CIV/APN/145/00

IN THE HIGH COURT OF LESOTHO

In the matter between:

PALESA 'MATLI	APPLICANT
AND	
PAMPIRI TSIKOANE	1st RESPONDENT
'MATHATO TSIKOANE	2nd RESPONDENT
THATO TSIKOANE	3rd RESPONDENT
METROPOLITAN LIFE LTD	4th RESPONDENT
LESOTHO NATIONAL INSURANCE GROUP	5th RESPONDENT
COMMISSIONER OF POLICE	6th RESPONDENT
ATTORNEY GENERAL	7th RESPONDENT

JUDGMENT

Delivered by the Hon. Mr. Justice G. N. Mofolo
on the 11th day of December , 2002.

This is a matter in which the applicant Palesa 'Matli approached this court for an order as follows:

1. That a Rule Nisi be issued returnable on the day of May, 2000, calling upon the respondents to show cause, if any, why:-

   (a) The periods of notice provided by the Rules of court and treating this matter as one requiring attention should not be dispensed with;

(b) First, second and third respondents should not be restrained from demanding the release of the benefits due in the insurance contracts of the deceased Thapelo Tsikoane from the fourth and fifth respondents, as well as death gratuity and leave pay from sixth respondent pending finalisation of this application.

(c) Fourth and fifth respondents should not be restrained from releasing the insurance monies due to the estate of the deceased Thapelo Tsikoane to any person other than applicant.

(d) Sixth respondent should not be restrained from releasing the deceased Thapelo's gratuity and leave pay to any person other than applicant;

(e) The resolution of the family of Thapelo Tsikoane appointing the third respondent to release the insurance moneys due to the estate of Thapelo Tsikoane should not be declared invalid;

(f) Applicant should be declared the rightful person to release the insurance monies due to estate of Thapelo Tsikoane from fourth and fifth respondent, as well as death gratuity and leave pay from sixth respondent and to use these monies for the maintenance and support of the heiress, Mahali and her younger sister, Lineo.

(g) Applicant should not be declared the sole custodian of all the deceased's belongings, property and personal effects, whenever they may be found, on behalf of the heiress, Mahali.

(h) First, second and third respondents should not be ordered to pay for the costs of this application;

(i) Granting applicant further and/or alternative relief.

2. Prayer 1 (a), (b), (c) and (d) to operate with immediate effect as interim interdicts pending finalisation of this applicant.

From the record of proceedings it appears that the application was filed with

office of the Registrar on 26th April, 2000 and moved on the 27th April, 2000 before my brother Lehohla J. who granted the interim relieve. The same day as moving the application the 4th, 5th, 6th and 7th respondents were served and an attempted service made on the other respondents who, on 28th April, 2000 signified their intention to oppose per their attorneys M.M. Klaas and Co.

On 27 April, 2000 the Rule had been made returnable to 8th May, 2000 and on 8th May, 2000 Mr. Mohau had appeared for the applicant and the court had ordered that opposing papers be filed by the 15th May, 2000. The rule had been extended to 22nd May, 2000. On 22 May, 2000 Mr. Nteso for the applicants had appeared along with Mr. Ntsane for the 7th respondent and the rule had been confirmed and served on the 1st, 2nd, 4th, 5th, 6th and 7th respondents on 26th May, 2000 with the final order being served on 1st and 2nd respondents on 6 June, 2000 and it would appear having been served with the final order 3rd respondent filed an opposing affidavit. What's noteworthy is that the 3rd respondent filed an opposing affidavit more than a month after his intention to oppose the application. This court has not been told why the 3rd respondent was late in filing his opposing papers.

When, however, the 3rd respondent was served with the final order only then did it occur to him to file an application (*ex-parte*) to set aside the final order. Although the applicant/3rd respondent was tardy in the original application, his application was launched reasonably sooner after the granting of the final order. The application prayed for an order as follows:

1. The Rule Nisi be issued returnable on the suitable date calling upon the Respondent to show cause (if any) why:

   (a) The order obtained in favour of the 1st Respondent on the 23rd May shall not be set aside.

   (b) The 2nd, 3rd, 4th and 5th respondents shall not be stopped or restrained from issuing any cheques or moneys in favour of 1st respondent.

2. That the respondents shall not be ordered to pay costs of this application in the event of opposition.

3. That prayer 1(b) operate with immediate effect as an interim rule in this matter.

The Rule Nisi was obtained on 21 June, 2000 before my brother, Monapathi J. and made returnable on 2 August, 2000. Respondents having been served Mr. Phoofolo on behalf of the 1st respondent had on 20 June, 2000 opposed the application and filed an Opposing or Answering Affidavit on 4th August, 2000. Mr. Phoofolo had set down the matter for 20 November, 2000 and on 5 March, 2001 applied to the

Registrar for allocation of date of hearing and this had been repeated on 9 March, 2001. On 30 April, 2001 Mr. Klaas for the applicant had set down matter for hearing on 28 May, 2001 well-nigh a year after obtaining the rule nisi. Mr. Klaas had applied for allocation of date of hearing on 27 July, 2001 and 8 December, 2001. There had thereafter been several notices of set down by attorneys on either side until 23 September, 2002 when, in order to minimise on time and expense the court had decided to allow rescission of judgement. The court allowed rescission mainly because although it took quite some time to decide the application, it had been lodged in time and the reason for not hearing the application could not exclusively be placed at the applicant's door; besides, it appeared that at the trial, a possibility existed that the applicant would have prospects of success.

The court was desirous of proceedings with the application on 23rd September, 2002 and Mr. Phoofolo was desirous that the application continue but as there were no heads of argument it was decided that the matter proceed on 27th September, 2002.

From the facts of the case, it does not appear that this is a difficult case for the deceased on dying left a number of insurance policies namely:

1. Policy no. 411286375 in which deceased appointed no beneficiary;
2. Policy no. 4214345159 in which the deceased appointed the applicant Palesa 'Matli as the beneficiary;
3. Policy no.4133626943 in which deceased appointed no beneficiary;
4. Policy no. 4138657212 in which deceased appointed no beneficiary.

The applicant has also alleged at paragraph 9.4 of her Founding Affidavit that 'at the fifth respondent's offices I discovered Policy no.848545 in which our above mentioned children are beneficiaries.'

By the way, it would seem when the deceased died he left two children of the marriage between himself and the applicant namely Mahali, a girl aged 16 years and Lineo, a girl, aged 14 years and when the deceased died divorce between the applicant and her late husband had been granted in terms of which the deceased was to maintain the two minor children at the rate of M150.00 per month per child, custody of the minor children having been awarded the applicant.

It also emerges that when deceased died the family met and made Mahali heiress to her late fathers estate but owing to her tender age the family decided to make the 3rd respondent Thato Tsikoane guardian and trustee of the young Mahali. While the applicant agrees with the resolution of the family in appointing Mahali heiress to her

late father's estate, the applicant contests 3rd respondent's nomination as guardian and trustee of the young Mahali on the ground that applicant as mother of Mahali is her natural guardian and trustee and there is no reason to appoint another guardian and trustee over her head. The deceased was claimed to be a policeman and a public servant and as such entitled to gratuity which applicant claims to rightly belong to Mahali, the heiress in terms of family resolution.

According to applicant's Founding Affidavit at paras 2 and 3, respondents 1 and 3 are father and daughter and the latter is a divorcee now living with respondents 1 and 2 and it would seem, since the applicant is divorced from and deceased and no longer belongs to the family, it was decided to appoint the 3rd respondent to manage Mahali's affairs. Mr. Klaas, has said custody has nothing to do with guardianship. I don't know what he means by this because the law appears to be that parents are natural guardians of their minor children and where a husband dies, as he is the natural guardian of the children, on death his wife becomes natural guardian of the children assuming, according to Mr. Klaas that the husband dies during the subsistence of the union. Mr. Klaass has also submitted that these are dispositions to be governed by the Administration of Estates Proclamation, 1935.

Perhaps yes and no. Yes because testate and intestate estates are governed by the **Administration of Estates Proclamation No 19 of 1935**. No, because minor's estates managed by natural guardians do not have to be reported to the Master and require to be reported when management of such estates are by tutors and curators appointed by natural guardians or by the court. In this instance it has to be recalled that it is common cause that on divorce applicant was awarded custody of the two minor children Mahali and Lineo.

According to **sec. 71 of the Administration of Estates Proclamation no. 19 of 1935;**

It shall not be lawful for any person except:

(a) The father of the minor or

(b) The mother of a minor whose father is dead ----- or

(c) The mother of a minor to whom the custody of such minor has been given by a competent court

by will or other deed to nominate any tutor or tutors to administer and manage the estate or to take care of the person of that minor; the proviso is to the effect that a

person who gives or bequeaths any property to such a person may nominate a curator or curators to manage the property during the legatees or donee's minority. The section to which I have referred above makes it unlawful for any person other than the father.

above at (a), the mother above at (b) and mother of a minor or as envisaged in (c) above to nominate by will or deed any tutor to manage and administer the estate or take care of the person of a minor except where a donor or person who bequeaths has nominated a curator(s) to manage the property of the legatee or donee during the letter's minority. In this case the donor or the applicant has nominated no such curators and the 3rd respondent is neither the father or mother of the donee and beneficiary Mahali; 3rd respondent having been nominated and appointed by the family to manage and administer the beneficiary's estate. I find that the 3rd respondent was nominated by the family against the spirit and letter of **sec. 71 of the Administration of Estates Proclamation No.19 of 1935.** and in respect it is important to bear in mind that in relation to the beneficiary the applicant is not only the natural guardian but has, by a competent court, been awarded custody of the two minor children. In terms of the law, custody orders in matrimonial proceedings are incidents of parental power and so far as the applicant is concerned, she is not incapacitated.

In terms of **sec. 72 of the Proclamation** above, a tutor(s) nominated to administer and manage the estate of a minor is estopped from carrying out his duties 'until letters of confirmation have been granted to him by the Master.' Moreover, according to **sec. 73 of the Proclamation supra,** it is incumbent on a tutor so nominated to apply to the Master for letters of confirmation. Nothing in the Proclamation suggests or requires a natural guardian to apply for letters of confirmation in order to administer and manage the estate of a donee or beneficiary during the latter's minority. And as was said in Van Rooyen v. Werner (1892) 9Sc 425 at 429, on the death of either parent the other is ordinary course of events, becomes the sole guardian of the minor children of the marriage.

There is authority for the proposition that even where there is a guardian available the court can, for good cause, appoint another curator dative or bonis to administer the property of a minor (**see Van Rij N.O. v. Employer's Liability Assurance Corporation Ltd., 1964 (4) SA 737 (WLD).** In the instant cause there is no such good cause for as I have said the applicant is not incapacitated and moreover, by judgement of a competent court she has been awarded custody of the two minor children including the beneficiary in this application.

I note that according to judgement in *Ex-parte* **Misselbrook, N.O. re: Estate Misselbrook, 1961 (4) 382 (D., CLD),** functions of natural guardians are to administer the minor's estate, not to use it up but to invest surplus funds and use the income for the minor's maintenance and education though, when the need arises, guardians may be authorised to use the capital in their hands for maintenance and education of minors.

This court having considered all the facts and circumstances of this case finds that it is in the best interest of the minor child Mahali that her affairs be administered and managed by the applicant and that there is no good cause for the appointment of another guardian or tutor to administer and manage the affairs of the said minor child Mahali.

Accordingly, the order is confirmed and the application granted as prayed save that since this is a family matter there will be no order as to costs.

G. N. MOFOLO
JUDGE

For the Applicant	:	Mr. Phoofolo
For the 1st, 2nd and 3rd Respondents	:	Mr. Klaas