

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

THABISO MAHASE

Appellant

and

NTHAKOANA MATILDA KHUBEKA
(duly assisted wherever necessary)

First Respondent

LILIAN MANTHAKOANA MAHASE
MINISTRY OF DEFENCE
ATTORNEY-GENERAL

Second Respondent
Third Respondent
Fourth Respondent

CORAM:

Ramodibedi, JA
Grosskopf, JA
Gauntlett, JA

JUDGMENT

Succession – customary law – final order already made in earlier proceedings between the same parties on same issue – res judicata - defiance of earlier order by respondents – impermissible use of doctrine of precedent by judge in application to enforce earlier ruling to reverse it.

4, 11 April 2006

GAUNTLETT, JA

[1] This appeal lies against an order of the High Court (Molai, J) dismissing an application for interdicts restraining the first and second respondents from interfering with the estate of the late Kelly Mahase (“the Estate”) and from receiving what were termed “death benefits” payable to the Estate and ultimately to the

appellant as its sole heir. The appeal is unopposed; it is nevertheless necessary to consider its merits.

[2] The appellant, in his application, describes himself as the lawful heir to the Estate, relying on a finding to that effect in a judgment handed down by Mofolo J on 8 February 2001 (CIV/APN/343/2000) (“the first case”). The appellant was joined as a party in the first case, in which a child born out of wedlock to the late Kelly Mahase sought an order that she was his heir. Mofolo J, after considering a number of customary law sources, concluded that this claim had to be dismissed, because in law the appellant was the heir.

[3] In his application before the court a quo in the present matter, the appellant attached the judgment of Mofolo J and asserted that the first and second respondents were making fraudulent attempts to obtain letters naming the second respondent as heiress. He expressed the apprehension that the second respondent with the help of the first respondent was seeking to claim funds to which he (the appellant) and not she in fact was entitled.

[4] In the court a quo Molai J dismissed the application on a simple basis. This was that the judgment of Mofolo J, which the appellant was now seeking to enforce,

was wrong. He reasoned as follows:

“In declaring the applicant the heir to the estate of the late Motlatsi Kelly Mahase, as it did, the High Court in CIV/APN/343/2000 clearly replaced the decision of the Mahase family by its own decision and did not, therefore, follow the decision of the Court of Appeal in **Moteane v Moteane LLR and Bulletin 1997/98**. The question that arises is which decision should this court now follow? Should it follow the decision of the High Court in CIV/APN/343/2000 or the Court of Appeal decision in **Moteane v Moteane, Supra?**

The Court of Appeal is the highest court. Once it has decided in **Moteane v Moteane**, ‘that it is not the court but the family who must nominate the heir,’ that decision is final and must be followed by the High Court and all other lower courts, on the principle of **stare decisis**. – see also page 6 of **Wille’s Principles of South African Law (Eighth Edition)** where it is said:

‘When once a decision has been given by the highest court in a state it is practically conclusive and final’.

[5] I must respectfully disagree with this reasoning. In my view, the learned judge erred, in the following fundamental respects.

[6] In the first place, the judgment by Molofo J was a final ruling between the same parties on essentially the same issue. In these circumstances, that issue – who was the heir to the estate – became *res judicata* (see Custom Credit Corp (Pty) Ltd v Shembe 1972 (3) SA 462 (A) at 472 A-B; KBI v Absa Bank Bpk 1995 (1) SA 653 (A); see generally Joubert et al (eds) Law of South Africa vol 9 (1st reissue 1999) paras 424-9).

[7] In the second place, and as a consequence, Molai J had no jurisdiction to make an order the effect of which was to negate the earlier order of Molofo J. A

High Court judge has no review power over a colleague (High Court Rule 50).

[8] In the third place, the learned judge appears to have confused the doctrine of precedent with his capacity to make an order at variance with a final order already made on the same matter between the same parties. Whether or not the judgment of Mofolo J was consistent with the Court of Appeal judgment in Moteane, supra was not a triable issue before Molai J. Simply because the latter considered the ratio of Mofolo J in the first case not to be a correct statement of the law did not entitle him to make a new order in the subsequent application which had the effect of negating Mofolo J's earlier unchallenged order on the same issue.

[9] I accordingly conclude that the appeal must succeed. The appellant has also appealed against the order by Molai J that no costs order should be made, "this being a family dispute". While in appropriate circumstances that may be a relevant consideration, I fail to see how it provided an appropriate and, indeed, exclusive basis for the proper exercise of the court's discretion on costs in this matter. The court not only exercised its discretion on a misconception of the underlying legal position, in the respects analysed above, but gave no regard to the fact that the respondents' conduct amounted to defiance of a final order on the same issue. That conduct obliged the appellant to come to court twice for the same relief. It is hardly equitable to make him bear his own costs in doing so.

[10] This order is made:

- “(1) The appeal succeeds, with costs.
- (2) The order of the court a quo is set aside, and substituted with an order in the following terms:
- (a) The first and second respondents are restrained and interdicted from interfering with the Estate of the late Kelly Mahase, which estate has been decreed by court as having been rightly inherited by the applicant herein.
- (b) The first and second respondents are restrained and interdicted from receiving death benefits payable to the estate of the late Kelly Mahase, by the Lesotho Ministry of Defence per authority CIV/APN/343/2000 dated 8 February 2001.
- (c) The first and second respondents shall pay the costs hereof, jointly and severally, the one paying the other to be absolved”.

J.J. Gauntlett
 JUDGE OF APPEAL

I agree:

M.M. Ramodibedi
 JUDGE OF APPEAL

I agree:

F.H. Grosskopf
 JUDGE OF APPEAL

For the appellant : T. Koto (with her,
 I. Motšoene)

No appearance for the respondents.