

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) No 9/2007

CIV/APN 130/06

In the matter between:

'MAFUSI MPOSHO

APPELANT

and

MOTŠEOA MOFAMMERE

1ST RESPONDENT

METROPOLITAN LIFE LTD

2ND RESPONDENT

**MINISTRY OF COMMUNICATIONS
RESPONDENT**

3RD

MASTER OF THE HIGH COURT

4TH RESPONDENT

THE ATTORNEY GENERAL

5TH RESPONDENT

Heard : 15.10.2007

Delivered : 24.10.2007

CORAM:

GROSSKOPF, JA

SMALBERGER, JA

MAJARA, JA

SUMMARY

In what circumstances is a father of an illegitimate child liable to maintain that child?

GROSSKOPF, JA

[1] The appellant was the applicant in the court a quo. She is the mother of Teboho William Mposho, her illegitimate son, who died intestate on 31 July 2005. I shall refer to him as the deceased. The appellant brought an application in the court a quo for an order inter alia declaring her to be “the sole beneficiary of the moneys and benefits” due to the estate of the deceased.

[2] Only the first respondent opposed the application. It is common cause that the first respondent and the deceased lived as husband and wife after she had left her husband to whom she was legally married. In 1998 the first respondent gave birth to her and the deceased’s illegitimate son, Mosebo Simon Liteboho Mposho (hereinafter referred

to as “Mosebo”). The fact that the deceased was Mosebo’s father is common cause. It is the first respondent’s case, as set out in her opposing affidavit –

“that where a deceased leaves a son, that son is a beneficiary and heir to his estate and/or is entitled to be maintained out of that estate.”

The first respondent accordingly asked in a counter-application that the appellant’s application be dismissed and that Mosebo be declared heir and beneficiary of the deceased’s estate.

[3] The court a quo held that the appellant was the beneficiary of the deceased’s estate, but ordered the appellant to maintain Mosebo out of the deceased’s estate in an amount to be determined later. The court a quo made the following order:

“1. The estate of the late Teboho William Mposho comprising movable and immovable property is the

sole property of his unmarried mother the applicant.

2. The child Mosebo Simon is entitled to maintenance out of the estate of deceased William Teboho Mposho.
3. The manner and means of Mosebo's support will be determined by parties at a later stage."

[4] The appellant noted an appeal on the following limited grounds:

- "1. The learned judge erred and misdirected himself in giving a maintenance order when there was no counter-application claiming such order, alternatively;
2. The learned judge erred and misdirected himself in granting a maintenance order not sought."

[5] Counsel for the appellant referred us in his heads of argument to the case of **Lesotho National Olympic Committee and Others v Morolong** LAC (2000 - 2004) 449 at 456 G, where this court held that -

"[i]t is indeed trite law that a litigant cannot be granted relief which he or she has not sought."

That of course is the general rule, as also laid down in **Phori v Durow t/a J and E Enterprises** LAC (1995 - 1999) 391 and **Mathapelo Mbangamthi v Puleng Sesing-Mbangamthi** C of A (CIV) no. 06/2005 (unreported). There are however cases such as the present where the court may grant relief which has not specifically been claimed.

[6] It is indeed so that the first respondent did not specifically ask for a maintenance order in her counter-application, but it is also clear from the passage quoted in paragraph [2] above that it was all along the first respondent's case that Mosebo is in any event entitled to be maintained out of the deceased's estate. The appellant in her replying affidavit in fact acknowledged that Mosebo's claim for maintenance was part of the relief sought by the first respondent. The heads of argument filed by both the appellant and the first respondent in the

court a quo form part of the appeal record before us. The appellant submitted in those heads that there were two facts in dispute, namely first, whether the appellant or Mosebo is the heir to the deceased's estate, and second, whether Mosebo is entitled to maintenance out of the estate of his deceased father. The major part of the appellant's heads in the court a quo dealt with the second question, and more particularly whether illegitimate children are entitled to maintenance out of the estate of a deceased parent according to the law of Lesotho as opposed to the law of South Africa.

[7] It is apparent from the foregoing that Mosebo's claim for maintenance was a major issue in the court *a quo* and that the appellant dealt with it as if it were an alternative prayer in the first respondent's

counter-application. In the circumstances set out above the appellant can hardly claim that she was prejudiced in any respect by the fact that the first respondent had failed to set out the maintenance claim in her counter-application. It would therefore be highly formalistic in my view to set aside the maintenance order of the court a quo on the simple ground that there was no specific prayer for such a maintenance order in the counter-application.

[8] There was no appearance for the first respondent on appeal before us. The appellant on the other hand was represented by counsel. The appellant then for the first time raised the argument that the first respondent had failed to prove that Mosebo was in need of maintenance and therefore entitled to maintenance. WCM Maqutu explains the

position as follows in his book on Contemporary Family Law (The Lesotho Position), 2nd edition 2005, at 234:

“ An illegitimate child in Basotho custom belongs strictly to the mother’s family. The natural father for purposes of the law is regarded as non-existent. It was only by statute (the Deserted Wives and Children Proclamation of 1959) that the natural father was required to provide the child with maintenance if the child is in need of maintenance.” (Emphasis added).

Section 3 of the Deserted Wives and Children Proclamation, 60 of 1959, made it an offence for a person able to maintain a wife, child or other person whom he or she may be legally liable to maintain, to refuse or neglect to do so. Section 3A (1) of the Deserted Wives and Children (Amendment) Act, 1 of 1977, provides as follows:

“(1) The court may, in addition to any sentence it may impose upon a person convicted under section 3, make an order in writing against that person to pay at such intervals, in such manner, and to such person as the court may think fit, a reasonable sum for the use of the person to be maintained by such a convicted person.”

Section 3A (3) provides that an order made under sub-section (1) shall have the effect of a civil judgment for the payment of money.

[9] The legislation referred to does not however determine the question of who is liable for the maintenance of an illegitimate child; it is only concerned with enforcement of payment by a person liable to maintain the child. The question therefore remains whether the deceased, as the natural father of Mosebo, was legally liable to maintain Mosebo.

[10] It was held by this court in the case of Robert P Ntle v. Khubelu Khaketla 1985 - 1990 LLR 213 (CA) at 215 that -

“[t]he Act does not create any new liability. Liability must be sought in the general law as it exists outside the Act.”

It was pointed out in that case at 216 that there are two distinct systems of law applicable in Lesotho, namely Roman -Dutch and customary law. It is clear under Roman-Dutch common law that a father is

bound to support his illegitimate child. It was further held in the above mentioned case at 218 that under customary law an illegitimate child belongs to the mother's family who are responsible for his support and care. The court in that case concluded at 218 that -

“if it is established, however, that such an illegitimate child who belongs to the mother's family is without adequate means of support because the mother's guardian, or whoever is responsible for his maintenance under customary law, is unable, or cannot be compelled, to support such child, then the mother and the father of the child become liable for its maintenance..... The effect of this approach is that while customary law is ordinarily to be administered when an illegitimate child belongs to the mother's family who then becomes responsible for its maintenance, the common law will be enforced whenever those responsible under customary law for the child are unable to support it adequately.”

[11] There is no evidence in the present case that Mosebo is in need of maintenance because his mother's family are unable to support him adequately, and that he is therefore entitled to claim maintenance from the deceased's estate. The appellant's appeal must accordingly succeed and

paragraphs 2 and 3 of the order of the court a quo quoted in paragraph [3] above must be set aside. Counsel for the appellant informed the court that the appellant does not ask for costs.

[12] The conclusion set out above does not, however, mean that Mosebo is without any legal remedy. If it can be proved that Mosebo is truly in need of maintenance he is entitled to claim maintenance out of the estate of the deceased.

[13] The following order is made:

1. The appeal is upheld but there is no order as to costs.

2. The order of the court a quo set out in paragraphs 2 and 3 of the court order of 30 April 2007 is set aside.

F.H. GROSSKOPF
JUDGE OF APPEAL

I agree:

J.W. SMALBERGER
JUDGE OF APPEAL

I agree:

N. MAJARA
JUDGE OF APPEAL

For the Appellant: Adv P.R. Thulo
For the Respondent: No Appearance