

CIV/APN/360/2000

IN THE HIGH COURT OF LESOTHO

In the matter between :

MOTLATSI MOTOKOA

APPLICANT

AND

SEHLOMENG 'MOTA

1st RESPONDENTEMPLOYMENT BUREAU OF AFRICA
(Ltd) TEBA-MAFETENG2nd RESPONDENT**JUDGMENT****Delivered by Hon. Justice M.L. Lehohla on the 3rd day of September, 2001**

On Friday last week this court heard arguments by counsel for respective parties in the above matter. The thrust of the arguments was centred between the applicant's counsel and counsel for the first respondent. Mr. Malebanye for 2nd respondent undertook to abide the Judgement of the Court.

The notice of motion moved on 25th September 2000 prayed for a **rule nisi** to issue returnable on the date and time to be determined by this court calling upon the Respondents to show cause why

- (a) the 2nd Respondent shall not be restrained from releasing to the first Respondent any benefits accruing from the death of the late Thabo Motokoa.
 - (b) the applicant shall not be declared the sole beneficiary of the late Thabo Motokoa, in terms of the contract between second Respondent and deceased;
 - (c) the 1st respondent shall not be restrained from receiving any benefits accruing from the death of the late Thabo Motokoa;
 - (d) the rules as to forms and notice shall not be dispensed with on account of urgency;
 - (e) the respondents shall not be ordered to pay costs hereof;
 - (f) the applicant shall not be granted further and/or alternative relief;
2. that prayer 1(a) and(d) shall operate with immediate effect as an interim order pending finalization hereof.

The affidavit of Motlatsi Motokoa has been attached to the notice of motion.

In his founding affidavit Motlatsi Motokoa avers that he is the father of the deceased Thabo Motokoa who at the time of his death was currently employed by Anglo Gold Vaal River surviving under the name Vaal Reefs Mining Company Limited. The deceased died on 2nd May, 1999.

The deponent further avers that the deceased, upon being employed, signed a contract with his employer executable through the office of the Labour Commissioner. The Contract was signed on 27th May 1998. A copy of the contract is annexed marked "B".

The annexure reflects the applicant as the beneficiary in respect of Insurance benefits accruing in terms of the contract in the event of Thabo's death. The 2nd respondent was thus contractually bound to transmit benefits to the applicant upon Thabo's death.

The applicant has not concealed that prior to the contract marked annexure "B", Thabo the deceased had appointed the 1st respondent as the beneficiary who it is alleged had been his girl friend with whom the deceased had been living together for sometime. To the extent that the applicant has not concealed that the deceased had previously appointed the 1st respondent as the beneficiary, his bona fides are above board.

Thus he accordingly avers that the deceased cancelled the contract that had initially been intended to benefit the 1st respondent and in its place created annexure “B” which was to benefit the applicant instead. Thus the applicant asserts that he alone is the lawful beneficiary to the deceased’s death benefits.

The applicant complains in paragraph 10 though now this complaint should be blunted by the attitude subsequently adopted by the 2nd respondent’s counsel who undertook to abide the decision of the court. Nonetheless the applicant’s complaint was that the 2nd respondent’s officers acting within the scope of their official duty with 2nd respondent unlawfully and wrongfully refused to release the said funds to him. It is said that they alleged that the 1st respondent is the deceased’s wife and beneficiary and that the applicant is not entitled to the said funds because he is not the deceased’s wife. The complaint further stated that the officers of the 2nd respondent claimed further that the benefits are to be shared between 1st respondent and the applicant. The applicant accordingly points out that they have no right to do such a thing.

The applicant further avers that the 1st respondent was never married to the deceased. He nonetheless argues alternatively that, even if she was so married that didn’t debar the deceased from appointing a person of his choice as a beneficiary under the contract.

The applicant has thus approached this Court labouring under grave apprehension that the 2nd respondent would in the circumstances unlawfully and illicitly release the said funds to the 1st respondent at any time and in the face of

unambiguous directive made manifest by the deceased during his life-time. He points out that should this be the case he would suffer irreparable harm as applicant, inasmuch as the 1st respondent is a person of straw. He rams this point home by indicating that he would not be afforded substantial relief at a hearing in due course.

The applicant thus finally avers that the case he has moved before court is a matter of extreme urgency and that he has no other suitable remedy in the circumstances.

Mr. Molapo camping on the trail of the 1st respondent argued that there is no urgency in this matter. But I have come to the conclusion that reading from applicant's affidavit a clear case for urgency has been made out. He relied for this proposition on **Commander L.D.F. vs M. Matela** COA (CIV) No 3 of 1999. It however appears to me that the above authority has been read out of context in the light of the fact that the proper and practical approach should be if the affidavit discloses sufficient facts from which it can be concluded that the case cries out for urgent relief as was the case in **Tseliso Makhakhe & ors vs Qhobela Molapo and ors** CIV/APN/410/99 by Monaphathi J. and confirmed on Appeal either notwithstanding or after **Commander LDF** above, that should be enough.

The 1st respondent avers that she was married to the applicant's son and was given the name 'Marorisang Motokoa as a result of her marriage to the late Thabo.

She avers that the applicant is not entitled to the remedy sought. She denies that Thabo executed Annexure B. She avers that the form which was executed and

signed on behalf of Thabo on 27th May 1988 did not have some of the hand-writings on it such as "Motlatsi Father Divorce - 07/01/99 - R4000.00 to follow and BH 683922".

She has annexed what she wishes to be regarded as genuine copies of the contract dated 14th July 1997 and 27th May 1998. Both are marked "M2" collectively. She prays that Annexure "B" be rejected as a fraudulent document and therefore a nullity. She points out that "M2" collectively reflects her as the wife of the deceased Thabo.

There is a strong undercurrent of belief in the 1st respondent's affidavit that because she is the wife of the deceased Thabo she is therefore the one who is entitled to the death benefit accruing from the contract the deceased concluded with his employer. Indeed Mr. Molapo buttressed this somewhat mistaken belief. Mistaken in the sense that this is not always true in all occasions.

The highest authority that should be relied on to disabuse all parties in similar circumstances is none other than C of A (CIV) No 8 of 1986 **RAMAHATA vs RAMAHATA** (unreported) at pp 4 and 5 where Schutz P, as he then was said:

"This case is a simple, one. The appellant has established a *stipulatio alteri* (contract for the benefit of a third party) between the son and the Insurance Company : see e.g. **Croce vs Croce** 1940 TPD 251. The institution of **stipulatio alteri** by virtue of being part of the Roman Dutch Law, also forms part of the law of Lesotho. The contract is to the effect that *she* is entitled to accept the benefit of this contract,

and the evidence is that she has in fact done so. *Her* rights therefore flow from contract and the M6000 has nothing to do with the deceased estate. For these reasons the appeal succeeds”.

I have italicised the words she and Her appearing in the above quotation to call to attention that the successful party in the **Ramahata** case was the deceased’s concubine for whose benefit a **stipulatio alteri** had been created by the deceased. Thus because she was nominated in that contract the deceased’s own wife and children stood to lose.

Mr. Molapo sought to rely on the **Employment Bureau of Africa Limited** constituting regulations adopted by Mineworkers in South Africa from 1st July 1997; to advance a sentimental view that his client and her children should not be made to suffer by preference of the applicant over them.

The fact of the matter is that the Roman Dutch Law principle on which the **stipulatio alteri** is based is part of the Law of Lesotho and cannot be shifted aside by regulations. The Employment Bureau of Africa Limited cannot legislate for the Kingdom of Lesotho. The law as set out in Ramahata above is trite and has been followed ever since. See **Valentina Kaphe vs TEBA & Anor** 1991-2 LLR & LLB pg 16. See also CIV/APN/152/90 **Rakoto vs KATIBA & TEBA** (unreported) at p 6 where it is stated:

“.....where an employee working for a company such as the second respondent chooses who should benefit in the event of his death;such a person becomes the beneficiary by virtue of the stipulation and nothing else; and if there is satisfaction as to the identity of such a person it doesn't matter what the name is and what the relationship she has with the deceased”.

This court cannot therefore deliberately overlook the trite authority on the issue in favour of regulations which are in conflict with the sound precepts of that authority. Furthermore evidence supplied by the custodians of the records of the 2nd respondent shows that the deceased appointed the applicant as his beneficiary finally. The applicant did not seek to hide that the 1st respondent had previously been so appointed. But what is clear is that as he was entitled to, the deceased decided to change his mind in favour of the applicant.

It is one of the basic fundamentals of the Law of Contract preserved by the Common Law that men are free and at liberty to enter into contracts without any hamstrings. It would indeed go against the grain if in the same society some class of people are prevented from achieving their goals in contracts while others are not. That would be flawed as discriminatory and therefore unconstitutional.

I accept Mr. Phafane's submission that the promulgator of the regulations relied on by 1st respondent cannot change the law of this Kingdom. The regulations cannot be allowed to affect what a mature man wants to do under a contract or who he wants to benefit therefrom. Suffice it to say the contract signed by the deceased

is clear and takes no account of the regulations.

Furthermore the court is not unmindful of the fact that the man who made the regulations is not a party to this contract thus they cannot affect the **stipulatio alteri** appearing therein.

The court's attention has been drawn to the fact that an extra set of papers in the shape of what is termed supplementary affidavit have been filed on behalf of the 1st respondent as late as 16th August, 2001 without even the courtesy of asking for leave of Court. That is unacceptable. Those papers are not to be treated as part of proceedings in this matter.

This court is not oblivious of the words of Ackerman J.A in *Strong Thabo Makenete vs Major General Lekhanya and ors* 1991 - 92 LLR & LB p. 126 at 127 that "Rules of court are not unimportant and cannot just be disregarded at will" with the hope that "non-compliance will simply be overlooked or condonation granted as a matter of course or right...".

The 1st respondent having challenged the 2nd respondent as well chose not to call the deponent to give **viva voce** evidence and be cross-examined on the vital issue where fraud is alleged. In the circumstances the court is at large to conclude that the deceased was just as much at large to change his mind in favour of the applicant a month before he died as he was to do so a minute or two after deciding that his wife would be the beneficiary. Mr. Molapo in the course of arguments submitted that the sets of contracts presented before court by main contestants as reflected in Annexures

“B” and “M2” respectively raise a serious dispute of fact and consequently the applicant’s case should be dismissed.

I have pointed out that notwithstanding the perceived dispute learned counsel did nothing when asked by court what he proposed doing. In the result the 1st respondent could not make any headway regard being had to the dictum of **Gaunlett J A in C of A (CIV) 18/98 Lesotho Hotels International vs. the Minister of Tourism etc and 3 ors** (unreported) at p. 11 as follows:

“The appellant in these circumstances, given the dispute of fact in the third category of the decision in **Room Hire (Pty) Limited vs Jeppe Street Mansions Pty Ltd** 1949 (3) SA at 1163, should have sought a referral to oral evidence [to request court] to proceed on that basis and grant final relief (**Plascon - Evans Paints Ltd vs Van Riebeeck Paints Pty Ltd** 1984 (3) SA 623 (A) at 634H-635B)”.

In **Plascon** at 635 above Coobett JA said “If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross examination” where “the court is satisfied as to the inherent credibility of the applicant’s factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks.....”.

Suffice it then that I take it that the 1st respondent failed to avail herself of her right to call the custodian of 2nd respondent's records at her own peril.

Consequently the application is granted with costs against 1st respondent only.



M.L. LEHOHLA

JUDGE

Applicant's counsel : Mr. S. Phafane
1st Respondent Counsel : Mr. L.D. Molapo
2nd Respondent's Counsel : Mr. Malebanye