IN THE HIGH COURT OF LESOTHO **CIV/APN/53/99**

In the matter between

MAKATLEHO SEKONYELA	**APPLICANT**
AND	
ANNA MALETSATSI SEKONYELA	**1ST RESPONDENT**
CLEMENT SEKONYELA	**2ND RESPONDENT**
RANKUENYANE SEKONYELA	**3RD RESPONDENT**
SALEMANE PHAFANE	**4TH RESPONDENT**
MASTER OF HIGH COURT	**5TH RESPONDENT**
ATTORNEY GENERAL	**6TH RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr Justice S. N. Peete
on the 7th day of February 2000

On the 5th February 1999, the present application was moved **ex parte** and was granted upon the following terms:-

1. The rules are hereby dispensed with on periods and modes of service.

2. A **rule nisi** is hereby issued calling upon the Respondents to show cause on the 22nd February, 1999 at 9:30 a.m why the following order shall not be made absolute.

1. The 4th Respondent is hereby interdicted and restrained from executing and administrating the Estate of the late Paul Sekonyela in terms of the Will, pending finalisation hereof and an action to be instituted within 30 days of this interim order.

2. The 1st 2nd and 3rd Respondents are hereby interdicted and restrained from disposing off and or dissipating or destroying property either movable or immovable wherever situated belonging to the Estate of the late Paul Sekonyela pending finalisation of this application and an action to be instituted by the applicant within 30 days of this interim order.

3. Ordering that all assets of the late Paul Sekonyela wherever situated should remain in the possession of the applicant pending the final determination of an action to be instituted within 30 days of granting of this order.

4. The 3rd Respondent is hereby ordered to return forthwith property being a double bed, three sitter sofa, gas stove, gas heater and cylinder to the applicant, belonging to the Estate of the late Paul Sekonyela.

2. Prayer 1 & 2 (a) (b) (c) & (d) to operate with immediate effect as interim relief."

The rule was made returnable on the 22nd February 1999. In her founding affidavit to the notice of motion, the applicant avers that she is the lawful wife and widow the late Paul Sekonyela who died on the 1st December 1998; and that the deceased and the applicant had contracted a customary law marriage in 1985 and some twenty-two herd of cattle were paid as bohali; and that four children Katleho (15), Sekonyela (12), Nthabeleng (7) and Nteboheng (5) were born of the said married.

The 1st Respondent is the mother of the late Paul Sekonyela, the second and third Respondents are the brothers of the deceased. All three respondents are beneficiaries of a will allegedly made by the deceased on the 17th March 1991. This will was not registered.

On the 8th February 1990 the deceased and the applicant "purported" to enter into an anti-nuptial contract excluding the marital power and community of property and entitling any consort to be at liberty to dispose his or her property and effects by will as he or she may think fit; in the anti-nuptial contract the deceased made certain furniture bequests to the applicant. It is again not in dispute that the deceased and applicant purported to enter into a civil law marriage on the 10th February 1990. The applicant avers that they entered into this civil law marriage merely to regularise their position in the Roman Catholic Church, which had suspended or excommunicated them after their initial elopement in 1983. She states that a few days before the civil marriage she was also made to sign a contract the contents of which she did not know. She states that since theirs was a customary law marriage, they could not have entered into a valid anti-nuptial contract and a civil rites marriage in 1990. In fact they were then already living as husband and wife since 1983. She also avers that her late husband under law could not make a valid will as he has purported to have done because neither was he married by civil rites nor had he abandoned the

customary way of life. The applicant then lists instances whereat her late husband slaughtered beasts for traditional feasts and other occasions which showed that he had not abandoned the customary way of life.

She states that the estate of the deceased is quite large and consists of houses, eleven buses, 14 coasters, 6 trucks, four cars, two caravans, six developed sites, cattle, sheep and goats.

She states that during his lifetime the deceased had caused some of his buses to be registered in the names of the first, second and third respondents merely to hoodwink the traffic authorities into believing that the buses had several owners when in fact the deceased was the sole owner. She states that in December 1998 the third respondent took away from her home some household furniture items like a double bed, a three sitter sofa, gas stove, gas heater plus cylinder.

In her answering affidavit, the first respondent admits the existence of the customary law marriage and that a civil rites marriage was also solemnized in 1990 but counters by stating that "Applicant all along sat back and never sought to invalidate the civil marriage and the anti-nuptial contract." She also contends that the deceased had abandoned the customary mode of life in that he "threw parties and practised a religious life, operated a European style of business and lived a European mode of life." It is therefore a question of fact in dispute as to whether the deceased had abandoned the customary way of life.

In her replying affidavit, the applicant contends that since her husband had not abandoned his customary way of life and had married by way of custom in 1985, he could not make a valid will; all he could do was to make written instructions in accordance with customary law (Laws of Lerotholi - 14 (1)) she also contends that the civil marriage purportedly solemnised was of no legal force or effect along with its anti-nuptial contract.

On the day of hearing **Ms. Tau** informed the court that there is a pending civil case CIV/T/68/99 in which the present applicant (plaintiff) claims:-

"1. Declaring the plaintiff and the late Paul Sekonyela to be married under customary law.

2. Cancellation of the anti-nuptial contract between plaintiff and the late Paul Sekonyela.

3. Declaring the civil rites marriage between the plaintiff and the late Paul Sekonyela as null and void **ab initio**.

4. Declaring the document purporting to be Last Will and Testament of Paul Sekonyela bequeathing all property to 1st Defendant as null and void and of no legal force and effect.

5. Declaring Katleho as the rightful heir of the late Paul Sekonyela.

6. Ordering cancellation of registration certificates of vehicles mentioned in paragraph 16 of the Declaration.

7. Declaring allocation of the site at Ha Thamae Mejametalane to 1st Defendant invalid.

8. Costs of suit.

9. Further and/or alternative relief."

It should be pointed out that there are some disturbing features in these proceedings; the deceased met a violent death on the 1st December 1998; the summons were filed with the office of the Registrar on the 22nd February 1999 and a notice of appearance to defend was made on the 26th February 1999. Since then a complete lull; there has been no plea entered in terms of Rule 22; nor has the plaintiff taken any steps to require defendants to deliver such (Rule 26). Counsel on both sides seem to have strangely abandoned the action for over a year. This is rather unfortunate upon their clients who are now being made to embark on fresh application proceedings, for which they pay fees!

In her submissions, **Ms Tau** contends that the will violates the spirit of Basotho custom because it tends to deprive the heir of his rightful share, and that the intended execution and administration of the estate of the deceased in terms of the last will made by the deceases will prejudice the rights of the applicant and those of the heir under custom. **Ms Tau** submits that upon the papers her client has established a **prima facie** right. Without endeavouring to indicate precisely what is meant by a **prima facie** right or how it is proved, the courts have readily accepted that where the right asserted by the applicant is **prima facie** established although open to some doubts, the applicant has fulfilled the first requirement (See **Prest** - Law and Practice of Interdicts, (1996) p.52; **Setlogelo vs Setlogelo** - 1914 AD 221; **Ndauti vs Kgami** 1948 (3) SA 27 at 36; **LF Boshoff Investment vs Cape Town Municipality**, 1969 (2) SA 256 at 257 A-F. The question should be whether has the applicant has established a **prima facie** right sufficient to sustain a cause of action. This it is the so called "threshold test" which simply means a prima facie right albeit admitting of some doubt. **Ms Tau** submits that since the marriage entered into by the parties in 1985 was a customary one, the deceased could not later purport "to turn" that customary marriage into a civil one, nor enter into an anti-nuptial contract, or make a will. She submits that the estate of the deceased could not be administered in accordance with the provisions Administration of Estates Proclamation of 1935 because the deceased had not abandoned customary way

of life and adopted a European mode of life and had not married under civil law -**Abrahanis vs Abrahanis** - 1991 - 96 LLR (Vol.1) P.1. Section 3 (b) of the Administration of Estates Proclamation reads:-

"3. This Proclamation shall not apply

(a) .....

.....

(b) to the estates of Africans which shall continue ot be administered in accordance with the prevailing African law and custom of the Territory: Provided that such law and custom shall not apply to the estates of Africans who have been shown to the satisfaction of the Master to have abandoned tribal custom and adopted a European mode of life, and who, if married, have married under European law."

She also submits that if the customary marriage entered into in 1985 by the deceased and applicant is regarded as valid, then the purported civil ceremony in 1990 has no legal force and effect. Section 42 of the Marriage Act No 10 of 1974 states:-

"This Act shall apply to all marriages solemnised in Lesotho save and except marriages contracted in accordance with Sesotho law and custom and nothing herein contained shall be taken as in any manner affecting or casting doubts upon the validity of any such last mentioned marriages contracted before or after coming into operation of this Act."

Section 29 (1) reads:-

> "No person may marry who has previously been married to any other person still living unless such previous marriage has been dissolved or annulled by the sentence of a competent court of law."

The comments of Lehohla J in **Qhobela vs Qhobela** are quite opposite in the regard.
Ms Tau also submits that unless the interim relief is granted the applicant has a well-grounded apprehension that she will suffer irreparable harm if the estate is administered in accordance with the will; she says this would consume the buses, cattle, sheep and goats and other important items of property; she lastly contends that the balance of convenience also favours the applicant who has reasonable prospects for success in the main action. It is however unfortunate that their action has been left in limbo for over a year. The court is owed a full explanation for this sad state of affairs; for I am of the opinion that pleadings in the action could have long been closed and matter set down for hearing. Of what use is issuance of summons if the file falls into a state of neglect or oblivion?

Mr Mahao (who is also a constitutional analyst of repute) for the Respondent submits in the main that section 3 (b) of the Proclamation has been made by the High Commissioner to "make provision for the administration of the estates of the deceased persons, minors and lunatics and of derelict estates and to regulate the rights of beneficiaries under the mutual wills made by persons married in community of property." He contends in his two pronged argument that this section in the Proclamation is inconsistent with the section 4 and section 5 of the Law of Inheritance Act No.26 of 1873. I should point perhaps out in passing that Mr Mahao seemed to be contending that the Administration of Estates Proclamation is a law subordinate to the Law of Inheritance Act and that it was a Proclamation made by the High Commissioner under the authority of the abovementioned Act. This is not so because since

1884, Basotholand was protectorate being governed by Great Britain through its High Commissioner and the Proclamations they decreed were statutory enactments on their own right. Legislative omniscience implies that when passing the Proclamation the High Commissioner had knowledge of the existence of a prior law like the 1873 Law of Inheritance and purposely excluded Africans from its operation.

These sections read:

> "4. No legitimate portion shall be claimable of right by anyone out of the estate of any person who shall die after the taking effect of this Part.
>
> 5. Every person competent to make a will shall have full power by any will executed after the taking effect of this Part to disinherit or omit to mention any child, parent, relative or descendant without assigning any reason for such disinheritance or omission, any law usage or custom now or heretofore in force in Basutoland notwithstanding: and no such will as aforesaid shall be liable to be set aside as invalid, either wholly or in part, by reason of such disinheritance or omission as aforesaid."

Mr Mahao submits that sections 4 and 5 of the Inheritance Law guarantee what has been referred to as "freedom of testation". That may indeed be so but these sections must however be read purposively whilst noting that there is no saving clause in the Law of Inheritance Act which excludes Africans from its operation; according to **Mr Mahao**, the Law of Inheritance is therefore of general application; he contends that section 3 (b) of the Proclamation infringes and limits this freedom guaranteed the Law of Inheritance. He also argues strenuously that section 3 (b) of the Proclamation violates sections 11,13,14 and 18 of the Lesotho Constitution in that it generally restricts the Basotho to make wills solely on the ground that they are Africans and because they have not adapted European mode of life; he quotes in support of this submission the case of **Hlauli vs Hlauli** (CIV/Adoption/1/98) where the learned Chief Justice Kheola said:-

> "There is no doubt in my mind that the word "African" used in section 14 of Adoption Proclamation is a racial description. It is based on colour - the black people of Africa. It is therefore clear that section 14 of the Proclamation is discriminatory of itself and in its effect."

The learned Chief Justice also discussed the effect of the subsection 4 (b) of section 18 of the Lesotho Constitution and in coming to the conclusion that there is no provision in the Constitution which prohibits Basotho people from exercising their rights of adoption under the Adoption of Children Proclamation he was of the opinion that the words "it shall not apply to Africans" were obnoxious, discriminatory and absurd. He went on to state:-

> "I have interpreted section 18(4)(b) of the Constitution of Lesotho and have come to the conclusion that it does not allow the legislature to pass discriminatory laws. It merely safeguards the application of certain personal laws of the Basotho. It does not use the word "Africans." I have come to the conclusion that section 14 of the Adoption of Children Proclamation No. 62 of 1952 is unconstitutional and I declare it as void."

Perhaps, the same line of reasoning can be adopted in attacking the constitutionality of section 3(b) of the Administration of Estates Proclamation. It is however no imperative upon me as of now to make a final decision on this very important constitutional point, because the present proceedings are only interlocutory and this constitutional point is certainly going to be argued in full in the main action. All I can only say at this stage that there is a very strong prima facie and valid point of law. **Mr Mahao** submits that it is totally irrelevant whether the deceased married civilly or customarily; the deceased had the full capacity and right to make the will as he did. In reply **Ms Tau** notes that the deceased

seems to have made his last will whilst labouring under the impression that section 3 (b) was a valid provision for he declares:-

> "(a) I have abandoned tribal custom and have adopted a European mode of life.
>
> (b) I have married under European law."

This may be a valid point but one which falls away if these obnoxious passages are excised from the will (Ex parte van der Spuy NO 1966 (3) SA 169). The will is not rendered invalid by the insertion of the statutory wording of an obnoxious piece of legislation, the portions can be excised from the will without affecting the true intention of the testator.

In coming to the facts of the application I should state that this court has a discretion whether or not to grant the application for an interim relief pendente lite and in doing so it should consider all the circumstances of the case and in particular the probabilities of success of the applicant in the main action; it also considers the nature of the injury which each party will suffer if the application is granted on one hand or refused on the other. Whereas the respondents have very good prospects in the main action, I am however of the view that the status quo must be maintained pending the finalization of the main action. The applicant is unlikely to dissipate and squander recklessly property which she may ultimate acquire in the event of her being successful in the main action. I am not satisfied that the respondents are likely to suffer prejudice if application is granted because in granting the application, this court has power to impose certain terms and conditions and indeed to regulate further proceedings (**Chopra vs Avlon Cinema SA (Pty) Ltd** 1974 (1) SA 469; **Ndauti vs Kgami & Others** - 1948 (3) SA 27; **Shoprite Checkers Ltd vs Blue Route Property Managers (pty) Ltd & others** - 1994 (2) SA 172 (c) at 184 H - 185D.

The success or failure of the applicant as plaintiff in the main action seems to revolve upon a very important constitutional question which I have, advisedly, elected not to make any final decision on to avoid pre-empting the decision in the main action. I do not wish to complicate this important case with problems of res judicata.

In exercise of my discretion therefore I grant the application and impose the following terms and conditions in order to protect the rights of the respondents in the event they are successful in the main action.

1. The Registrar of this court will cause to be made a full inventory of all properties in the estate of the deceased affected by the proceedings.

2. The applicant is directed not to alienate, destroy or dissipate in any manner whatsoever the said inventoried properties till the finalisation of the main action.

3. The applicant's and respondents' attorneys directed to cause the filing of pleadings in the main action to be finalised before the end of March, whereupon the Registrar is directed to set the case for hearing as a matter of priority.

The issue of costs is deferred until the end of the main action.

S. N. PEETE

JUDGE

For Applicant : Ms Tau

For Respondents : Mr Mahao