

IN THE HIGH COURT OF LESOTHO

In the matter between:

SEABATA LEPETLA

1st APPLICANT

AND

NAPO MAKHETHA
M.K.M. FUNERAL SERVICES

1st RESPONDENT
2nd RESPONDENT

RULING

Delivered by Hon. Mr. Justice G. N. Mofolo
On the day of 9 December, 2002

This is a case in which initially burial rights were in issue between the applicant and the 1st respondent. The court having disposed of burial rights prayers (e) and (f) had been deferred. The prayers read, respectively:

- (e) The Applicant shall not be declared the lawful heir to the late Nts'ehiseng Makhetha (born Lepetla) and thus the rightful person to bury the body of the late Nts'ehiseng Makhetha (born Lepetla).

- (f) The purported self-appointment of the first Respondent as the heir to the late Nts'ehiseng Makhetha (born Lepetla) shall not be declared null and void.

As I have said the initial burial rights application had been opposed by the second respondent per his attorney Mr. Monyako and Mr. Monyako was in court when the burial application was made and the above prayers deferred on the understanding that they were ready for hearing.

When the deferred matters were heard for some reason Mr. Monyako was no longer counsel for the 1st Respondent and Mr. Phoofolo appeared saying though 1st respondent had withdrawn his mandate from Mr. Monyako, the latter had refused withdrawing from the case saying he cannot withdraw from a case he had completed.

Be this as it may, Mr. Phoofolo has informed this court that perusing the file, he had found the application had been opposed on the ground that 1st respondent is heir to the estate of the late Nts'ehiseng and that from the body of the affidavit this was the only claim made by the 1st respondent without in

any way motivating his application and as the Answering Affidavit was bare it was necessary to file an additional affidavit to motivate 1st respondent's claim of being heir to the estate of the late Nts'ehiseng. Mr. Phoofolo has further submitted that the remissness of attorney for the 1st respondent cannot be visited on the respondent after all the applicant would in no way be prejudiced by the admission of a fourth affidavit while 1st respondent's rights would be adversely affected were he not allowed a fourth affidavit.

The law in this regard is simply namely that leave to file further affidavits in granted 'in special circumstances' (see *Joseph & Jeans v. Spits & others*, 1931 WLD 48; *Stack NO. v. Fisher NO.* 1935 SWA 44). It has been said there are special circumstances where something unexpected emerges in the applicant's replying affidavit or where new matter was raised or where the court desired to have fuller information on record (see *Stark's* case above) or where an applicant sought leave to sue in *forma pauperis* but had failed to disclose material information as to his means (**Hayward v. Cordwell, 1932 EDL 305**).

In this instant application Mr. Phoofolo has submitted 1st respondent has failed to disclose material information as to his claim that he is heir to the estate of the late Nts'ehiseng and it is desirable that the court should have fuller information on record why 1st respondent claims to be the late Nts'ehiseng heir for all the court has in 1st respondent's affidavit is that the deceased was 1st respondent's stepmother. Further, the 1st respondent has alleged deceased bore the surname, Makhetha.

Mr. Phoofolo has further submitted the reason for the omission is ascribable to his attorney's remissness which cannot be visited on the 1st respondent.

In *Gibb v. Du Toit & others (2) 1938 PH (W)* it was said although the court may give leave for the further filing of affidavits dealing with new matter in the applicant's replying affidavits, it will not do so when the affidavits sought to be filed do not constitute a reply but raise wholly fresh issues entailing the filing of further affidavits. When new facts come to the respondent's knowledge after

filing affidavits, the court will deal with those matters tendered after the applicant's replying affidavits have been filed, but will require satisfactory information that the facts in question came to the respondent's knowledge in the manner stated or alleged. See *Hersman v. Jacobs Brothers*, 1931 EDL 284. Apparently, a court will not disallow the filing of additional affidavits solely on the basis of an alleged rule of practice against the filing of more than one set of affidavits. See *Baker and Another v. Weston & Another*, 1967(1) SA 134 (C).

As I have said it was not new facts coming to the knowledge of the 1st respondent but it was rather their omission by his attorney. Mr. Phoofolo has done his utmost to explain why the affidavit is out of time and I consider that having regard to all the circumstances of the case it should be received. I have also considered that balance of convenience favours the filing of further affidavit in that its non-filing would prejudice 1st respondent while any prejudice that may be suffered by the applicant can be remedied by an order for costs.

Accordingly, exercising its discretion, the court allows the further filing of

another affidavit within seven days of this ruling. 1st respondent will bear costs of this application.



G. N. MOFOLO
JUDGE

For the 1st Respondent : Mr. Phoofolo

For the Applicant : Mr. Nathane