them in so far as they relate to him.

In her opposing affidavit the first respondent avers that it is true that her mother

Alice was married to first applicant's father-in-law by civil rites and in community of property. She avers that the truth of the matter is that both first applicant and her deceased husband have South Africa as their country of domicile and that the deceased Thaki holds a South African passport; that the matter is not urgent in that the applications before Court are made eighteen days after the death of Thaki and twenty-four days after the death of Ramalebo. The late Molefi and her mother Alice owned a house at No.480 in Sharpeville in South Africa. That house is still the home of Thaki and Ramalebo who never lived at Borokhoaneng in Lesotho. She avers that the deceaseds' father predeceased her mother Alice. Her mother was entitled to her half share of the estate plus a child's share which equalled ⅓ by simple arithmetic her mother has inherited 5/6 of the whole estate including that in Lesotho and in Sharpeville on the death of Molefi.

If I may digress and deal with the point raised by the first respondent above; I agree with her that when Molefi died intestate the mother of the first respondent was entitled to inherit half of the estate plus a child's share of the whole estate. By the "whole estate" I mean the Borokhoaneng-Qoaling estate plus the Sharpeville property in the Republic of South Africa. Alice was not entitled to take all the Borokhoaneng-Qoaling property and to bequeath the whole of it to the first respondent. She was entitled to her half share of that property plus a child's share. Section 1 (1)(a) of Proclamation No.2 of 1953 provides:

"(1) Subject to the provisions of section three the surviving spouse of every

person who after the commencement of this Proclamation dies either wholly or partly intestate is hereby declared to be an intestate heir of the deceased spouse according to the following rules:-

(a) If the spouses were married in community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato,* the surviving spouse shall succeed to the extent of a child's share or to so much as, together with the surviving spouse's share in the joint estate, does not exceed six hundred pounds in value (whichever is the greater)".

When Molefi died intestate he left the two deceased persons who were entitled to succeed *ab intestato.* They are Thaki and Ramalebo Selebeleng. They were entitled to a child's share of the joint estate. Alice was not entitled to inherit the whole estate and to deprive Thaki and Ramalebo of their shares. On this ground alone Alice's will is invalid because it purports to bequeath to the first respondent the whole of the immovable and movable property at Borokhoaneng-Qoaling. It is contrary to the provisions of section 1 (1) (a) of the Basutoland Intestate Succession Proclamation No.2 of 1953.

There is a serious dispute of fact regarding the house in Sharpeville in the Republic of South Africa. The first applicant avers that the house was sold by the late Molefi during his lifetime. The first respondent denies that it was sold and avers that it

is still part of the estate. She avers that that is the part of the joint estate that was taken or inherited by Thaki and Ramalebo. This allegation is not supported by any evidence. In any case the first respondent's failure to follow the procedures prescribed by the Administration of Estates Proclamation No.19 of 1935 renders the above dispute of fact irrelevant. Section 31 (2) provides that Letters of Administration shall authorise the executor to administer the estate wherever situate. The house in Sharpeville forms part of the estate which was jointly owned by the late Alice and the late Molefi. The inventory which the first respondent ought to have made would have included the house in Sharpeville because the law refers to the estate "wherever situate".

Section 31 (1) of the Administration of Estates Proclamation No.19 of 1935 provides -

> "The estates of all persons dying either testate or intestate shall be administered and distributed, according to law, under letters of administration granted by the Master in the form "B" in the First Schedule to this Proclamation. Such letters of administration shall be granted to the executors testamentary duly appointed by persons so dying or to such persons as, in default of executors testamentary, are appointed, as in this Proclamation described, executors dative to the persons so dying."

The first respondent is an executor testamentary duly appointed by the late Alice

and as such she was under an obligation to apply for Letters of Administration from the Master of the High Court which would authorise her to administer and distribute the estate she has never been granted any Letters of Administration according to which she could distribute the part of the estate to which she is entitled in terms of the will. I mean in terms of the will if it had been valid. I have already said that it is invalid because it purports to bequeath the whole estate to the first respondent. She is relying on the will as a document which has transferred ownership of the property to her. She is wrong because a will is not a title deed. It merely reveals the wish of the testator. It is only after the Letters of Administration have been granted that the estate can be administered and distributed according to a valid will.

In the present case the first respondent does not seem to have followed the proper procedure prescribed by the law because up to now she has not applied for Letters of Administration from the Master of the High Court. She is merely holding the will and claiming ownership of the property in question. Section 13 (a) of the Administration of Estates Proclamation No.19 of 1935 provides as follows:

> "Whenever any person dies within the Territory leaving therein any property or a will, the nearest relative or connection of the deceased at or near the place of death, or in default of any such near relative or connection, the person who at or immediately after the death has the control of the premises at which the death occurs, shall within fourteen

days thereafter cause a notice of death to be framed in the form "A" in the First Schedule to this Proclamation, and shall cause that notice, signed by himself, to be delivered or transmitted -

(a) if the death occurs in the district wherein the office of the Master is situate, to the Master; or".

The first respondent did not comply with section 13 (1) (a) above.

Another very important section is section 16 (1) (a) which provides that every person (other than the Master) who has a will in his possession at the time of or at any time after the death of the person executing the same shall forthwith transmit or deliver the will -

(a) if it is in the district wherein the office of the Master is situate, to the Master.

If the above section had been complied with the will would have been registered by the Master when Alice died. Notwithstanding such registration the validity or legal effect would still be determined by the Court if challenged by another person.

Section 20 (1) and (3) provides as follows:

"(1) When one of two spouses who have been married in community of

property dies the survivor shall, within six weeks after the death, cause any inventory of all property which, at the time of the death, formed part of or belonged to the estate possessed in community between the predeceasing and surviving spouses, to be made in the presence of two impartial witnesses being persons of good credit and repute and in the presence of such persons having an interest in the distribution of the joint estate as heirs or legatees of the predeceased spouse as may attend.

(3) Every such inventory shall be subscribed by the surviving spouse, the witnesses aforesaid, and the heirs or legatees so attending."

Alice failed to comply with the provisions of section 20 above. If she had made such an inventory six weeks after the death of her husband that would have shown that the couple had a house and some movable properties in Sharpeville. Her assumption that the late Thaki and the late Ramalebo who are her step-sons had inherited the Sharpeville property was unreasonable and not based on any evidence. Her wrong assumption has seriously prejudiced the late sons of Molefi because she has excluded them from the property at Borokhoaneng to which each of them was entitled to a child's share. She wrongly bequeathed the whole estate to the first respondent. I have already held above that her conduct invalidates her will because she was entitled to half of the estate at Borokhoaneng plus a child's share. That was the portion of the joint estate which she was entitled to bequeath to her daughter.

Section 44 provides that 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 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, an 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. This section shows the importance of Letters of Administration as well as the making of inventory of the property of the estate. The first respondent has failed to comply with its provisions.

Mrs Kotelo, attorney for the first respondent, submitted that statutory provisions in a will are peremptory and not mandatory. It seems to me that the two words mean more or less the same. In the Shorter Oxford English Dictionary "mandatory" means of the nature of, pertaining to or conveying a command or mandate; obligatory, especially in consequence of a command." "Peremptory" means that puts an end to, or precludes all debates, question, or delay. Peremptory order, without fail."

She further referred to **Loque and another vs The Master and others** 1995 (1) S.A. 199 in which it was held that it is apparent from section 2 (3) and section 2 A of the Wills Act 7 of 1953 that the Legislature, whilst still providing for formalities to ensure authenticity and to eliminate false or forged wills, nevertheless intended that failure to comply with formalities prescribed by the Act should not frustrate or defeat the genuine

intention of testators. The Wills Act, as now amended the Law of Succession Amendment Act 43 of 1992, stresses the importance of giving effect to the genuine will of a deceased expressed in a document. It was held further that the provisions of the Act are peremptory rather than directory.

Section 2(3) of the Wills Act as amended provides:

"(3) If a Court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the Court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act 66 of 1965, as a will, although it does not comply with all the formalities for the execution or amendment of will referred to in ss (1).

Section 2A provides:

"If a Court is satisfied that a testator has -

(a) made a written indication on his will or before his death caused such indication to be made;

(b) performed any other act with regard to his will or before his death caused such act to be performed which is apparent from the face of the will; or

(c) drafted another document or before his death caused such document to be drafted,

by which he intended to revoke his will or a part of his will, the Court shall declare the will or the part concerned, as the case may be, to be revoked."

It is clear that in *Loque 's case* (supra) the Court was dealing with, and interpreting the amendment to the Wills Act of the Republic of South Africa. Our Wills Ordinance No.15 of 1845 has not been amended in a similar manner. It is a very old statute which appears on page 510 in the Laws of Basutoland - Volume VIII of 1963. As our law has not been amended like the South African law this court cannot follow the decision in *Loque 's Case* (supra). It is the Court's duty to interpret the Wills Ordinance of 1845 and the Administration of Estates Proclamation No.19 of 1935 as they stand in the statute books. Section 3 of the Wills Ordinance provides:

> "; and where the instrument shall be or shall have been written upon more leaves than one, the party executing the same and also the witnesses shall sign or shall have signed their names upon at least one side of every leaf upon which the instrument shall be or shall have been written."

On page 10 of the record is the Will of Alice 'Mamosili Selebeleng. On page 1 of that Will which is page 11 of the record we see the initials of Alice and her two witnesses. They have not signed that leaf in terms of section 3 quoted above. In **Harpur NO v Govindamail and another** 1993 (4) S.A. 751 (A.D) it was held that the word "signature" did not bear a technical or legal meaning but had to be interpreted in its

ordinary, popular sense. That in ordinary usage the word 'signature' did not bear a technical or legal meaning but had to be interpreted in its ordinary, popular sense. That in ordinary usage the word 'signature', used without qualification, meant signature by writing one's name or signature by making one's mark. That although they might be used to identify the person affixing them, initials were not a signing in the ordinary sense of the word.

Alice's Will is therefore invalid because it was not signed properly on page 1. The requirement of proper signatures is a peremptory provision of section 3 of the Wills Ordinance.

I propose to return to the first respondent's opposing affidavit and make a few remarks. She avers that the matter is not urgent because the first applicant has a choice not to throw away her husband but to bury him from their home at Hamanskraal in Pretoria. Or both deceased can be buried from their home in Sharpeville. Even here in Lesotho applicants can bury the deceased anywhere they like. But they should not ask to be permitted to encroach on her rights in her home. She alleges that she will suffer great prejudice if applicants bury their deceased from her home, this will cause her great emotional strain, financial loss and irreparable damage.

Urgency is challenged. The burial of deceased persons is naturally an urgent matter. No man can enjoy keeping a body in a mortuary for a long time even if he has

enough money to pay the mortuary for a long time. The bereavement is usually prolonged by the body lying in the mortuary for a long time.

The delay to bury the deceased in the present case was caused by the first respondent who refused to allow to use their home at Borokhoaneng as a place from which burial services were to be conducted. In her affidavit she admits that to the joint property of her late husband and herself she was entitled to half of the property plus a child's share. The rest of the property was to be inherited by the two deceased persons. Although she refers to them as strangers, she knows them to be the sons of her late step father, Molefi.

It is a common practice for people working in the Republic of South Africa to inform their families that when they die they should be buried in Lesotho from their parents' home. They do not like the idea of being buried from a rented house in that foreign country. The late Thaki apparently did not regard the rented house at Hamanskraal as his home. He knew his father's home at Borokhoaneng and expressed a wish to be buried from there. It was the hostile attitude of the first respondent towards her own step bothers that led to this unfortunate litigation causing dead bodies to remain in mortuaries for a long time.

If the Sharpeville house has been inherited by the deceased persons in question it was her duty to include it in the joint estate and to disclose to the Master of the High

Court that Molefi's sons had already inherited it. She would have to produce title deed or registration certificate or lease as proof that the house is registered in the names of the two deceased persons. In paragraph 7 of her opposing affidavit the first respondent correctly avers that her mother was entitled to half share of the estate plus a child's share which equalled ⅓. She refers to the whole estate including that in Lesotho and in Sharpeville on the death of Molefi.

The first respondent avers that in terms of the 1990 (sic) Land Act Amendment which enabled widows to inherit direct from their husbands Alice became the full undisputed owner of the property at Borokhoaneng and in 1992 she willed it to her.

The Land Act of 1979 was actually amended in 1992 by Order 6/1992. The amendment was not made retrospective. When Molefi died in 1983 the relevant section 8 (2) (a) (b) provided:

"(2) Notwithstanding subsection (1) where an allottee of land referred therein dies, the chairman of the Land Committee having jurisdiction shall record in his register the passing of the interest in the land of the deceased allottee to -

(a) the first male issue of the deceased allottee (who shall share with his junior brothers in accordance with the advice of the family) unless the deceased allottee had designated otherwise;

(b) where paragraph (a) does not apply, the person nominated as the heir of the deceased allottee by the surviving members of the deceased allottee's family; or."

Thaki, as the first male issue of Molefi, ought to have inherited the estate of his father but for Alice's will that could not happen.

Thaki might have lived in Sharpeville all his life but that could not stop him from wishing to be buried in Lesotho from his father's home at Borokhoaneng.

The first respondent avers that the first applicant is not the Master of the High Court and that it is the Master who should file an affidavit and or suggest that she has not complied with certain legal requirements, not the first applicant whom she is sure has never ever seen the face of or talked to the Master. This dispute ought to have been dispelled by the first respondent by annexing her Letters of Administration granted to her by the Master. Her failure to do so means that she has not got them. She is the one who has never seen the face of or talked to the Master. The provisions of a Will can never be effective without the powers of the Master.

It is not true that the applicants are brining a succession case by the backdoor. If the first respondent behaved reasonably and allowed the applicants to conduct their burial services from their father's house at Borokhoaneng there would have been no litigation

involving an order that Alice's will should be declared as invalid.

For the reasons stated above the rule was confirmed.

J.L. KHEOLA
CHIEF JUSTICE

31st October, 2000

For Applicants - Miss Tau
For Respondents - Mrs Kotelo.