

IN THE HIGH COURT OF LESOTHO

In the matter between

'MASOPHIA NDLOVU

APPLICANT

and

THE EMPLOYMENT BUREAU
OF AFRICA LIMITED – TEBA

1STRESPONDENT

'MATHABO THAKALEKOALA

2NDRESPONDENT

JUDGEMENT

Delivered by the Honourable Mrs. Justice K.J. GUNI
On the 6TH August, 2002

The applicant in this matter is 'MASOPHIA NDLOVU. She is the sister of the late MOJALEFA ARON THAKALEKOALA. The 1st respondent is THE EMPLOYMENT BUREAU OF AFRICA – commonly known as TEBA. The 1st respondent operates as a recruitment and/or employment Agency for the Mining Industry of the Republic of South

Africa. It is through the 1st respondent that the late MOJALEFA ARON THAKALEKOALA was recruited from here in LESOTHO to go and work in the mines in the REPUBLIC OF SOUTH AFRICA. The 2nd respondent is the widow of the LATE ARON MOJALEFA THAKALEKOALA.

The deceased worked for LORAINE GOLD MINES LTD – a South African company. He worked for the said Mine at WELCOME in the province of ORANGE FREE STATE. At the time the deceased was recruited, prior to his engagement as a miner at the said location, he entered into a contract for the benefit of the third party – his sister, the applicant herein. In terms of that contract he appointed this applicant – his own sister, as his death beneficiary.

The fact of this applicant's appointment as the deceased's death beneficiary is evidenced in Annexure "BB" attached to the Founding Affidavit. The 2nd respondent does not dispute the fact of the said appointment. The 2nd respondent does not challenge or question her late husband's right or authority to make the said appointment. The

deceased had further indicated his own sister – this applicant as his next of kin. This indication is also supported by the production of Annexure “CC” attached to the found Affidavit. Both these facts – the appointment of the applicant as the deceased’s death beneficiary and his next of kin, have been unequivocally admitted by the 2nd respondent, who is the only party opposing this application.

Acting upon the deceased’s apparent instructions and indications, the 1st respondent gave a death report to this applicant when her brother – MOJALEFA ARON THAKALEKOALA died on 13th January 1998, at WELCOME in the REPUBLIC OF SOUTH AFRICA.

The applicant was also given by the 1st respondent an advance payment of four thousands maloti (4 000.00) towards the funeral expenses of her late brother. There is no dispute that the applicant handed that whole amount to the deceased’s family to be used for that specific purpose of meeting the costs of burial of the deceased.

However, before the deceased was buried, the 2nd respondent sued this applicant in CIV/APN/30/98. In that application the 2nd respondent sought amongst other remedies, an order of court, directing this applicant and the 1st respondent – TEBA, to release to her (The widow of the deceased) the proceeds of the insurance - commonly called death benefits of the deceased. TEBA is also acting here on behalf of the insurance company. That application was immediately withdrawn. According to the 2nd respondent, she withdrew the said application because she was included amongst the members of the deceased's family to whom this applicant handed over that advance payment of an amount of four thousands maloti for the purpose of meeting the costs of burial of the deceased. According to the applicant the 2nd respondent withdraw her application on the realisation that she had no valid grounds for that suit.

To this applicant's surprise the 2nd respondent surreptitiously approached the 1st respondent to seek the release to her by the 1st respondent those death benefits. The 1st respondent obliged without further ado as requested by the 2nd respondent. When this applicant

approached the 1st respondent in order to claim and enforce her right as the death beneficiary, the 1st respondent rejected her claim on the grounds that she is not the widow of the deceased. This dispute arose. The applicant is not claiming heirship of the deceased's estate. She is not claiming a portion of the deceased estate. RAKOTO Vs KATIBA CIV/APN/15/90. Her claim is based purely on the terms of that contract which was entered into between her late brother and the insurance company for the benefit of the third party. The applicant is that third party who was appointed as a death beneficiary by her late brother. She did not accept that her claim to enforce her rights arising out of that contract for the benefit of the third party could be frustrated on the grounds that she is not the widow of the deceased.

The applicant, then approached this court and obtained the rule Nisi in the following terms:-

- “(a) That the 2nd respondent be ordered and directed to release death benefits of that Insurance for the benefit of the third party) in the sum of sixty-four thousands, three hundred and eighty-seven maloti (64 387.97) and ninety-seven lisente.
- “(b) That the 2nd respondent pays costs of this application.

Although that rule Nisi was sought and issued out against both the 1st and 2nd respondent, only the 2nd respondent has opposed the confirmation of the said rule Nisi. No papers have been filed on behalf of the 1st respondent. In fact the Rule Nisi does not order nor direct the 1st respondent to do anything.

The applicant's case as made out from the papers filed of record, is to the effect that she is the appointed death beneficiary of her late brother. She is entitled to receive the proceeds of the insurance contract which was entered into between her late brother and the insurance company represented by TEBA. Those proceeds do not form part of the deceased estate. RAKOTO Vs KATIBA (supra). She is not claiming the heirship of the deceased estate. Her rights arise out of that contract. She contends that she has established the principle or ~~concept of STIPULATIO-ALTERI which must be applied and enforced.~~ LOUISA AND PROTECTOR OF SLAVES Vs VAN DER BERG (1830) 1 M 471.

The 2nd respondent seems to deny that there is no such principle or concept in the LAW OF THE REPUBLIC OF SOUTH AFRICA. The 2nd respondent contents that the proper law of the contract is that of the REPUBLIC OF SOUTH AFRICA. The statute law of the REPUBLIC OF SOUTH AFRICA according to the 2nd respondent has drastically changed that institution of STIPULATIO ALTERI as announced in the case law of this kingdom.

The main system of law applicable in LESOTHO and the REPUBLIC OF SOUTH AFRICA is Roman Dutch law. The institution of STIPULATIO ALTERI is part of ROMAN DUTCH Law.

Being part of the ROMAN DUTCH LAW, this principle of STIPULATIO ALTERI is therefore part of the civilian system of law applicable within this jurisdiction - (LESOTHO AND REPUBLIC OF SOUTH AFRICA). RAMAHATA Vs RAMAHATA 1985-90LLR 488(C of A). RAKOTO Vs KATIBA and Another CIV/APN/15/90 . There seems to be no argument that the proper law of this particular contract is that of THE REPUBLIC OF SOUTH AFRICA. That is the law

which must be given effect to. As I have pointed out earlier on, the main system of law in The REPUBLIC OF SOUTH AFRICA is the same as the civil law applicable in Lesotho. That being the case the ROMAN DUTCH LAW institution of STIPULATIO ALTERI similarly apply in SOUTH AFRICA as it does in LESOTHO.

The alleged drastic statutory changes made to affect the application of the principles of STIPULATIO ALTERI were not put nor indicated to me. My search for the relevant statute, rules and/or regulations which allegedly reversed the position held in RAMAHATA Vs RAMAHATA 1985 – 90 LLR. 488 (C of A), was unsuccessful. The foreign law must be given effect to when it is a proper law of the contract. RAMAHATA Vs RAMAHATA(supra). The difficulty arises when that law is not known and its existence as such is in doubt or totally unknown. There is no way the unknown law or non-existing law can be applied. The known and existing position of the law on this subject of STIPULATIO ALTERIO remains recognised and enforceable as pronounced in the cases of both the High Court and Court of Appeal in this kingdom; such as MOTOKOA Vs MOTA

and TEBA CIV/APN/360/00 KAPHE Vs TEBA and Another 1991-92
LLR & LB Page 16; RAKOTO Vs KATIBA AND Another
CIV/APN/15/90, RAMAHATA VS RAMAHATA 1985-90 LLR 488.

For these reasons the rule is confirmed as prayed with costs.

K. J. GUNI
JUDGE



For applicant - Mr. S. Phafane
For respondent - Mr. T. Molapo