IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO.20/2009
CIV/APN/240/08

In the matter between:

KHETLA T.J. RAKHETLA — **1ST APPELLANT**
MAKHOTSO RAKHETLA — **2ND APPELLANT**

AND

LEBOHANG ALDEIA (Born Rakhetla) — **1ST RESPONDENT**
ESTATE OF THE LATE 'MATHABO A. RAKHETLA — **2ND RESPONDENT**
METROPOLITAN LESOTHO — **3RD RESPONDENT**
MASTER OF THE HIGH COURT — **4TH RESPONDENT**
ATTORNEY GENERAL — **5TH RESPONDENT**

Heard : 14 October 2009
Delivered : 23 October 2009

CORAM: SMALBERGER, JA
GAUNTLETT, JA
MAJARA, JA

SUMMARY

Succession – first appellant and his late wife (the deceased) married (for the second time) by antenuptial contract – whether the deceased's intestate estate devolves by Sesotho law and custom or common law – relevant considerations – held common law applied – first respondent and her sister declared to be heirs to the deceased's estate – appeal dismissed.

JUDGMENT

SMALBERGER, JA

[1] On 21 July 2008 appellants (applicants in the court below) obtained urgent relief against the respondents in terms of a *rule nisi* operating as a temporary interdict returnable on 11 August 2008. The essential terms of the *rule nisi* provided:

> "a) That the 1st respondent be and is hereby interdicted and restrained from holding out herself as the executrix and/or the heiress of the estate of the late Mathabo A. Rakhetla and from collecting rentals from House number 243 Constitutional road (Maseru Central) with lease no. 12284-029.
>
> b) That the 2nd applicant herein is the heiress to the estate of the late Mathabo A. Rakhetla.
>
> c) That it is hereby declared that the 1st respondent has no right of inheritance from the estate of the late Mathabo A. Rakhetla by virtue of her being not a member of the Rakhetla family but a member of the family of Aldeia."

[2] The application was opposed. Answering and replying affidavits were duly filed. On the extended return day the matter came before Nomngcongo J. The learned judge held that apart from the fact that no proper case had been made out for urgency (the point having been raised *in limine*) the appellants had not established any right to the estate of the late Mathabo A. Rakhetla ("the deceased") and accordingly had no *locus*

standi in respect thereof. He accordingly dismissed the application with costs, hence the present appeal.

[3] The following relevant facts are either common cause or not in dispute. First appellant and the deceased were married in community of property in 1957. They were divorced in early March 1991 and their joint property was divided between them in terms of a deed of settlement. On 17 April 1991 they remarried, but this time by antenuptial contract. In terms of the antenuptial contract the deceased acquired substantial property rights in certain properties including the immovable property held under lease number 12284-029. The deceased passed away on 28 February 2006 after a long illness. She apparently died intestate. First appellant and the deceased had three children (two daughters and a son). First respondent is their eldest daughter; the second daughter, Thabang Thacker ("Thabang") is married and lives in England; the son, Thabo, pre-deceased his mother (the deceased) and left his estate to her. First respondent gave birth to a son, Thuso, out of wedlock. First respondent did not subsequently marry Thuso's biological father. Instead she married into the Aldeia family. Second appellant married Thuso on 3 August 2007. She was widowed when Thuso passed away on 19 November 2007. It is

common cause that after Thuso's death the second appellant stepped into his shoes in relation to any inheritance to which he might have become entitled.

[4] The appeal raises a number of issues. They include whether the application in the court below was urgent; the non-joinder of Thabang; and the *locus standi* of the first appellant. Counsel for the parties, however, were agreed that the nub of the appeal concerned the question who was entitled to inherit the deceased's intestate estate. This Court is required to resolve that issue and to make an appropriate order consequent upon its decision. The other issues may for all practical purposes be disregarded.

[5] It is common cause that Sesotho law and custom does not regard a child born out of marriage as illegitimate. Such child belongs to the family of the mother, and a boy in the position of Thuso is considered to be the legitimate son of his grandparents. In claiming in his founding affidavit that he and the deceased had "adopted" Thuso, the first appellant was doing no more than confirm that Thuso had been assimilated into the family in keeping with customary practice. After the deceased's death the Rakhetla

family purported to appoint Thuso as “heir to all the properties in the [deceased’s] name.”

[6] The competing claims of the parties to the deceased’s estate raise the vexed question of whether her estate has to devolve in terms of customary or common law. Her estate cannot be governed by both systems (*Makata v Makata* LAC (1980-1984) 198 at 200E). It is common cause that if the deceased’s estate falls to be dealt with under customary law Thuso would have inherited her estate upon her death and the rights to her estate would vest in his widow, the second appellant. On the other hand, if common law were to apply, the deceased’s intestate heirs would be the first respondent and Thabang. Thuso, the biological son of the first respondent, would not have qualified as an heir to the deceased’s estate under the common law. Only if the first respondent had pre-deceased the deceased would Thuso have stepped into her shoes as an heir.

[7] Section 3 (b) of the Administration of Estates Proclamation 19 of 1935 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 estate of Africans who have been 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."

[8] The appeal record does not shed much light on the question whether the first appellant and the deceased had adopted a European mode of life generally. On behalf of the appellants it was contended that the assimilation of Thuso into the family in terms of Sesotho custom showed their adherence to tribal custom, despite an earlier marriage by civil rites. Such assimilation of course occurred many years before the first appellant and the deceased were divorced and then remarried under antenuptial contract. They may well in later years have decided to change their mode of life.

[9] That Basotho have chosen to marry by civil rites may indicate their choice of a European way of life, but is by no means conclusive of that fact. Under the common law, marriage would normally be in community of property. Maqutu: *Contemporary Family Law (the Lesotho position*): 2nd edition, at p273 states with regard to a marriage in community of property

that “the idea of a woman having an estate of her own is foreign to indigenous law. How this affects succession has never been cleared.” What would be even more foreign is a marriage by antenuptial contract with the legal consequences that flow therefrom including exclusion of the husband’s marital power.

[10] Sebastian Poulter: *Legal Dualism in Lesotho*, at p.30, deals with possible grounds on which a choice can be made between customary and common law in the family sphere. One possibility is that “the choice can be made by reference to a specific event which can be interpreted as an adherence (express or implied) to one system or the other.” There is no logical reason why this approach, which commends itself, cannot be extended to other spheres if circumstances permit.

[11] In the present matter the defining consideration in my view in seeking to determine whether customary or common law should be invoked in relation to the devolution of the deceased’s estate is the way the first appellant and the deceased effectively manipulated their marriage to re-arrange their property rights. Their divorce in March 1991, and their

remarriage a month later, suggest, as a matter of probability, that their divorce was not a genuine one, but was one of convenience to enable them to arrange their proprietary rights, for whatever reason, in terms of an antenuptial contract.

[12] The antenuptial contract, duly executed by a notary public, provides *inter alia* (in paragraphs 3 to 5) as follows:

> "(3) That all inheritances, legacies, gifts or bequests which may devolve upon or be left, given or bequeathed to either of the said intended spouses shall be the sole and exclusive property of him or her upon whom the same shall devolve or to whom the same may be left, given or bequeathed;
>
> (4) That each of the said intended spouses shall be at full liberty to dispose of his or her property by will, codicil or other testamentary disposition without the hindrance or interference in any manner of the other of them:
>
> (5) That the marital power which the husband by law possesses over the estate of his wife is hereby expressly excluded."

[13] The provisions referred to have legal implications far removed from Sesotho law and custom and strongly indicate the adoption of a European way of life by the parties particularly in relation to their proprietary rights regime. In terms of the antenuptial contract the deceased would have been free to dispose of her property by will. As stated by Maqutu (supra) at 284,

"[i]t would seem that freedom of testation is for the Basotho who have abandoned the Sesotho way of life." Thus while neither a civil rites marriage nor the making of a will, or having reserved the right to make a will, *per se* amount to proof of an abandonment of a customary way of life, they may amount to proof of that fact if taken in conjunction with any other relevant consideration(s), such as that referred to in paragraph [11] above. (*Sebakeng Mokete and Others v Lerato Mokete (born Makhobalo) and Others*, C of A (CIV) 19/2007 at para [14].).

[14] In the light of the above it follows, in my view, that the first appellant and the deceased must be taken to have adopted a European way of life, and that the deceased's estate falls to be distributed under the common law relating to intestacy. That would make the first respondent and Thabang the heirs to the deceased's estate.

[15] There is, however, a twist in the tail. It appears from the first respondent's answering affidavit that she and Thabang always considered Thuso to be entitled to share the deceased's estate equally with them. They wish to continue to recognize him as an heir even though under the common law he was not. Their attitude is commendable, and I can see no

objection to accommodating their wish in that regard, which acknowledges the importance of family ties in Sesotho life, and making an appropriate order. Such an order would be based upon the peculiar facts of the present matter, and must not be taken to create a legal precedent.

[16] It follows that the appeal falls to be dismissed. The first respondent seeks the costs of appeal. The appellants uncompromisingly insisted throughout that the second appellant, as Thuso's heir, was entitled to the whole of the deceased's estate. They were not prepared to make any concession to the first respondent and Thabang. In that they have been held to be wrong. The fact that second appellant will succeed to a portion of the deceased's estate will come about, not because of any legal entitlement, but as the result of an act of familial generosity. In the result the first respondent is entitled to the costs of appeal.

[17] We reiterate our thanks to counsel for their mutual co-operation in ensuring that the appeal was heard this term, and for their very helpful arguments.

[18] The following order is made:

(1) The appeal is dismissed, with costs.

(2) It is declared that the first respondent (Lebohang Aldeia), Thabang Thacker and the late Thuso Rakhetla are to be regarded as the heirs to the estate of the late Mathabo A Rakhetla.

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J W SMALBERGER
JUSTICE OF APPEAL

I agree:

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J J GAUNTLETT
JUSTICE OF APPEAL

I agree:

_____

N MAJARA
JUSTICE OF APPEAL

For the Appellants : Adv L.A. Molati

For Respondents: Adv N.G. Thabane