CIV/APN/295/00

IN THE HIGH COURT OF LESOTHO

In the matter between

'MATHABANG GETRUDE RASEBOLELO APPLICANT

and

LEBOHANG RESEBOLELO	**1ST RESPONDENT**
THE COMMISSIONER OF POLICE	**2ND RESPONDENT**
THE ATTORNEY GENERAL	**3RD RESPONDENT**

JUDGEMENT

Delivered by the Honourable Justice Mrs. K.J. GUNI
On the 8th August, 02

The deceased – TEBOHO RASEBOLELO married his first wife- the 1st respondent's mother by customary law. There is no date given for this marriage. Apparently they have only one child born of that marriage. That first-born child of the deceased and his customary law wife is the 1st respondent herein. Subsequently, on the 25/05/1973 the deceased married for the second time, another woman by civil

rites and in community of property. Therefore it is an established fact that the deceased married twice two different women under two different systems of law.

In this kingdom we have a dual system of law. The SESOTHO CUSTOMARY Law system operates simultaneously with the civil law which was received during the colonialism of this country. Any person intending to enter into a contract of marriage in this country has a right and he or she is obliged to elect the system of law which must govern his or her marriage relationship. Although the two systems (i.e. customary law and civil law) operate simultaneously, they run parallel each other. That is why the parties are compelled to make their choice because they cannot enjoy the operation of both systems together at the same time. MAKATA V. MAKATA (C of A) 1982-84 LLR Page 29. They can only be bound by the rules and principles of only one of the two systems – not both.

The deceased elected to enter into his first marriage in accordance with the SESOTHO CUSTOMARY law. The consequences

of that marriage are determined in accordance with the Customary Law.

The deceased died on the 9th February 2000. He was buried on the 26th February 2000. Roundabout March 2000, the family was engaged in the arrangements to wind and distribute his estate. The applicant herein obtained letters of introduction as the heiress to the deceased estate from some members of the family, the chief and the district secretary. During the same period the 1st respondent also obtained the same letters from the same offices, as the heir to the deceased estate. This process of indicating the heir to the deceased estate was completed round about April.

The deceased was a policeman during his lifetime. He died while he was still working as a policeman at Mafeteng charge office. There are therefore terminal benefits resulting from his untimely death while working as a policeman. These are known as death benefits. In his case they apparently consisted of his salary, leave pay and gratuity. The applicant claims to be the widow of the deceased,

and, as such she is entitled to receive the said death benefits. This she claims on the grounds that she married the deceased by civil rites and in community of property on the 25/5/73. She produced the marriage certificate – Annexure "A" attached to the founding Affidavit.

The 1st respondent claims to be the first-born son of the deceased and as such entitled to be his heir according to SESOTHO CUSTOMARY Law. According to the applicant she became aware that the 1st respondent was a contestant to the heirship of the deceased's estate roundabout 26th June 2000. She instructed her attorneys of record who wrote a letter dated 26th June 2000, to the Commissioner of Police. (Refer to Annexure "E" attached to the founding Affidavit). The Commissioner of Police was asked to release the death benefits to no-one except this applicant. For one month or so nothing happened. On the 8th August 2000, the applicant filed this application.

She sought and obtained a rule Nisi in the following terms:-

1. That the periods and modes of service be dispensed with on the grounds of urgency of this matter.

2. That a rule nisi be issued and be returnable on the date and time to be determined by the Honourable Court calling upon the Respondents to show cause, if any, why:-

   (a) The Second Respondent shall not be interdicted forthwith from paying the terminal benefits of the late TEBOHO PATRIC RASEBOLELE to the First Respondent or anybody else besides the Applicant;

   (b) The Applicant shall not be declared to be the lawful and or rightful beneficiary of the said terminal benefits of the late TEBOHO PATRIC RASEBOLELO;

   (c) The First Respondent shall not be ordered to pay costs of this application and the Second and Third Respondents to pay costs only in the event of their opposing this application;

   (d) Further and/or alternative relief.

3. Prayer 2 (a) supra should operate with immediate effect as an interim interdict.

   AND THAT the affidavit of Application attached hereto will be used in support of this application.

   FURTHER TAKE NOTICE THAT Applicant has appointed the office of the undersigned attorneys as the address of service in this matter.

The 1st respondent has opposed this application. He has raised the question of law regarding the manner in which the applicant approached this court. He has also claimed on the merits of this

application that he is the first-born son of the deceased. In terms of the Sesotho Customary Law he is his heir.

I propose to deal first with the question of Law. It is the 1st respondent's contention that the applicant is not entitled to proceed as a matter of urgency because there was no urgency and even if there was urgency, the affidavit filed in support of the urgent application does not comply with the HIGH COURT RULES, which govern such applications.

The party who seeks relief from this court is entitled to choose the manner and/or procedure to adopt when approaching the court. The party must exercise this right of choice to approach the court very carefully. She or he must comply fully with the rules governing the procedure she or he prefers. The applicant in our case preferred to approach this court by way of an urgent application. How and why she approaches the court in this fashion is fully set out in Rule 18 (22) (a) (b) (c) HIGH COURT RULE Legal Notice N0.9 of 1981. The

portion of this rule, which is particular relevant for the determination of this matter, reads as follows:-

> *"18 (22) (a) .....*
>
> *(b) In support of an urgent application the applicant shall set forth in detail (1) circumstances which he avers renders the application urgent and also (2) reasons why he claims he cannot be afforded a substantial relief in a hearing in due course? -------" (My underlining and numbering to highlight those two requirements).*

The applicant has elected to approach this court by way of an urgent application. Has she complied with the requirements set out in the rule which govern such applications? Is there anywhere in the affidavit filed in support of this application where there are specific avernments which set forth the circumstances which make this application urgent?

At paragraph 16 it is averred that the applicant was advised to get a court order urgently to stop the issue of the cheque in the name of the 1st respondent. When was this? Was it before or after 26th June 2000? But from the reading of the applicant's papers it becomes clear

that at least by 26th June 2000, she was aware that the cheque is due to be issued in the name of the 1st respondent and for his own benefit as the deceased's heir. There is again a deafening silence as to what steps the applicant took and what frustrated her if she was frustrated. A month or so passed. She then rushed to court and obtained ex-parte this interim court order. What prompted this sudden rush to the court in this fashion after allowing long periods of inactivity to lapse? Perhaps there was no urgency. An attempt is being made to create circumstances on paper in order to pass this particular application as urgent. The matter should not become urgent when it is placed before the court when in fact while it was in the hands of the owners, there was no urgency. National University of Lesotho V University Teachers and Researchers C of A (CIV) N0.13/98

CIV/APN/223/97

There are no avernments which specifically set forth circumstances which render this application urgent. I have to fish and famble through the papers in search of those avernments which render this application urgent. This is purely the result of poor draftsmanship. No reasons are mentioned anywhere in the affidavit

to show this court that this applicant could not obtain a substantial relief in a hearing in due course.

Attention must be paid to the rules of this court by the attorneys when selecting the method to institute any proceedings before this court. The rules of this court are there to give guidance and directions. The rules must be followed to the letter otherwise what are they for. For the none compliance with rule 18 (22) HIGH COURT RULES (Supra) this application must fail.

Even though this application falls to be dismissed on this question of law alone, I propose nevertheless to deal with its merits. The established facts show unquestionably that the 1st respondent is the deceased's first born. According to the LAWS OF LEROTHOLI PART 1. – which is the statement of SESOTHO CUSTOMARY Law, a man's first-born son is his heir.

The applicant has made serious but unsupported allegations that the deceased's first wife deserted him and he divorced him on that

ground. These are mere allegations. She further claims that the 1st respondent has changed his status of the deceased's first born son.

The 1st respondent denies all these allegations. According to the 1st respondent his parents never divorced. He also denies that he ever changed his name. The divorce of the deceased and the 1st respondent's mother is hotly disputed. There is no proof. Therefore this court cannot accept that bare allegation that the deceased divorced his first wife prior to his purported marriage by civil rites to this applicant. Now that there is no proof of divorce can a man married in accordance with Sesotho Custom marry another woman in accordance with civil rites while his customary law marriage subsists? This question has been answered in the negative many times at Judicial Commissioner's Court, High Court and Court of Appeal, in cases such as :-

MAKHOOANE V MAKHOOANE (J.C. 43/56)
RAKHOABE V RAKHOABE CIV/T/11/68
MATSOETLANE V MATSOETLANE CIV/A3/68
MAKHOTHU V MOKHOTHU C of A (civ) N0.1 OF 1976
MAKATA V MAKATA C of A 1982 – 84 LLR Page 29

The validity of SESOTHO CUSTOMARY Law marriage is not questionable. It has been recognised by statute law since the two systems commenced to operate simultenously. The marriage Proclamation under which the applicant purported to enter into marriage by civil rites with the deceased does not allow polygamy. It specifically prohibits marriage to a person who has been previously married to another. Even though the deceased described himself as a bachelor on the marriage certificate – (Annexure "A") he was in fact a married man. His status as a married man remained unchanged until his marriage with the 1st respondent's mother was dissolved. He therefore could not contract a valid marriage during the subsistance of his valid customary law marriage. MAKATA Vs MAKATA (Supra). The purported marriage between the parties on the 25/05/1973 was invalid "Ab inito". Therefore the applicant cannot in those circumstances describe herself as the legal widow of the deceased.

The other side of this coin still confirms the 1st respondent as the heir of the deceased. Even if there was a valid divorce between his parents prior to the applicant's marriage to the deceased, as the first-

born son, he was still his late father's heir. The serious allegation that he was taken to his mother's maternal home does not divorce him from being the son of his father. He acquired his status of being the first-born son by birth. He will remain so, it does not matter where he goes and what he calls himself thereat. Even if his mother was divorced he is still his father's son.

This application had no merit at all. It must be dismissed. It is so dismissed with costs.

K.J. GUNI
JUDGE

For applicant - Mr. T. Molapo
For respondents' - Mr. S. Phafane