C of A (CIV) NO.23 of 2004

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:-

TSEPO MOKATSANYANE	FIRST APPELLANT
‘**MAJANKI MOKATSANYANE**	SECOND APPELLANT

and

MOTSEKUOA THEKISO	FIRST RESPONDENT
THE MASTER OF THE HIGH COURT	SECOND RESPONDENT
THE ATTORNEY GENERAL	THIRD RESPONDENT

CORAM : RAMODIBEDI, J.A.
SMALBERGER, J.A.
GAUNTLETT, J.A.

HEARD: 15TH APRIL 2005

DELIVERED: 20TH APRIL 2005

SUMMARY

Customary law – widow disinheriting the heir by a will – validity of the will considered –section 3 (b) of the Administration of Estates Proclamation No.19 of 1935 – the effect thereof – section 2 of the General Law Proclamation 2B of 1884 – section 5 of the Law of Inheritance Act 1873.

The deceased Kopano Mokatsanyane and his wife 'Malebenya appointed the First Respondent as their customary heir – However upon Kopano's death, 'Malebenya executed a will purporting to disinherit the First Respondent and at the same time appointing the First Appellant as her heir – the First Respondent successfully sued the Appellants in the High Court – the appeal against the decision of the High Court dismissed with costs on the ground that 'Malebenya had no right in law to disinherit the First Respondent whether by will or not.

JUDGMENT

RAMODIBEDI, J.A.

[1] At the heart of this appeal lies the validity of a certain will executed by the late 'Mapheello alias 'Malebenya Mokatsanyane ("Malebenya") on 28 August 2000. In that will, 'Malebenya "disinherit[ed]" the Appellant on the ground that his mother had sued her claiming inheritance on his behalf and was thus "disrespectful" to her. As will become apparent shortly, this appeal further raises the age-old problem of conflict of laws in this country – a problem, I observe, inherent in our dual legal system comprising Sesotho customary law on the one hand and Roman – Dutch law on the other.

[2] Regrettably, I should add, this appeal illustrates the ease with which litigants are prepared to flirt with one legal system one minute but change to the other system soon thereafter when it suits them.

[3] The litigation in this matter arose out of an urgent application made on notice of motion in the High Court for an order in the following terms:-

> "*1. That a Rule Nisi be issued and returnable on the date to be determined by this Honourable court calling upon the Respondents to show cause if any, why:*
>
> (a) *The periods and modes of service be dispensed with an account of the agency of this matter.*
>
> (b) *First and Second Respondents should not forthwith be restrained from taking control of the premises of the late KOPANO MOKATSANYANE at Ha-Tsosane and to collect rentals for their own benefit from the said premises.*
>
> (c) *Directing the third Respondent to take control of the premises and to receive for safe-keeping rentals from the rented flats pending the result of this application, and to surrender same to whomsoever will this*

Honourable Court declare as the deceased's heir.

(d) *Directing third Respondent to confirm, and by the strength of this Honourable Court's order the tenants residing in the deceased's eight room flats to pay the monthly rental to the third Respondent.*

(e) *Declaring Applicant as the lawful heir in the estate of the late KOPANO MOKATSANYANE.*

(f) *Granting applicant further and/or alternative relief.*

(g) *Costs*

2. *Prayers 1 (a) (b) (c) and (d) to operate with immediate effect pending he (sic) determination of this application."*

[4] On 10 November 2003, Peete J duly issued a rule nisi as prayed but ordered that only prayers 1 (a) (b) and (c) operate with immediate effect as interim relief.

[5] On 25 August 2004, Guni J confirmed the rule and granted the application as prayed with costs. Hence this appeal.

[6] The following are the relevant material facts which are either common cause or hardly in dispute. The late Kopano Mokatsanyane ("Kopano") had no male issue. He begot the First Respondent's mother 'Motena 'Maselloane as the only child. After Kopano's wife (whose further particulars are not disclosed in the record) passed away, he married 'Malebenya and they together adopted the First Respondent as they had no male issue. They brought him up as their own child for all intents and purposes and he was duly accepted as such into the family. Not only that, but Kopano did more.

[7] On 30 September 1989, and in terms of Annexure "B", Kopano duly appointed the First Respondent in writing as his heir. The document reads as follows:-

"30-09-1989

I Kopano Mokatsanyane I appoint my heir upon my death and my wife's being 'Malebenya Adelice Mokatsanyane, the name of the heir is Motsekuoa Patrick Thekiso. He was given to me by Thapelo Thekiso and his mother Motena Thekiso and the Mokatsanyane family at a tender age.

Signed: *Seboka Mokatsanyane*
Maema Mokatsanyane
Sentšo Mokatsanyane
Mongoe Mokatsanyane
Teisi Mokatsanyane
Scribe
Kopano Mokatsanyane."

This document which, in my view, qualifies as the deceased's written instructions in terms of Sesotho customary law, bears the date stamp not only of the chief of the area where Kopano lived at Ha Tšosane but also that of the Ministry of Interior.

[8] It is further common cause that Kopano predeceased 'Malebenya and that on 16 August 1997, however, the whole family council of Mokatsanyane duly accepted the First Respondent as heir to both Kopano and 'Malebenya. They did so in writing in terms of a document thereof which reads as follows:-

"*As the Mokatsanyane family we accept Motsekua (sic) Patrick Thekiso the son of 'Maselloane and Thapelo Thekiso, who was given to Kopano and 'Malebenya*

Mokatsanyane at young age to be their son. The family has therefore accepted him with open arms and he will be known as the son of Kopano who is Motsekuoa Patrick Mokatsanyane.

A sheep has been [slaughtered to welcome him into the family] *and he has been accepted as a member of the Mokatsanyane family. He will be the heir to 'Malebenya upon her death.*
This was done in the presence of the following:-

1. *SEFAKO MAKATSANYANE*
2. *MAMAKALO MOKATSANYANE*
3. *RALEFATLA MOKATSANYANE*
4. *SENTS'O MOKATSANYANE*
5. *MAEMA MOKATSANYANE*
6. *MALITHA KHETSI*
7. *'MALEBANYA MOKATSANYANE*
8. *TSIETSI MOKATSANYANE*
9. *MOLISE MOKATSANYANE*
10. *'MANEO MOKATSANYANE*
11. *TS'EPO MOKATSANYANE*
12. *'MAMALEFETSANE MOKATSANYANE"*

[9] As is evident from this document, 'Malebenya personally duly signified her concurrence by singing the document at item number 7thereof. Once again this is common cause.

[10] Sadly, 'Malebenya herself passed away in July 2003 and boom! trouble started. A document was read out at her funeral which has turned out to be her will in which she now "disinherit[ed]" the First Respondent. The will was apparently executed on 28 August 2000, and registered in the office of the Master of the High Court on 20 September 2000. It reads in part:-

"This is the last will and testament of 'Mapheello Mokatsanyane a

widow/housewife of Ha-Tšosane, Maseru urban area

- 1 -

I hereby revoke, cancel and annul all previous WILLS, codicils or other Testamentary writings heretofore made or executed by me.

- 2 -

I hereby declare that I have abandoned the customary way of live (sic) and have adopted the European way and mode of life.

- 3 -

I hereby disinherit MOTSEKUOA PATRICK THEKISO @ MOKATSANYANE, who obtained the surname of MOKATSANYANE as our heir and beneficiary to my husband and me after my death but whose mother has sued me claiming inheritance on his behalf, following the document annexed to and marked "MM".

- 4 -

I hereby appoint TSEPO MOKATSANYANE, son of my late husband brother in accordance with custom, to be the sole and universal heir of all and whole of my estate movable and immovable and of every description at HA-TŠOSANE wherever situate."

[11] Significantly, 'Malebenya has used the name 'Mapheello in the will. No mention is made of the name of 'Malebenya and I should say that it is hard to suppress a felling that she was probably uneasy about her change of heart which might in turn be viewed as double standards.

[12] It will be observed that the bedrock of the Appellants' case both in the court below and in this Court is that the First Respondent has been disinherited by the will in question and in particular clause 3 thereof. In this connection, the First Appellant avers in part as follows in paragraph 4 of his Opposing Affidavit:-

"I submit that Annexure (*sic)* "A" and "B" were subsequently revoked by 'Malebenya's will attached herein and marked "M" which is self explanatory".

As will become more apparent in paragraph [17] below, the First Respondent challenges the correctness of this assertion.

It follows in these circumstances, in my opinion, that the onus burdens the Appellants to prove the validity of the will in question. Indeed the general rule is that he who asserts must prove. See Van Wyk v Lewis 1924 AD 438 at 444.

In reaching this conclusion, I am not unmindful of the majority decision in Kunz v Swart and Others 1924 AD 618 to the effect that there is a presumption in favour of the validity of a will, thus placing the onus of proof on the person challenging it. With respect, I think that the minority decision of De Villiers JA to the contrary is not only more cogent but is also more preferable to the situation in Lesotho. In this regard the learned Judge of Appeal quoted from a passage in Voet (Pand. 5.3.4) to the effect that "without any doubt" the onus probandi is upon the person who maintains that a will has been made. In this country, as I shall endeavour to demonstrate shortly, testamentary disposition is restricted to persons who have abandoned a customary mode of life and have adopted a European way of living. It makes common sense and logic in my opinion that such persons should bear the burden of proof in that regard. Placing the burden on the persons challenging wills on this score would no doubt amount to proving the negative. By contrast, the position in South Africa is that wills may be validly made by any persons except minors under the age of 16 and persons who are at the time mentally incapable of appreciating the nature and effect of their acts.

[13] In my view, therefore, the real important issue between the parties in this matter revolves around the capacity in which 'Malebenya executed the will in question. That in turn involves a determination whether she had abandoned a customary way of life when she executed the will. In this connection I respectfully regret that I am unable to agree with the learned Judge a quo in her view that "'Malebenya's declaration that she has abandoned the customary way of life and has adopted the European mode of life is irrelevant in the determination of this matter."

[14] Before going further, it is necessary to have regard to the provisions of section 3 (b) of the Administration of Estates Proclamation No.19 of 1935 to the following effect:-

> "*This proclamation shall not apply …to the estates of Africans which shall continue to be administered in accordance with the prevailing African law and custom of the territory: Provided that such law and custom shall not apply to the estates of Africans who have been shown to the satisfaction of the Master [of the High Court] to have abandoned tribal custom and adopted a European mode of life and who, if married, have married under European law."*

[15] Now, the question whether a person has abandoned a customary mode of life and adopted a European way of living is obviously a question of fact to be judged on the particular facts of each case. It remains then to determine whether 'Malebenya satisfied this test when she executed the will in question.

[16] I observe at the outset that nowhere in their affidavits have the Appellants dealt with the factual issue whether 'Malebenya had abandoned a customary way of life and adopted a European mode of living.

[17] By contrast, it will be noted that the First Respondent specifically challenged the validity of the will in paragraph 7 of his replying affidavit. Therein he averred in part as follows:-

> "… *I never saw this document* (the will in question). *I could not even tell* (at

> ‘Malebenya’s funeral) *whether it was authetic or not. I therefore had no will to place before this Honourable court to challenge. Now that deponent* (First Appellant) *has placed it before court I say that it is invalid and the joint will* (the document in terms of which Kopano and ‘Malebenya appointed him their joint heir) *remains valid.”*

The First Respondent continued his direct challenge to the will in the following terms:-

> “*In so far (sic) the contents of deponent’s annexure “M”* (the will in question) *are concerned I deny that ‘Malebenya had abandoned a customary mode of life. If she did so it was merely for the convenience of*
>
> *revoking the documents appointing me as her customary heir. I was appointed her customary heir and she confirmed this openly at a family meeting, and she could not later make a will, which disinherits me. Furthermore shemade this new decision on her own without the family’s consent, or even hearing me on the issue although her decision affected me directly. This will has not even been reported to the master after ‘Malebenya’s death.”*

[18] Bearing in mind the question of onus as set out above, it was incumbent, in my judgment, for the Appellants to have at least applied for oral evidence to deal with the issue whether ‘Malebenya had abandoned a customary mode of life. On the contrary, the attitude evinced by the Appellants is that mere production of a will is enough to do the trick. In my view it is not so. There is no magic power in a will and where it is challenged, as here, proof must be forthcoming. It follows that the declaration contained in clause 2 of ‘Malebenya’s will does not amount to evidence especially when viewed in the light of the First Respondent’s challenge to it made on oath.

[19] In any event, and as was correctly pointed out by Guni J, there is no evidence that Kopano himself abandoned a customary way of life and adopted a European mode of living. It is therefore most unlikely that ‘Malebenya being his wife and living together as

husband and wife could have led a different mode of life from his.

Furthermore, I consider it most unlikely that 'Malebenya could Have changed her customary way of life in three years' time between 1997 when she admittedly participated in the appointment of the First Respondent as her customary heir and 2000 when she purported to disinherit him by a will.

[20] In the light of the aforegoing considerations, the conclusion is inescapable that the Appellants failed to discharge the onus of proof that 'Malebenya had abandoned a customary way of life and adopted a European mode of living when she executed the will in question. It follows that they have failed to prove the validity of the will. Once that is so, the law that governs the matter is Sesotho customary law. See Molungoa Bolei Khatala vs Francina Bolei Khatala 1963-6 HCTLR 97.

The provisions of section 2 of the General Law Proclamation 2B Of 1884 also bear reference. That section reads:-

> "*In all suits, actions or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the colony of*
> *the Cape of Good Hope: Provided, however, that in any suits, actions or proceedings in any courts, to which all the parties are Africans, and in all suits, actions or proceedings whatsoever before any Basuto Court, African law may be administered…..…"*

[21] Although section 14 (1) of the Laws of Lerotholi is on allocation of property, it is nevertheless a clear indication, in my view, that the written instructions of the deceased must be respected in a matter such as this. That section reads:-

> *"If a man during his lifetime allots his property amongst his various houses but does not distribute such property, or if he dies leaving written instructions regarding the allotment on his death, his wishes must be carried out, provided the*

heir according to Basuto custom has not been deprived of the greater part of his father's estate."

[22] Now, it is important to bear in mind that, but for the will in question, the Appellants do not dispute the fact that the First Respondent was properly and duly appointed a customary heir to both Kopano and 'Malebenya.

[23] Guni J pointed out in her judgment that in terms of Sesotho customary law a wife is regarded as a minor. Indeed **Sebastian Poulter**: Family Law and Litigation in Basotho Society observes at page 292:

"[t]he (customary law) widow obviously has no right of disposition either by allocation during her lifetime or by testamentary instrument."

With respect to the learned author, this statement now requires qualification. It is plainly a statement representing the classical traditional viewpoint expressed twenty nine years ago. In my judgment the correct legal position is that a customary law widow does have the right of disposition by testamentary instrument provided she satisfies two requirements namely:

(1) that she has abandoned a customary mode of life in favour of a European way of living;

(2) that the heir is not thereby deprived of more than half of the estate.

Indeed it requires to be stressed that provided these requirements are met, section 5 of the Law of Inheritance Act 1873 applies. That section provides as follows:-

"5. Every person <u>competent to make a will</u> shall have full power by any will

executed after the taking effect of this Part to disinherit or omit to mention any child, parent, relative or descendant without assigning any reason for such disinheritance or omission, any law, usage or custom now or heretofore in force in Basutoland notwithstanding: and no such will as aforesaid shall be liable to be set aside as invalid, either wholly or in part, by reason of such disinheritance or omission as aforesaid." (Emphasis added)

The words "competent to make a will" provide a clear indication, in my view, that this Act is limited to persons who have abandoned a customary way of life and have adopted a European mode of living. On this construction, therefore, the section did not avail Malebenya.

[24] The learned Judge a quo was correct in my view, in concluding that 'Malebenya could not in law revoke her late husband's wish. It is for that matter trite that Sesotho customary law simply does not permit a testator to deprive the customary heir of more than half of the deceased's estate. See the internal conflict of Laws in Lesotho: W.C.M. Maqutu and AJGM Sanders, at p387. The learned authors make the point in these terms:-

"…the customary law, while making allowance for testate succession, does not permit a testator to deprive the customary heir ….of more than half of the estate". See Mokorosi vs Mokorosi 1954 HCTLR 24. See also section 14 (1) of the Laws of Lerotholi referred to in paragraph [21] above.

[25] In the light of these considerations, therefore, there can be no question of 'Malebenya lawfully "disinheriting" the First Respondent in this matter. It is necessary to add also that there was no reasonable justification at all in purporting to disinherit him. The fact that she did so merely because the First Respondent's mother had sued her and was thus "disrespectful" to her is not sufficient justification to disinherit the First Respondent himself. It seems not right that he should literally be punished for the sins of his mother as has happened here.

[26] In the result, the appeal is dismissed with costs.

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M.M. RAMODIBEDI

JUSTICE OF APPEAL

I Concur: _____

J.W. SMALBERGER

JUSTICE OF APPEAL

I Concur: _____

J.J. GAUNTLETT

JUSTICE OF APPEAL

For Appellant: **Adv. M. Mokoko**

For Respondents: **Mr E.H. Phoofolo**

Delivered at Maseru this 20th day of April 2005