

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.8/09

In the matter between:-

'MANKHASI MAHAO

APPELLANT

And

**LESOTHO ELECTRICITY CORPORATION
'MAREITUMETSE POSHOLI/ZULU
MASTER OF THE HIGH COURT
THE ATTORNEY GENERAL
LABOUR COMMISSIONER**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT**

CORAM : RAMODIBEDI, P
GAUNTLETT, JA
TEELE, AJA

HEARD : 13 OCTOBER 2009
DELIVERED : 23 OCTOBER 2009

SUMMARY

Law of contract - Stipulatio alteri, viz. a contract for the benefit of a third party - The benefits accruing therefrom not forming part of the deceased's estate - Whether an order of costs de bonis propriis justified - The audi alteram partem rule applied.

JUDGMENT

RAMODIBEDI, P

[1] The central point of dispute in this appeal typically highlights the conflict between the law of inheritance on the one hand and the principle of *stipulatio alteri*, viz. a contract for the benefit of a third party on the other hand. As will be demonstrated shortly, the point is brief and will not, as I see it, bear any elaboration. It shall suffice to mention at the outset that the appellant relies on inheritance while the second respondent relies on the principle of *stipulatio alteri*.

[2] The parties are on common ground that in his lifetime Moima Baptista Posholi ("the deceased") was employed at the first respondent corporation. It was there that he nominated the second respondent, 'Mareitumetse Posholi/Zulu, as his beneficiary to the first respondent's Provident Fund in terms of a form styled Beneficiary

Nomination Form, annexure LEC "I", dated 18 August 2004.

[3] The deceased died a bachelor on 28 June 2007. More than a whole year after the deceased's death, namely, on 16 October 2008, the appellant brought an urgent application, ex parte, claiming the following relief against the respondents:-

- (1) Restraining and interdicting the first respondent from paying to the second respondent monies out of the deceased's estate.
- (2) Directing and ordering the first respondent to pay all the monies due and payable to the appellant in her capacity as the heiress to the deceased's estate.
- (3) Interdicting the second respondent from holding herself out as the deceased's wife and heiress.
- (4) Costs in the event of opposition.

[4] Although the appellant's prayers were evidently based on the undisputed fact that she was the heiress to the deceased's estate, the real bone of contention between

the parties in the court a quo turned on certain monies which accrued to the second respondent as the deceased's beneficiary to the first respondent's Provident Fund in terms of annexure LEC "1". It was on that basis that the case was decided in the court below, with the court (Majara J) upholding the principle of *stipulatio alteri* in favour of the second respondent. Similarly, the grounds of appeal in this matter, insofar as the merits are concerned, are only directed at challenging the applicability of this principle to this case. As will become apparent shortly, this appeal also challenges the learned Judge a quo's order of costs *de bonis propriis* which she made against the appellant's counsel.

- [5] It is important to note that in several of its decisions this Court has upheld the *stipulatio alteri* principle. The true essence of this principle is that it is a contract for the benefit of a third party. The rights of the beneficiary or *stipulans* flow directly from the contract itself. This principle is now so firmly established in this

jurisdiction that nothing further needs to be said about it. As soon as the third party accepts the stipulation made in his favour in the contract he is entitled to enforce it. In such a case the question of the deceased's estate or inheritance is irrelevant. See, for example, **Ramahata v Ramahata 1985 - 1989 LAC 184 at 186;** **'Mota v Motokoa 2000 - 2004 LAC 418.**

[6] Viewed in the light of the above considerations, it follows that the second respondent was entitled to payment of the disputed monies as the deceased's beneficiary to the first respondent's Provident Fund. Such monies had nothing to do with the deceased's estate as such. The question of inheritance as I have said, and as I repeat now for emphasis, is irrelevant.

[7] Accordingly the appeal on this aspect of the case is without merit. It falls to be dismissed. This leads me to the question of costs.

[8] The first respondent has specifically asked for costs on attorney and client scale. Although unfairly imputed to the appellant's counsel, regard being had to what follows in paragraph [10] hereunder, the court a quo was of the view that there was abuse of the court's process in the matter. Indeed, it is apparent from the record of proceedings that the appellant persisted with the application in spite of the fact that it had been overtaken by events to her own knowledge. This is a relevant factor, in my view, in considering whether or not costs should be on attorney and client scale.

[9] Furthermore, the following facts are either common cause or are not seriously disputed, namely:-

- (1) That there was no basis for approaching the court a quo and seeking orders on an urgent basis. See, for example, **Mahlakeng And Others v Southern Sky (PTY) Ltd And Others 2000 - 2004 LAC 742** at 749 - 752;
- (2) That the orders in question were sought without notice.

See, for example, **Commander, Lesotho Defence Force And Another v Matela 1995 - 1999 LAC 799** at 804 - 805.

- (3) That there was material non-disclosure in that the appellant filed a supporting affidavit to the effect that the second respondent was still legally married to one Tseliso Charles Zulu. As it turned out, however, the couple had at that stage already been divorced to the appellant's own knowledge.

In the light of the foregoing considerations I am satisfied that an order of costs on attorney and client scale was fully justified.

[10] I deal now with the complaint that the appellant's counsel was ordered to pay costs *de bonis propriis* without having been afforded an opportunity of being heard. In her judgment the learned Judge a quo said the following:-

"Both counsel for respondents prayed that the Court should make a punitive order of costs against the other side and that

applicant's counsel should be ordered to pay costs de bonis propriis. They submitted that he abused the Court's process in that he persisted with the application in spite of the fact that he was aware that it had since been overtaken by events."

The record does not reveal, however, that the appellant's counsel was given an opportunity of being heard on the issue. It would appear that the learned Judge a quo simply proceeded to make an order of costs *de bonis propriis* based on the submissions made by the respondents' counsel. In fairness to him, Adv. Rasekoai for the second respondent very properly conceded that the court a quo committed a procedural flaw in failing to afford the appellant's counsel an opportunity of being heard.

[11] It cannot be emphasised strongly enough that an order of costs *de bonis propriis* is a very drastic remedy. It accords with the fundamental principle of fairness, in my view, that such an order should not be resorted to without affording the person concerned an opportunity of being heard on the issue. This is in line with the

principle of natural justice, more particularly the *audi alteram partem* rule. See, for example, **Sekonyela And Others v Sekonyela 2000 - 2004 LAC 271** at 272 - 273; **Matebesi v Director of Immigration And Others 1995 - 1999 LAC 616** at 622. Apart from anything else, and as was correctly said in the Instruction of Ptahhop, from the 6th Dynasty (2300 - 2150 BC) quoted in Lawrence Baxter: Administrative Law at p539, "*a good hearing soothes the heart.*"

[12] It follows from these considerations that the court a quo's order of costs *de bonis propriis* against the appellant's counsel cannot stand.

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

- (1) The appeal is dismissed with costs.
- (2) The court a quo's order of costs *de bonis propriis* against the appellant's counsel is set aside and replaced with the following order:-

"The application is dismissed with costs on attorney and client scale."

M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

J.J. GAUNTLETT
JUSTICE OF APPEAL

I agree:

M.E. TEELE
ACTING JUSTICE OF APPEAL

For Appellant : Adv. C.J. Lephuthing
For First Respondent : Adv. S. Phafane KC
For Second Respondent : Adv. M.S. Rasekoai

