CIV/APN/252/98
CIV/T/38/93

IN THE HIGH COURT OF LESOTHO

In the matter between :

LESENYEHO KHOAPHA **APPLICANT/PLAINTIFF**

and

PALESA 'MAMPHO KHOAPHA
(born SEBILO) **1ST RESPONDENT/DEFENDANT**
THEKO J. MORUTHOANE (Liquidator) **2ND RESPONDENT**

JUDGMENT

For Applicant/Plaintiff : Mr. Mda

For Respondents/Defendants : Messrs Mafantiri/MA Ntlhoki

Delivered by the Honourable Mr. Justice T. Monapathi
on the 1st day of March 2000

I had already made my ruling on the 14th December 1998. My reasons now follow.

These proceedings which are for a declaratory Order are a sequel to a decree of divorce which was granted on the 29th May 1995, the parties having been married by civil rites in community of property, on the 6th of February 1991. The Second Respondent was appointed to act as a liquidator on the division of the parties joined estate per this Court's Order of the 9th December 1996.

In this application the Applicant (who was represented herein by Mr. Mda) sought in the main a declaratory order that plot No.14303-669 situated at Ha Matala, Maseru urban area and site no. 12292-470 situated at Katlehong Maseru urban area be regarded as forming part of the parties joint estate and that the Second Respondent's recommendations in his throughly prepared report which will be sought to be made an order of Court. It is to be noted that the Second Respondent recommendations had been that those two sites be regarded as part of the joint estate as has been more clearly shown in that report which was annexed to these proceedings.

An inventory of the joint estate was furnished by the Applicant to the liquidator as has been shown in one of the annexures. It was to be observed that the First Respondent (who was represented herein by Mr. Nathane) had not furnished the liquidator with any inventory. She however had clearly indicated which property did not form part of the joint estate as was shown in the inventory provided by the Applicant.

The two mentioned sites, according to the Respondent, did not form part of the estate. That was primarily what the Court was decide in this judgment. She claimed that situated at Katlehong she has sold to one Phetho Sebilo on or about January 1991. His age was not disclosed. There was an affidavit by the said buyer

attested to on the 11th October 1997.

Secondly, the plot situated at Matala Maseru urban area which was a developed site was said to be held by the First Respondent in trust for her minor son Ronald Hantle Sebilo (not born of the parties' marriage). In support of her assertion the Respondent has tendered the following documents: the lease document which was in respect of the site at Matala, secondly a deed of hypothecation by Palesa Khoapha the Second Respondent as a *curator bonis* of Ronald Hantle Sebilo per Court Order in CIV/APN/55/92 in favour of Lesotho Building Finance Corporation in respect of that plot. The deed of hypothecation was annexed to the proceedings. So was the order of Court.

The said lease document was alleged to have been issued on the basis of an affidavit by Chief Khoabane Letsie Theko annexure "B" to the opposing affidavit and the letter from the same chief dated the 13th July 1990 which was also annexed to the proceedings. This letter seemed to go along with an affidavit that was also sworn to by the same chief. I needed from the onset to comment about the affidavit. First it by way of stating what was contained in the translated version 1 thereof. The chief said:

"1

I am chief of Matala Thaba Bosiu Maseru who was reigning and I have power to allocate land on this particular site in question before the 16th June 1980.

2

I certified that before publication of the Order NO.29/80 Ronald Hantle Sebilo was allocated by law a site which appears in the plan

after which this statement is made for.

3

This sworn statement is made for purposes of sub lease to obtain documents which certify his lawful allocation on the site which was allocated to him and fail to produce evidence of allocation or given. Sworn on the 10th August 1990.

Principal Chief of Thaba Bosiu on the 10-8-90". (My underlining)

It also had a rubber stamp impression of the office of that chief.

I proceeded to observe the letter which formed an annexure immediately following on the affidavit and its translation. The letter was from the office of Principal Chief of Thaba Bosiu, and was addressed to the Commissioner of Lands. The Chief was recorded to have said that:

"I introduce to you Ronald Hantle Sebilo that he got a site at Ha Matala a long time ago. I will appreciate your confirmation in this matter Sir. With thanks

(Sg) KHOABANE L K THEKO

Principal Chief of Thaba Bosiu and Ha Ratau" (My underlining)

I needed to point out that clearly no date of allocation was mentioned of the making this allocation except that it was previously alleged (in the affidavit) to have been before 1980. That was presumably before the new 1979 Land Act came into force. I supposed the importance that was suggested was that the chief was the allocating

authority then (before 1980). But this would not have been sufficient because since 1973 and in terms of the land administration law enacted in that year there were allocating committees of which the chief was merely Chairman.

I would remark and show my concern about the lack of particularity, the lack of specificity and an absence of any circumstances concerning this allocation that the Chief spoke about. One would have thought that there should have at least been a member of committee or secretary of committee (to which application was made) to explain the relevant allocation transaction or procedure. Or alternatively the chief should have stated the role he played, the circumstances, and there should have been an explanation and more of the reason why none of the statutory (regulatory) books of record were available.

Furthermore the chief (by way of better elaboration) should have told this Court more about his knowledge and by way of something to do with a desire to convince the Court about the allocation of the site to the particular person that is Ronald Hantle Sebilo as against the First Respondent. Inasmuch as it was averred by the Applicant that it must have been the First Respondent who was allocated and no one else much more particularity was required from the Chief in his supporting statements. This was so, as submitted, considering the general circumstances and information contained in annexed documents. These documents included those that indicated on their faces that the First Respondent was the owner of the described properties such as registered leased and deeds of hypothecation. To clarify these: In the lease No. 14303-669 the lessee is shown as PALESA SEBILO, Civil Servant - Spinster (Trustee of Ronald Hantle Sebilo). And in the deed of hypothecation the First Respondent was described as PALESA KHOAPHA (born Sebilo) on the 15th March 1952 as curator bonis of Ronald Hantle Sebilo per Court Order

CIV/APN/55/99 dated 23/02.

I found no reason to doubt the Applicant's submission about the role of a liquidator. That firstly, a liquidator was an officer of Court and not representative of either party. In this regard I was referred to *EX PARTE DE WET* N.O. 1952 (4) SA 122 (OPD) at 124D. Secondly, the common law role of the liquidator after the dissolution of the joint estate was to collect, realize and divide the estate. See GILLINGHAM v GILLINGHAM 1904 TS 609 at 613 which was cited with approval in *EX PARTE DE WET* (supra) 125A-C. Thirdly, where division could not be effected in cases where the parties do not agree to an amicable division assets are normally sold and proceeds divided between them. See that case of *EX PARTE DE WET* (supra) . I believed that selling of the sites and division of the proceeds was what the Applicant looked forward to. That is why he applied the way he did in the absence of an amicable division as already indicated above.

The Second Respondent had made recommendations as regards the division of the joint estate. The Applicant did not have any objection to the said recommendation except that she contended that some property allegedly sold by the Applicant, that is site No. 12292-470 and another allocated property being plot No. 14303-669 allegedly allocated to Ronald Sebilo did not form the part of the joint estate.

The good position in law as submitted by the Respondent's Counsel was that those properties no longer belonged to the First Respondent or at least one of them had never been her site at all but had been an a direct allocation to that person called Ronald Hantle Sebilo while the other had been sold off.

I appreciated Mr. Mda's concern about the fact that the First Respondent had not filed any affidavit reflecting her objections in terms of an order which was issued at her request. This was the order which is reflected at page 64 being an order I issued on the 27th October 1997. In that order I had suggested amongst others that the liquidator, the Second Respondent, should hold the joint meeting of the parties and their Counsels to receive whatever representations including those in response to the report within fourteen (14) days. And furthermore that the parties were to file affidavits reflecting any objections and responses of the liquidator. Meaning also that the parties were to voice their objections which would also belong to additional report which would be recorded by the liquidator.

I however saw no significance to the absence of the First Respondent response in view of the fact that Mr. Mda applied for this special declaration which the Respondent earnestly resisted. The failure of the First Respondent to file any objections as I directed then was no onger of any substance. I did not intend to follow the matter of her failure because it was clear now that she was objecting that the two sites formed part of the estate in the manner I have already shown. In no way in my view would the failure close out the First Respondent's objection nor would that be held to have adversely affected her right to fight the application.

The salient question for determination this Court was whether or not the items of property formed part of the joint estate. The understanding was being that even if before the marriage the First Respondent acquired any property in her name that property automatically became part of the joint estate unless it was a donation in which the donor stipulated that such property would not form part of the joint estate. It became a question of a balance of probabilities whether the properties in reality belonged to the First Respondent and so by operation of the law became part of the

joint estate.

The First Respondent's position that there existed a trust in favour of Ronald Hantle Sebilo was later abandoned by her Counsel Mr. Mafantiri. It was because no reply had come forth against this submissions put forward by Mr. Mda. Firstly in our law no unilateral act of a party can create a trust. Usually in a deed of trust there is a settler trustee and beneficiary (See CHALLENOR'S ESTATE vs COMMISSIONER FOR INLAND REVENUE 1960(1) SA 13 NPP at 22-CE) That this (first) had to be for a benefit of a third party was trite (see EX PARTE ORCHISON 1951(3) SA 550 TPD at 552 F). Thirdly there were later requirement to be satisfied in order to create a trust. Sufficient words of the founder of his intention to create one. In addition such intention was to be expressed with sufficiently clarity or aptness to indicate an intention to create an obligation. Furthermore the subject matter had to be defined with reasonable certainty. And still furthermore the object of the trust had to be a lawful.

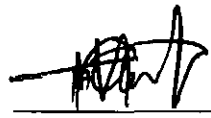
If any of the essentials were lacking the trust would be invalid (See DEMMPERS AND OTHERS vs MASTER AND OTHERS 1977(4) SA 44 (SWA) at 56 C-E. That the settler could also be a beneficiary was pointed out by reference to GOODRICH AND SON (PTY) LTD vs REGISTRAR OF DEEDS NATAL 1974(1) SA 408(W) no wonder that argument that there was a trust in favour of Ronald Hantle Sebilo was abandoned. This meant that the reference to the First Respondent as being a trustee of Ronald Hantle Sebilo at page 88 of the record was bogus in the circumstances that no such trust could be proved in that even under customary law.

The Applicant besides asking for a declaration that the site at Matala

belonged to the First Respondent he attacked what he called the unreality that the mortgage bond (page 94-108) of the record was none other than that of the First Respondent herself and not the alleged beneficiary Ronald Hantle Sebilo. It was against the First Respondent herself who in fact made payments and their disputed the estate whether it was being serviced or not. If it was not serviced this was even more serious because resort would had against the estate of which the property was part.

In further reference to the plot at Ha Matala the Court was referred to the Minister's consent to the mortgage of the property (at page 108 of the record) showed that the First Respondent was the owner of the site. It did not in anyway show that the site belonged to anybody else but the First Respondent.

I accepted none of the defences. On probabilities there was none of the properties which did not belong to the joint estate. The two sites were to be regarded as having belonged to the joint estate at the material time. They should accordingly devolve according to the plan of division of the liquidator. Costs of the application would be costs by the liquidation. The Applicant therefore succeeded. That was the Order that I made on the 14th December 1998.



T. Monapathi
Judge
1st March 2000