IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO. 19/2007
CIV/APN/598/2004

In the matter between:

SEBAKENG MOKETE	**1st APPELLANT**
NTOBAKI MOKETE RAPOKISA	**2nd APPELLANT**
LESOTHO BANK (BUTHA-BUTHE BRANCH)	**3RD APPELLANT**
MINISTRY OF EDUCATION (TSD)	**4th APPELLANT**
ATTORNEY-GENERAL	**5th APPELLANT**

AND

LERATO MOKETE (born Makhobalo)	**1st RESPONDENT**
RELI TRISHA MOKETE NTHABELENG	**2nd RESPONDENT**
MELICA MOKETE	**3rd RESPONDENT**

CORAM: **RAMODIBEDI, JA**
SMALBERGER, JA
TEELE, AJA

Heard: **7 April 2008**
Delivered: **11 April 2008**

SUMMARY

Application in High Court relating to claims by former wife of the deceased in respect of the latter's estate on behalf of their minor daughters - what law governs deceased's estate - marriage (subsequently dissolved) by civil rites - not per se amounting to an abandonment of tribal custom in terms of section 3 (b) of the Administration of Estates Proclamation 19 of 1935 -authenticity and validity of will purportedly executed by the deceased - two

main issues not properly raised and ineptly dealt with in the affidavits filed - Master of the High Court not joined in proceedings - potential prejudice to minor children - Court of Appeal rule 17(4) -order of court a quo set aside and matter remitted to enable parties to file further affidavits relating to main issues - ancillary relief

JUDGMENT

SMALBERGER, JA

[1] On 25 November 2004 the respondents (as applicants) launched an urgent application by way of notice of motion against the appellants (as respondents) in which the following relief was sought:

"1. That the normal rules and modes regulating service of process be dispensed with on account of urgency of this matter.

2. That a rule nisi be issued returnable on a date to be determined by this honourable court calling upon the Respondents to show cause, if any, why:

d) The 1st Applicant shall not be appointed as the curator *ad litem* for the 2nd and 3rd Applicants.

e) The 3rd Respondent shall not be interdicted from releasing funds in account number 0121005412501 in its possession,

an account belonging to the deceased Mokete Mokete.

f) The 4th Respondent shall not be interdicted from releasing any funds whatsoever that have accrued to the deceased Mokete Mokete by virtue of his employment with them.

g) The 1st and 2nd Respondents shall not be interdicted from interfering with the deceased's accounts and the 1st Applicant's house and children.

h) The 1st Respondent shall not be directed to dispatch the passports and death certificate of the deceased to the 1st Applicant who shall keep them and use them for the benefit of the minor children of the deceased.

i) The 1st Applicant shall not be declared the rightful person to claim the deceased's benefits on behalf of the deceased's minor children.

j) That prayers 1 and 2(a), (b), (c) and (d) shall operate with immediate effect as an interim relief."

[2] On the same day a *rule nisi* was issued in the terms sought. On the extended return day, the respondents being in default of appearance, a final order was granted. The respondents subsequently sought and were granted rescission of the default judgment, and given leave to file opposing affidavits. They duly filed such affidavits, to which the applicants in turn replied. Apart from dealing with the merits, the opposing affidavits raised various points in limine relating to alleged procedural and other irregularities one such being the non-joinder of the Master of the High Court. For the sake of convenience I shall continue to refer

to the parties as in the court below.

[3] In her founding affidavit the first applicant described herself as a "female Mosotho adult of Baroeng in the district of Butha-Buthe". The second and third applicants are the minor children of the first applicant and one Mokete Mokete ("the deceased"), who passed away on 16 September 2004. The first applicant and the deceased were married by civil rites in community of property (the date of marriage does not appear from the record), but were divorced on 5 March 2001 on the grounds of the deceased's adultery. In terms of the divorce order the first applicant was granted custody of the second and third applicants and the deceased was ordered to pay maintenance for them at the rate of M500.00 per month per child. The first respondent is the brother of the deceased.

[4] The first applicant's claims are brought under the common law as custodial parent of the second and third applicants whom she claims are the rightful heirs of the deceased. The claims are premised on the fact that the deceased died intestate. The essence of the first respondent's opposition is that customary law applied; that he is the deceased's customary law heir on whom the duty to maintain the second and third applicants falls; and that the assets of the deceased's estate devolve upon him. Apart from that the first respondent also claims that the deceased left a valid will in which he bequeathed the whole of his estate to him.

[5] The matter came before Majara J. On 31 August 2006 the learned judge delivered a judgment dealing with the various points raised *in limine,* in regard to which she concluded:

> "It is my view that *in casu,* justice dictates that this Court should overlook the alleged irregularities and deal with the merits of the case in the best interests of the minor children especially because as I have already stated, I find none of

them to be so serious as to prejudice respondents in their case. I therefore will not waste time to determine whether any of them should be upheld or dismissed."

[6] In due course the merits were canvassed before Majara J. On 12 October 2007 she handed down a written judgment at the conclusion of which, and for the reasons given, she granted the application "as prayed for in terms of the prayers as they are stated in the notice of motion, with costs." The present appeal lies against her order in that regard.

[7] The first issue decided by the learned judge was "which law should govern the estate of the late Mokete Mokete". In this regard she concluded:
"In my opinion, this should depend on *inter alia,* the type of marriage that the deceased and the 1st applicant entered into which is undisputedly the civil rites common law marriage. They were also divorced under this law. Both parties are agreeable in this regard which in my view means that the provisions of **Section 3 (b) of the Administration of Estates Proclamation of 1935** are applicable herein. The said section provides as follows:-

"The proclamation shall not apply to the estates of Africans, which shall continue to he administered in accordance with prevailing African law and custom of the territory: provided that such law and custom shall not apply to the estates of Africans who have shown to the satisfaction of the Master to have abandoned tribal custom and adopted a European mode of life and who, if married, have married under European Law."

In terms of this law, where an African is married under

> European Law and satisfies all the other conditions, his estate shall not be administered under African Law but by the received law such as *in casu."*

[8] Having disposed of that issue, Majara J went on to consider the first respondent's claim to be the deceased's rightful heir in terms of what was alleged to be the deceased's will. She went on to hold:

> "I find the will invalid and/or void for lack of authenticity and for the reason that when considered together with the family's instructions, it suggests that it was authored after these proceedings were instituted just so that it could substantiate 1st respondent's case.
>
> Accordingly, I find that the late Mokete Mokete died intestate and that as a result his estate should devolve wholly to his two minor children as the rightful heirs."

[9] At the roll call on 26 March 2008 there was no appearance on behalf of the applicants (respondents on appeal), nor had heads of argument been filed on their behalf. As the interests of minor children are at stake in this matter, it was arranged that Mr. Thoso, who appeared for the respondents (appellants on appeal), would take steps to ensure that the applicants were made aware of the fact that the appeal was to be heard on 7 April 2008. He duly did so, and we thank him for his efforts in that regard. When the

appeal was called, Mrs Thabane appeared for the applicants. She had only been instructed to appear on their behalf on 28 March 2008. This was her first appearance in this Court. She did not file any heads of argument. She failed to appreciate that, despite being out of time, she should have filed such heads together with an application for condonation for their late filing - see generally in this regard rule 15 of the Court of Appeal Rules, 2006 dealing with the effect of a breach of the Rules. She apologized for her failure to do so and undertook to furnish us with written heads of argument by the end of the day, the hearing of the appeal to proceed in the meantime. While practitioners should be acquainted with the Rules of this Court and be aware of their requirements, Mrs Thabane's failure to do what was required of her, while not entirely excusable, is perhaps understandable in the circumstances.

[10] Certain other preliminary matters require attention. The appeal record includes thirty-three pages relating to a successful application for rescission which have no relevance to the issues on appeal. Unnecessary documentation must be excluded from the record - cf rule 5 (16) of the Rules. Furthermore, rule 5 (5) requires that copies of the record should be in English. That applies to all documents included in the record. Annexure "BB" to the opposing affidavit, an important document in the context of

the appeal, is in Sesotho, and no translation thereof is provided. Care must be taken to ensure that a record complies in all respects with the provisions of rule 5. Failure to do so could attract an adverse, even punitive, order as to costs.

[11] Rule 8 (19) of the High Court Rules 1980 provides:

> "When an application is made to court, whether **ex parte** or otherwise, in connection with the estate of any person deceased, or alleged to be a prodigal or under any legal disability mental or otherwise, a copy of such application, must, before the application is filed with the Registrar, be submitted to the Master for his consideration and report. If any person is to be suggested to the court for appointment of curator to property such suggestion shall also be submitted to the Master for his consideration and report. There must be an allegation in every such application that a copy has been forwarded to the Master."

The provisions of rule 8 (19) were not complied with in the present instance. The nonjoinder of the Master was raised *in limine* by the respondents but was disregarded by the judge *a quo* as one of a number of non-prejudicial irregularities. She erred in so holding. Bearing in mind that the present matter involves a

deceased estate, persons under a legal disability (minor children), the appointment of a curator and an application of the provisions of section 3 (b) of the Administration of Estates Proclamation of 1935 ("the Proclamation"), this was *par excellence a* matter where the Master should have been joined as a party and the requirements of High Court rule 8 (19) complied with.

[12] In holding that the common law governed the estate of the deceased the judge *a quo* appears to have been of the view that the proviso to section 3 (b) of the Proclamation is satisfied where there has been a marriage by civil (European) law. This is clearly not the case **(Khatala v Khatala** (1963-1966) HCTLR 97 at 100 B-C). The proviso excludes from the operation of section 3 (b) Basotho who "have abandoned tribal custom and adopted a European mode of life, <u>and</u> who, if married, have married under European law." It therefore postulates <u>two</u> requirements, both of which have to be present for the proviso to come into operation. Only the second (marriage under European law) has been established. The first (abandonment of tribal custom and adoption of a European mode of life) was not raised in the affidavits and has never received proper consideration in this matter.

[13] 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. The onus would be on the first applicant, who claims that the common law applies, to establish such abandonment and adoption - see the remarks in this regard of Ramodibedi JA in **Tsepo Mokatsanyane and Another v Motsekuoa Thekiso and Others** C of A (CIV) NO.23 of 2004, paras [14] and [15].

[14] Nowhere on the papers before us does the first applicant claim that the deceased abandoned his customary mode of life, let alone present any facts in support of such contention. Consequently, the first respondent was never required to deal with the issue or present facts in rebuttal. The matter - vital to the proper outcome of the application - was simply never canvassed. As previously indicated, a civil rights marriage does not *per se* amount to proof of such fact; nor does the making of a will **(Tsepo Mokatsanyane and Another v Motsekuoa Thekiso and Others** *(supra)* at para [19]. They may however do so when taken in conjunction with other considerations.

[15] A similar problem arises in relation to the authenticity and validity of the alleged will of the deceased. The first respondent placed no more than the bare fact of its existence before the court without any further evidence to support its authenticity. We do not know, for example, if the will was ever lodged with the Master in terms of section 15 of the Proclamation, or whether the requirements of section 16 of the Proclamation (the delivery of a will "forthwith" to the Master, after the death of the person who executed it, by the person who has such will in his possession) have been complied with. No specific challenge was directed against the will's authenticity by the first applicant in her replying affidavit. The judge *a quo's* rejection of the will appears to have been based more on conjecture than fact. This issue too was one that needed further elucidation to enable the court *a quo* to arrive at an informed conclusion.

[16] We are concerned that there is a real danger, given the failure of the parties properly to identify the main issues in this matter, the inept way in which the matter was presented, the lack of relevant factual material, and the failure to join the Master in the

proceedings, that any judgment we may give on appeal on the record as it stands may redound to the detriment of the minor children, whose interests we are required to protect, and result in a failure of justice. To avoid this we are of the view that the matter should be remitted to the court *a quo,* under the power conferred upon us by rule 17 (4) of the Court of Appeal Rules, 2006, and the parties afforded the opportunity to join the Master, comply with High Court rule 8 (19), and supplement their affidavits to enable the issues between the parties to be fully ventilated so that a proper determination of their rights may be made, particularly those of the minor children. Mrs Thabane and Mr. Thoso agree to this approach. They also agree that the costs of the proceedings to date should be costs in the cause. As the matter requires finalization as soon as possible, the Registrar of the High Court will be requested to give precedence to the matter on the opposed roll as soon as it is ripe for hearing.

[17] In the result the following order is made:-

The judgment of the court *a quo* is set aside and the matter is remitted to the court for further hearing and final determination of the issues referred to in (3) below.

The respondents (applicants in the court *a quo)* are required to join the Master of the High Court forthwith as a party to these proceedings and to comply with the provisions of High Court rule 8 (19) to the extent required.

The respondents (applicants in the court *a quo)* are given leave to amplify their papers within 21 days of the date of this judgment with regard to the issues (a) whether the deceased, Mokete Mokete, had "abandoned tribal custom and adopted a European mode of life" in terms of section 3 (b) of the Administration of Estates Proclamation 19 of 1935 and (b) the authenticity and validity of the purported will, Annexure "BB" to the opposing affidavit of the first appellant (first respondent in the court *a quo).*

The appellants (respondents in the court *a quo)* and the respondents (applicants in the court *a quo)* are thereafter to deliver any answering and replying affidavits within the periods laid down in High Court rule 8 (10) (b) and (11).

A *rule nisi* in the terms issued by the High Court on 25 November

2004 is to remain operative pending the final determination of the application of the respondents (applicants in the court *a quo).*

The costs of and relating to the appeal are to be costs in the cause.

(7) The Registrar of the High Court is requested to give the matter priority on the contested roll once a notice of set down has been filed.

J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

M.M. RAMODIBEDI
JUSTICE OF APPEAL

I agree:

M. E. TEELE
ACTING JUSTICE OF APPEAL

For Appellants : Adv T. Thoso
For Respondents : Mrs K. Thabane