

CIV/APN/340/2001

IN THE HIGH COURT OF LESOTHO

In the matter between:

TŠOEU LETUKA

APPLICANT

and

KHOJANE MOTINYANE
DAVID TŠITA MOTINYANE
HALALELA MOTINYANE
LESOTHO FUNERAL SERVICES (Hlotse)

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT

JUDGMENT

Delivered by the Honourable Mrs Justice Hlajoane
Acting Judge on 9th Day of October, 2001

The Applicant in this case approached the Court *ex parte* seeking an order for interdict and declaratory order couched in the following terms:-

1. That a *rule nisi* do hereby issue calling upon the Respondents to show

cause if any, on a date to be determined by this Honourable Court, why:-

- (a) the ordinary periods of notice shall not be dispensed with due to the urgency of the matter
 - (b) the first Respondent herein shall not be interdicted forthwith from carrying on the burial of the late 'Mantšemelo Motinyane on the 8th September, 2001 pending the finalisation hereof
 - (c) the first, second and third Respondents herein shall not be interdicted forthwith from vandalising and/or otherwise dealing with the estate of the late 'Mantšemelo Motinyane pending the finalisation hereof
 - (d) the fourth Respondent herein shall not be interdicted forthwith from releasing the body of the late 'Mantšemelo Motinyane to the Respondents herein and/or their agents pending the finalisation hereof
 - (e) the Applicant herein shall not be declared the lawful heir to the late 'Mantšemelo Motinyane and therefore the rightful person to bury the body of the late 'Matšemelo Motinyane
 - (f) the purported appointment of the first Respondent as the heir of the late 'Matšemelo Motinyane shall not be declared null and void
 - (g) the Respondents herein shall not be directed to pay the costs hereof on the attorney and client scale
 - (h) the Applicant herein shall not be granted such further and/or alternative relief as this Honourable Court may deem fit
2. That prayers 1(a), (b), (c) and (d) operate with immediate effect as temporary interdicts.

The application was opposed by the first Respondent who claimed to be the

lawful heir to the late 'Mantšemelo Motinyane and therefore the rightful person to bury the body of the deceased 'Mantšemelo.

The facts of this case which also are a common cause are as follows:-

That the late 'Mantšemelo Motinyane and her husband the late Motinyane Motinyane had only one child, a daughter called Ntšemelo Motinyane. Ntšemelo married the Applicant herein by civil rites and in Community of Property and then became known as 'Maikaneng Letuka.

Again it is common cause that 'Maikaneng predeceased her parents having passed away in 1993, whilst her parents died in 1999 and 2001 respectively. Also it is not disputed that during the life time of her parents as well as during the lifetime of 'Maikaneng herself a meeting was called of the member of the Motinyane family.

It was on the 25th May, 1987. In that meeting, first and second Respondents were present, and a decision was taken appointing 'Maikaneng as the heiress to her parents' estate. Not only a decision was taken, but that first and second Respondents appended their signatures to the decision which had been reduced to writing.

It is worth mentioning at this stage that though the Applicant avers that the late Motinyane Motinyane and 'Mantšemelo Motinyane appended their signatures to the document appointing their daughter as their heiress, the Applicant contend otherwise as they were according to him illiterate. But affidavits of Moabi Motinyane and Lebenya Motinyane, the latter claiming to be the head of Motinyane family, are to the effect that, they were present when the decision was made in the meeting of the 25th May, 1987 and that there was no objection raised by any member of the Motinyane family thereof present including the first Respondent himself. They further deposed to the information that they all appended their signatures to the said document after it had duly been executed. They both witnessed personally and/or saw when both Motinyane Motinyane and 'Mantšemelo Motinyane also appended their signatures to the document.

The other undisputed fact has been that the late 'Mantšemelo Motinyane once sued the first Respondent when he had taken her cow and calf without her consent. In that case 'Matšemelo had been successful. The animals had been in Applicant's possession.

On Estoppel.

The first Respondent submitted that he was made to sign the already executed document, but did not want to take the Court into his confidence by mentioning what exactly happened which culminated in signing of the document by him. He never pleaded *duress* misrepresentation or one like.

The Applicant on the other hand submitted that in fact, the first Respondent was in law *estopped* from resiling from the resolution on the basis of the Principle of **Caveat Subscriptor**. Innes CJ (as he then was) in the case of **Burger vs Central South African Railways 1903 T.S. 571**, in dealing with a case similar to the present case had this to say:-

“It is a sound principle of our Law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. There are grounds of course, upon which he may repudiate a document to which he had put his hand.”

The learned Judge in that case showed that, neither fraud nor misrepresentation had been alleged, which is the position obtaining in the present case. The first Respondent only alleged, he had been made to sign, by who, it is not stated, or the circumstances that made him to lose reason and good judgment.

Also Fagan CJ (as he then was) had this to say in **George vs Fairmead (Pty)**

Ltd 1958 (2) S.A. 465, that:-

“When a man is asked to put his signature to a document, he cannot fail to realize that he is called upon to signify, by doing so, his assent to whatever words appear above his signature. The party who seeks relief must convince the Court that he was misled as to the purport of the words to which he was thus signifying his assent.”

On the authorities cited above, the Respondents 1 and 2 cannot be heard to have withdrawn from what by their signatures assented to.

On Inheritance

Applicant claims to be the heir of the late ‘Mantšemelo Motinyane by representation *per stirpes* and as such he is entitled to bury the remains of the late ‘Mantšemelo Motinyane. On survivorship, the law is very clear that, a person cannot succeed to the property of the deceased unless he/she survives the deceased.

In **Estate Open vs Estate Atkinson and Others 1966 (4) S.A. 589** the couple had appointed their only daughter under their joint will usufructuaries of the income of the trust established by them. The will further had a clause which

stipulated as to what should happen on the death of the daughter. The daughter unfortunately predeceased the testator, and it was held that, the daughter had never succeeded to the status of usufructuary because she had predeceased the testator . Even in our case, since ‘Maikaneng Letuka did not live to inherit from her parents, the estate never passed to her. By the same token Applicant cannot therefore inherit from Motinyane’s estate as there was no provision for a substitute in the letter by the deceased. ‘Mantšemelo Motinyane and Motinyane Motinyane should therefore be taken to have died intestate. The question of the mode of life test does not apply in this case as it has not been raised by any of the two parties. It follows therefore that the duty to bury here is governed by Basotho custom. It is not the custom of the Basotho to leave special direction as to burial.

As Maqutu J said in the case of **Mafereka vs Mafereka and Others 1991-96 vol. 1 LLR 445**, “that every man in Lesotho expects to be buried according to Basotho custom and tradition”. I would only modify that by replacing ‘every man’ by most men, as lately there seems to be this new imported tradition of burning the dead “cremation”.

In this case as in **Apaphia Mabona vs Khiba Mabona CIV/APN/280/86**

[unreported] the deceased left no written instructions as to burial. As already stated, the question of the parties' marriage in our case is irrelevant. What is relevant is that the parties died leaving no male issue. According to Basotho custom where there is no male issue, the family will sit in a meeting and decide on who the heir is following their order of succession. The family did convene such a meeting and have made their nomination.

In the result the Motinyane family should proceed with the burial of 'Mantšemelo Motinyane. The Application is accordingly dismissed and the rule therefore discharged with costs.


A.M. HLAJOANE
ACTING JUDGE

For Applicant: Mr Nathane

For Respondent: Mr Teele