

IN THE HIGH COURT OF LESOTHO

In the Matter Between:

‘MATABETA MOSHOESHOE (Nee MAKUME) Applicant

and

MAKHABANE MAJOROBELA MOSHOESHOE 1st Respondent

MATHIE MOSHOESHOE 2nd Respondent

MALUKE MOSHOESHOE 3rd Respondent

LITSOANELO MOSHOESHOE 4th Respondent

MASTER OF THE HIGH COURT 5th Respondent

Ruling

**Delivered by the Honourable Mrs Acting Justice A.M. Hlajoane on 30th
October, 2002.**

The prayers sought in this Application were framed as follows:

1. Dispensing with the ordinary rules pertaining to modes and period of service.

2. Authorising a rule nisi to be issued on the date and time to be determined by this Honourable Court calling upon the first Respondent to show cause if any why:
 - (i) The first Respondent shall not be restrained from claiming and receiving and/or utilising payments due to the estate of the late Sekete Moshoeshoe, pending finalisation of this Application.
 - (ii) The first Respondent shall not be restrained from purporting to act as the guardian of the three (3) minor children of the late Sekete Moshoeshoe, pending finalisation of this Application.
3. Declaring that the estate of the late Sekete Moshoeshoe devolve intestate under common law on the Applicant as the Surviving Spouse and widow of the late Sekete Moshoeshoe.
4. Declaring that the estate of the late Sekete Moshoeshoe devolve intestate under common law on the three (3) minor children namely Mathe aged 20 years, Maluke aged 18 years and Litsoanelo aged 16 years and on the Applicant.
5. Declaring the Applicant to be guardian of the three (3) minor children.
6. Directing that Applicant be restored in possession of the car bearing registration numbers AK 413 which Applicant was forcefully dispossessed by 2nd and 3rd Respondents.

7. (i) The first Respondent pay the costs of this Application only in the event of opposition.

(ii) Second and 3rd Respondent to pay costs of this Application only in the event of opposition.
8. That Applicant be granted such further and/or alternative relief.
9. Prayers 1, 2 (a) and (b) operate with immediate effect as an interim order against first Respondent.

The relevant papers were duly filed in terms of the Rules of Court, and the Applicant in her Replying affidavit reacted to the opposing papers by raising the following points in limine:

- (i) That paragraph 2 of the deponent's (1st Respondent) opposing affidavit is hearsay evidence and inadmissible, and that an Application will be made to have it expunged.
- (ii) That reference by deponent CIV/APN/474/2000 is not relevant and material to the determination of this matter and is intended only to prejudice me (Applicant) in my claim and Application will be made to have it struck out.

For purposes of clarity I will briefly explain the nature of that piece of evidence

or document which the Court is asked to declare as hearsay evidence and therefore inadmissible.

It is an annexure "LTM" to the opposing affidavit which introduced some allegation that in fact, Applicant was married to a certain 'Matli Mahlelehlele customarily, before getting married to the deceased in this case. It is of importance at this juncture to note that this was just an allegation which the deponent has no knowledge of. The author of that document "LTM" has not deposed to any affidavit. Applicant in this case contended that the deponent never said that he verily believed the information to be true and also set out facts of his belief. **Syfreets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd 1991 (3), S.A. 276.**

The definition of hearsay evidence as set out in the case of **Estate De Wet vs De Wet 1924 CPD 341**, namely that, "It is the evidence of statements made by persons not called as witnesses which are tendered for the purposes of proving the truth of what is contained in the statement." This has been the old approach before the acceptance of the accommodation by the South African Law Commission in its review of the Law of Evidence. The emphasis thus no longer falls on the purpose with which the declarant made the statement but rather on the question of the credibility of the declarer.

The new approach has thus simplified the definition of hearsay evidence to mean, statement, be it oral or written, given by someone other than the person who made the assertion, in circumstances where it is important that the asserter be cross-examined. Of importance also is the fact that although the purpose for which the

statement is tendered is no longer the primary test for hearsay evidence, it nonetheless remains one of the factors which the Court must consider. Also that in the exercise of its judicial discretion, it is still open to the Court if in its opinion feels that hearsay evidence should be admitted in the interest of justice. See **Metedad v National Employer's General Insurance 1992 (1) S.A. 494**, that such evidence may be used in civil matters in the search for truth. For an excellent exposition of the definition of hearsay as well as the exceptions to it see **Hewan v Kourie 1993 (3) S.A 233**.

The annexure relied upon has no date and has not even stated as to when the marriage to 'Matli Mahlelehlele took place. In **Mia's Justice v Mia 1944 WLB 102**, Shreiner J had this to say:

"that if deponent is unable to state that he believes the truth of the hearsay information furnished to him, he can hardly ever be permitted to rely upon it for the relief which he seeks."

It would therefore not be proper to say that failure to comply with that requirement for the admission of hearsay statements is a mere technicality. The Court has however allowed the deponent, in interlocutory matters where injury and or other special circumstances appear to justify its doing so, to state that he is informed and verily believes certain facts on which he relies for relief, **Steyn v Schabert 1979 (1) S.A. 694**. But even there, facts must be stated in full and grounds for such belief and also how the information was obtained. The source of such information must be disclosed with a degree of particularity sufficient to enable the opposing party to even make independent investigations of its own including where necessary, verification of the statement from the source itself.

The Respondent explained the reason for having failed to get an affidavit from the author of Annexure "LTM", that it was due to time constraints and could therefore not have time to call the author to depose to an affidavit. It has to be remembered that the interests of minor children here are the ones to be safeguarded, the High Court therefore being an upper guardian of all minors must take all that is in its powers in order to protect those interests. The following is said about the rule in **Harnischfeger Corporation v Appleton 1993 (4) 479 at 484**, "It intends that the principle against hearsay evidence should not be a shield of defence against facts."

By invoking the provisions of Rule 8(14) of the High Court Rules, the Court directs that the Author of Annexure "LTM" be called to come and give oral evidence on the issue of Applicant's marriage into his family if any.

Relevance of CIV/APN/474/2000

Applicant is saying that reference to CIV/APN/474/2000 by Respondents bears no relevance and that it is not material for the determination of this Application and is intended only to prejudice the Applicant in her claim. The Court was told through annexure "A" that the Applicant in this case sought to eject 2nd and 3rd Respondents from their home where Applicant presently stays. It is the Applicant's contention that the annexure is going to prejudice her in conducting her case, and that it is only intended to cloud the Court's vision and not to assist the Court in anyway.

The Respondents' on the other hand feel that the document is highly relevant in that it will help the Court to determine the issue of guardianship of the minor

children in a rather well informed manner. The Court is thus asked to make a pronouncement on whether or not the said Application is to be declared relevant or material to the issues for determination in this case.

The proceedings in that CIV/APN/474/00 appear to be very relevant as they seem to assist the Court in getting a clear picture of how the Applicant relates to the minor children whom she now seeks to apply for their guardianship. The same Application also assist the Court in realising that in actual fact, the mother of the minor children is still here in Maseru and was allowed interim custody of the minor children during the lifetime of their father, the deceased in this case.

It is trite law that in ex-parte Applications utmost good faith on the part of the Applicant becomes a necessary requirement. A party who approaches Court Ex-parte and fails to make a full disclosure of all facts material to the issues in dispute runs the risk of having his Application dismissed with costs, **Papashane v Andre 1979 (1) LLR 1**. There has to be a disclosure of all material facts, that is, not only facts that a litigant considers relevant, but all other facts that may possibly influence the Court in coming to a right decision, **Ntšolo v Moahloli 1985-89 LAC 307**.

The Applicant in this case has therefore not approached the Court with clean hands as she has withheld from it some relevant information. By and large, the balance of convenience does not favour the Applicant as the proper guardian to look after the minor children to the prejudice of other interested parties not mentioned in this case. The High Court being the upper guardianship of all minors had to be told everything about the welfare of the minor children in order to decide on what is in the

best interest of those minors.

The Court in the case of **Tsehlo v Tsehlo 1985-90 LLR 356** was of the view that it had no jurisdiction to deprive the father of custody of the minor child where there were no matrimonial proceedings pending except under its powers as upper guardian of all minors where there was danger to the child's life, health or morals. This goes to show that the interests of minor children are always considered by this Court to be of utmost importance, and the Court has to do everything that is in its powers possible so as to protect those interests.



A. M. HLAJOANE
ACTING JUDGE

For Applicant : Mr Lichaba

For Respondents : Mr Makholela