IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C OF A (CIV) NO.10/08

In the matter between:

'MARELEBOHILE Nalane (Nee Molapo)	**FIRST APPELLANT**
'MASENUKU MOLAPO	**SECOND APPELLANT**
'MASEKHOBE MOLAPO	**THIRD APPELLANT**

and

THABISO MOLAPO	**FIRST RESPONDENT**
LEHLOHONOLO MOLAPO	**SECOND RESPONDENT**
MASTER OF THE HIGH COURT	**THIRD RESPONDENT**

CORAM: RAMODIBEDI, P
HOWIE, AJA
HLAJOANE, JA

Heard : 7 October 2008

Delivered : 17 October 2008

SUMMARY

Administration of Estates - Conflict of laws - Customary law as opposed to common law - The Administration of Estates Proclamation No. 19 of 1935.

Practice - Parties - Non-joinder of the customary heir as essential party - Application for condonation to argue a new point that the heir had waived his rights.

JUDGMENT

RAMODIBEDI, P

[1] In broad terms, this appeal highlights, in typical fashion, the nagging problem of conflict of laws in this country. Is the deceased's estate in this matter, comprising some flats for

rental and four head of cattle, governed by customary law or does it fall under common law as enshrined in the Administration of Estates Proclamation No. 19 of 1935 ("the Proclamation")? Ultimately the case, as I see it, rests on the question of the non-joinder of the customary heir in these proceedings.

[2] The facts are fairly simple and indeed hardly in dispute. The appellants and the first two respondents are siblings. Initially there were eight siblings in all. Three of them passed away. These included one Molise Molapo ("the deceased")

whose estate is the subject matter of this litigation. He died intestate and childless. In fact it is said that he had never married at all in his lifetime.

[3] The eldest of the siblings, the late Peete Molapo, begot a male child, namely, Libe Molapo who is admittedly the heir in the litigants' family under customary law. It is common cause that he was not joined in these proceedings.

[4] The parties are on common ground that the deceased's death was not reported to the Master of the High Court.

Instead, the parties, namely, the five surviving siblings agreed to distribute the estate amongst themselves in equal shares and this was done. They shared the monthly rentals equally. But because there were only four head of cattle at that stage, they decided to await the progeny from one of the cows in order to reach the magic figure "5". This would then enable them to get one beast each, so they thought.

[5] The first respondent had been given the responsibility by the other siblings to collect the monthly rentals and distribute them amongst the five of them. It is alleged, however, that

the whole arrangement collapsed when the first respondent suddenly stopped distributing the appellants' shares to them. It is further alleged that the second respondent collected the four head of cattle in question and refused to share them with the appellants.

[6] Against this background, the appellants launched an application on notice of motion in the High Court seeking an order in the following terms:-

"-1-

That applicants, first and second respondents are all heirs *ab intestato* to the estate of the deceased Molise Molapo.

-2-

That applicants, first and second respondents are all entitled to share equally from proceeds of the estate of the deceased Molise Molapo.

-3-

That the third respondent [The Master of the High Court] be directed to appoint a Curator bonis to take the custody and charge of the Estate aforesaid pending the outcome of this application.

-4-

That the third respondent be ordered to direct the said Curator bonis to collect such debts of the estate pending the outcome of this application for distribution.

-5-

That the first and second respondents be ordered to pay costs of this application.

-6-

That applicants be granted such further and/or alternative relief."

[7] At the hearing of the matter in the court *a quo*, the appellants abandoned prayers 3 and 4 of the notice of motion. This was because the deceased's death had not been reported to the Master of the High Court. As a result the Master had declined in writing from intervening.

[8] After hearing submissions on the merits, the court *a quo* dismissed the appellants' application with costs, essentially on the ground that customary law was applicable and that the appellants were therefore guilty of failing to join Libe Molapo as the customary heir.

[9] Thereafter, the appellants' response appears to have been characterised by a remarkable confusion as to the exact nature of their complaint. In their grounds of appeal they only raised three complaints namely:-

"-1-

The court erred by holding that customary law of succession was the law applicable to this matter.

-2-

By so holding, the court ignored the circumstances of this case which clearly pointed to the fact that rights to the estate in dispute devolved in accordance with the common law of intestate succession. The order of the court *a quo* thereby implied that an estate could devolve and be dealt with under two different systems of law. The learned judge erred in this regard.

-3-

> The court *a quo* erred by ordering that the respondents were in all circumstances entitled to an order of costs."

[10] To add to the confusion in the matter, the appellants have now filed an application in this Court seeking leave to file an additional ground of appeal in the following terms:-

> "The court erred by disregarding the clear fact that Libe Molapo had for all intents and purposes waived his right and/or abandoned any claim of right he may have had to the estate."

Needless to say that this application is strenuously opposed by the respondents on the ground that it is bad in law as "it seeks to argue matters which were not traversed in the pleadings or the reply to the answering affidavit in the court *a quo*."

[11] It will be convenient, first, to address the appellants' point relating to waiver. I should commence this exercise by pointing out that waiver is a question of fact. As such it must be pleaded. Furthermore, the onus is on the party relying on waiver to show that the other party, with full knowledge of his right, decided to abandon such right, either expressly or by conduct plainly inconsistent with the intention to enforce the right in question. Authorities in this regard are legion, starting with the case of **Laws v Rutherfurd** 1924 **AD** 261. See also **Hepner v Roodepoort - Maraisburg Town Council** 1962 (4) **SA** 772 (**A**) at 778; **Montesse Township & Investment**

Corporation (Pty) Ltd And Another v Gouws NO And Another 1965 (4) **SA** 373 (**A**) at 381.

[12] I observe at once that nowhere in their affidavits did the appellants allege or make out a case for waiver. Indeed in their founding affidavit they made no mention of Libe Molapo at all. They failed to disclose the material fact that he is the customary heir. On the contrary, Libe Molapo's name appeared for the first time in the respondents' answering affidavits. Therein they made the case that he is the customary heir and that he should have been joined as such. Libe Molapo himself

deposed to an affidavit in which he supported the respondents' case that the appellants' claim be dismissed with costs. There is, therefore, no basis in the circumstances for any suggestion that Libe Molapo waived his rights as the customary heir.

[13] As can be seen from the above considerations, the question of waiver was neither canvassed nor investigated in evidence in the court *a quo.* Accordingly, the point relating to waiver, which is raised for the first time on appeal, must fail. The application for leave to file an additional ground in that regard is consequently dismissed with costs.

[14] The point of non-joinder is short and can quickly be disposed of. The starting point, in my view, is to determine which law is applicable. Is it customary law or the common law of intestate succession under the Proclamation? Section 3 (b) of the Proclamation is decisive in determining which law is applicable. This section provides as follows:-

> "3. This Proclamation shall not apply -
>
> (a) .....
>
> (b) 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] As is apparent from this section, the estates of Africans fall to be administered in accordance with customary law unless it is shown to the satisfaction of the Master of the High Court that such Africans have abandoned tribal custom and have adopted a European mode of life and also that, if married, they have married under common law. See for example **Makata v Makata** 1980-1984 **LAC** 198 **at** 200; **Ntsane v Thatho** 2000-2004 **LAC** 248 **at** 252; **Tšepo Mokatsanyane & Another v Motsekuoa Thekiso & Others C of A (CIV) No.**

23/04; **The Executor, Estate of the Late Florina Likomo Khakale v Mokoto Khakale & Others C of A (CIV) No. 10/07.**

[16] In fairness to them, the appellants have readily conceded that the applicable law in this matter is customary law and not common law. This concession was, in my view, correctly made, having regard to the facts of the case. There was simply no evidence to show that the appellants had abandoned tribal custom and had adopted a European mode of life. Once this conclusion is reached, it follows that Libe Molapo is the

heir in terms of customary law. The appellants conceded this point as well in this Court. As pointed out previously, they simply sought to rely on waiver without more.

[17] The appellants do not seriously dispute the proposition that, as the customary heir, Libe Molapo should have been joined in these proceedings. It is indeed well-established in our law that a party which has a direct and substantial interest in the litigation is an interested party. It must as such be joined in the litigation. Similarly, this Court views the question of non-joinder in such a serious light that it will not hesitate to

raise it *mero motu*. This is because, as this Court has said, the Court cannot allow orders to stand against persons who may be interested, but who had no opportunity to present their case. See for example **Matime and Others v Moruthoane and Another** 1985-1989 **LAC** 198. See also **Lesotho District of the United Church v Reverend Mothonyana Lawrence Moyeye & Others C of A (CIV) No**. 12/06 and the cases cited therein.

[17] It follows from the foregoing considerations that the court *a quo* was, in my view, fully justified in dismissing the appellants' application on the ground of non-joinder.

[18] So far as costs are concerned, there is no reason why these should not follow the event. In any case, an award of costs is a matter pre-eminently within the discretion of the trial court. An appellate court is slow to interfere with the exercise of such a discretion in the absence of a misdirection. No such misdirection has been shown to exist.

[19] In the result, the following order is made:

(1) **The appeal is dismissed with costs to the first and second respondents to be paid by the appellants jointly and severally, the one paying the others to be absolved.**

(2) **Such costs to include the costs of the appellants' application for leave to file an additional ground of appeal.**

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M.M. RAMODIBEDI

PRESIDENT OF THE

COURT OF APPEAL

I agree: _____

C.T. HOWIE

ACTING JUSTICE OF APPEAL

I agree: _____

A.M. HLAJOANE

JUSTICE OF APPEAL

For Appellants : Adv S. Ratau

For Respondents: Adv. T. Mothibeli