C of A (CIV) 30/2010

IN THE COURT OF APPEAL OF LESOTHO

In the matter between

MAMONAHENG RASEKOAI	**1st Appellant**
MONAHENG SEEISO RASEKOAI	**2nd Appellant**

and

NTHUNYA RASEKOAI	**1st Respondent**
COMMISSIONER OF LANDS	**2nd Respondent**
MINISTER OF LOCAL GOVRNMENT	**3rd Respondent**
ATTORNEY GENERAL	**4th Respondent**
MARTHA RASEKOAI	**5th Respondent**

CORAM: MELUNSKY, JA
SCOTT, JA
HOWIE, JA

HEARD: 12 APRIL 2011

DELIVERED: 20 APRIL 2011

Summary

Customary law – Laws of Lerotholi – Rival claims to be heir of the deceased by his late eldest son's widow, their son and the deceased's sole surviving son – Held that the heir is the late eldest son's son: s11 (1) – The latter still a minor – The widow (his mother) is his guardian and entitled to appointment as administrator of his inheritance pending his majority: s12 (1) – Written instructions left by the deceased regarding the distribution of his estate – Whether a will depended on abandonment by him of customary way of life – If not a will, such distribution subject to heir's half share of estate: s14 (1).

JUDGMENT

Howie, JA

[1] The late Philemon Molefi Jacob Resekoai (the deceased) died on 3 May 2006. He was 79. A document dated 1 March 2004 purporting to have been written and signed by him (the document) contains wording indicative of his intention to disinherit the first appellant. The document also purports to bear the signatures of two witnesses.

[2] The first appellant was the deceased's senior daughter-in-law. She is the widow of the deceased's eldest son, Cyril Mohlomi Rasekoai. The latter had died in 2002.

[3] The first appellant and her late husband had three children. The second appellant, a young man now in his twenties, is their eldest son.

[4] The deceased and his first wife had five sons. Only one survived him. He is the first respondent.

[5] The deceased's first wife predeceased him. He married again after her death. (The later marriage is of no relevance to this case.) Accordingly there was only one house at all material times.

[6] In October 2006 the first appellant applied in the High Court for an order declaring her to be the sole heiress of the deceased, an order restraining disposal of any of his sites and fields and an order ejecting the first respondent from the deceased's residence at Ha Ts'osane, Maseru. The first respondent opposed the application. (The other cited respondents were the Commissioner of Lands, the Minister of Local Government and the Attorney-General. They took no part in the litigation.)

[7] In due course the widow of the deceased's third son was joined as fifth respondent. She also opposed the application alleging that the deceased had allocated and transferred to her during his lifetime a site belonging to him at Ha Ts'osane. Her allegation was initially disputed.

In what follows, reference to "the respondents" will be to the first and firth respondents.

[8] The matter came before Mofolo AJ. Because there were factual disputes on the papers the learned Judge referred the case for the hearing of oral evidence. The date and provisions of the order in terms of which he did so do not appear in the record. The record does include a transcript of the oral evidence subsequently given. From the transcript it seems that the issue originally intended for determination was whether the signature of the apparent author of the document was that of the deceased. However, as the hearing progressed various other issues came to be canvassed. They did not comprise all the issues that needed to be decided, however. Indeed, the hearing appears to have been unfortunately unstructured. At the end of it evidence had been given by the first appellant on the one side. On the other side there was evidence of the respondents and of two persons who said they had signed the document as witnesses.

[9] It is appropriate to mention at this point two things of importance that happened during the course of the oral hearing. The first is that during the first appellant's evidence counsel representing her stated in unambiguous terms, which the judge repeated and counsel confirmed, that the first appellant's claim to the site which the deceased had

transferred to the fifth respondent during his lifetime was then and there withdrawn. Why the fifth respondent was later called to give evidence is therefore obscure, but be that as it may. Nothing indicates that the claim was revived. Therefore the position is that there remained no issue between her and the first appellant in so far as that site was concerned.

[10] The other matter of importance to which I referred was that the second appellant, who is an admitted advocate, was granted leave to join as second applicant. He deposed, separately, to an affidavit in support of his joinder. Accordingly, he proceeded to present and conduct the first appellant's case both at the oral hearing before the Judge and also in this Court. He also conducted his own case in both Courts.

[11] Having heard the oral evidence Mofolo AJ delivered judgment. He criticised the second appellant for his dual role in the matter. He said it was undesirable for a legal representative to be a witness in the case he was conducting as it impaired his independence. He recorded that he therefore refused the second appellant the opportunity to testify. Understandably, this aspect is not an issue on appeal. The second appellant did not testify and he was entitled to represent his mother and himself in both Courts.

[12] The Judge then referred to the disputed facts and said that their existence must have been foreseen before the litigation began. There

were therefore only two courses open to him, so he said. They were referral of the application to trial or its dismissal. He decided upon dismissal for a number of reasons among which were that the deceased's heir was not the first appellant but the second appellant. The former therefore had no *locus standi* and the latter was "the proper person to sue in respect of the ... estate". The appeal is against the dismissal of the application.

[13] The issues on appeal may be summarised as follows:

1. Was the deceased the author of the document?

2. If so, was the document a will, the answer necessarily depending on whether the deceased had, by 1 March 2004, abandoned tribal custom and adopted a European mode of life?

3. If the document has to be understood and applied in accordance with customary law, is the deceased's heir either of the appellants or is it the first respondent?

4. In so far as the document records the deceased's having distributed some of his property and his instructions as regards distribution of his other property after his and his (second) wife's death, was the

overall distribution in conflict with section 14 (1) of the Laws of Lerotholi?

5. Whoever the heir is by law, was there a valid family appointment as heir of either the first appellant or the first respondent?

[14] In her oral evidence the first appellant said she knew the deceased's signature and that the signature on the document was not his. However, when one of the witnesses to the document was giving evidence the second appellant declared to the Court that the signatures on the document were not in dispute and, in effect, that the authenticity of the document was accepted. That answers the first question.

[15] Turning to the second, it involves the deceased's mode of life. He married his first wife in a civil marriage at a Catholic Mission in 1954 by Christian rites. He was a schoolteacher for some years before joining the civil service. What caused his animosity towards the first appellant in the main was, according to what the deceased recorded in the document, that she openly defied him by wearing a mourner's "*thapo*" which had been formally abolished by the head of the Molefi Rasekoai family. This was on the occasion of her husband's death in February, 2002.

[16] Subsequently, on 16 January 2004, the deceased wrote to the first appellant and in the letter he urged her to respect the traditions and customs of his family. He wrote:

> "You must also remember that my family is (a) Christian, and I shall conduct it as such."

[17] Taken cumulatively the factors referred to thus far could be consistent with adoption by the deceased of a European mode of life.

[18] However, the documentary evidence in the record includes a number of items written by the deceased which clearly evince an adherence to a customary way of life. First of all, the document itself comprises a set of instructions under the heading "Information to the Family". The deceased did not call it a will. He speaks of rights to a deceased person's corpse. One would not regard that approach as European or Westernised. Also, the distribution of property during his lifetime tends towards a customary way of life because a Westernised person would, generally speaking, rather tend to dispose by will.

[19] In what amounts to a memorandum which he wrote on 8 February 2002 shortly after his eldest son's death (in which he criticised the first appellant for wearing the "*thapo*"), the deceased said she had forfeited her "rights and privileges" to his possessions and should not claim any

of his property "under the pretext that she is the eldest daughter". He went on to say that after his death his property would be "in the hands" of the respondents who were aware that when the first appellant married "he should be given his property". He went on to say that his second wife (whom he was due to marry) had to be respected, as was his first wife, and that the former would automatically assume all the deceased wife's rights and privileges. He concluded:

> "Nthunya and Martha understand this very well. She will be their mother."

The deceased signed and dated this memorandum and indicated that copies were to go to the Chief of Ha Ts'osane, the Chief of Sebelekoane, the respondents and, his attorneys.

[20] The references, terminology and concepts contained or referred to in the memorandum are essentially customary in nature and foreign to Western or common law concepts.

[21] Finally, and most significantly, the last person to give oral evidence, Lebeko Notsi, a witness to the document, said that the deceased, who had been his Sesotho teacher at school, summoned him one day to talk about the disposal of his property. The deceased said he was (to quote the witness)

> "dealing with issues basing himself on the Sesotho custom and in accordance with the Laws of Lerotholi ..... 'basing myself with this Law I'm giving Nthunya Gregory Rasekoai because he's the only son that I have.'"

[22] The case for the respondents has always been that the document is a valid will. However, the anterior question is whether the deceased was, in terms of the Law of Inheritance Act of 1873 "competent to make a will." That, in turn, depends on whether the deceased had abandoned a customary way of life and adopted a European mode of living: Mokatsanyane and Another v Thekiso and Others 2005 – 2006 LAC 117 at 124 H – I. And the respondents bore the onus to prove such abandonment: Mokatsanyane, at 121 G-I.

[23] Having regard to the evidence to which I have referred it is no more conducive to discharge of the onus than the evidence in Thoka v Hoohlo 1978 LLR, 325 (to which we were referred) in which abandonment was held not to have been proved. One must then conclude that the onus here was not discharged. The case must therefore be decided on the basis that customary law applies and that the document was not a will but a record of past distributions and a set of instructions for the purpose, inter alia, of future distributions. That disposes of the second question.

[24] Coming now to the question as to who is the deceased's heir according to customary law, neither the second appellant nor Mr. Manyeli, for the respondents, could refer us to any direct authority. As far as case law is concerned, the second appellant relied essentially on Thatho v Ntsane and Others, High Court case CIV/T/357/97 in which judgment was delivered on 12 September 2000.

[25] That case involved litigation between the widow of an only son and that son's sister. There was no question of the latter being a customary heir. The widow was found to be the customary heir because the only relevant males (her husband and her own only son) were deceased. Moreover the estate in dispute was that of the deceased son, not, as here, the estate of the widow's father-in-law. The case is therefore of no assistance in regard to identification, in the present matter, of the customary heir. Thato does, however, contain a relevant statement concerning family appointments as heir, to which I shall revert.

[26] The Laws of Lerotholi I (1959 edition) state in section 11 (1) that the heir is the first male child of the first married wife. It then goes on to provide for the situation where there is another wife i.e. a second house, but in this case there was only one house. The deceased's heir apparent while his eldest son was alive was therefore the latter. The question,

then, is what effect the eldest son's having predeceased the deceased has had on the line of succession.

[27] Section 11 (1) of the Laws of Lerotholi make it clear that male primogeniture is fundamental. This already loads the scales in favour of the second appellant's being the deceased's heir. The second appellant is not the deceased's eldest son but as the senior grandson he is in the male primogeniture line and that, as indicated, serves to give him precedence.

[28] In Contemporary Family Law (The Lesotho Position), 2nd edition, Maqutu states at 288 that a widow's offspring take on the rights and status of their father (her husband) even when the latter has long since died. Quite clearly the second appellant is his deceased father's heir. That being so, the first appellant is not. And if she is not her husband's heir still less can she be the heir of her father-in-law. So really the contest narrows down to the rival claims of the second appellant and the first respondent.

[29] The crucial question is whether the right to the deceased's estate that would have devolved on the second appellant's late father has passed to him and not to the first respondent.

[30] The predominance of primogeniture would suggest an affirmative answer as a matter of principle, attracting the conclusion that the line of succession from the deceased downwards did not stop when his eldest son died.

[31] The enquiry, however, should rather be more specific, namely, whether primogeniture has the consequence that the right of inheritance to the deceased's estate must be regarded in law first to have passed to the estate of the late Cyril Mohlomi Rasekoai. If it must be so regarded then the second appellant's entitlement to be the deceased's heir is clear for, as already indicated, what was in law his father's entitlement must pass to him.

[32] In this regard, Poulter, Family Law and Litigation in Basoto Society, makes the following statement (at 231) which advances the case for the second appellant:

> "(I)t should be pointed out that if an heir is born and attains majority through marriage but predeceases his father, the inheritance passes to the heir's own heir...."

In support of that statement the learned author refers to a case of Tsita v Rantote J.C. 98/1959 the report of which is, unfortunately, not available in the High Court Library.

[33] Poulter's statement would seem to me to reflect a logical application of the primogeniture principle and confirmation than the line of succession is a vertical one.

[34] There are clear indications that the deceased recognised that this was indeed the position in the customary law of succession. In his memorandum of 8 February 2002 to which I have referred he said that the respondents "should look after the children of Mohlomi." He went on –

> "When Monaheng gets married he should be given his property and it is known by [the respondents]."

[35] That was an acknowledgment that the second appellant was due to be a beneficiary in the deceased's estate. There is no evidence that he was due for an allocation so the contemplated benefits must have been due in terms of customary law. By necessary implication that would have been an entitlement as heir. It is also significant that no other grandchildren were referred to in any of the deceased's writings. Nor, when he wrote the document in 2004 did he purport to override what he had said in the memorandum.

[36] With regard to Lebeko Notsi's evidence that the deceased had said

that he wanted to benefit the first respondent, this does not weaken the second appellant's case. The deceased was at liberty to grant benefits to others subject to the rights of the heir.

[37] I conclude, therefore, that the second appellant is the deceased's customary law heir.

[38] The next issue to be considered concerns the distributions and instructions referred to in the document. These can occasion no difficulty in so far as what customary law involves. There may well have to be a redistribution but that is not something we have to deal with. The law is as stated in section 14 (1) of the Laws of Lerotholi: the deceased's wishes must be carried out provided the second appellant receives half the estate.

[39] There is then the matter of the family decisions, respectively relied upon by the parties which were made after the after deceased's death. In the one recorded in an annexure to the first appellant's founding affidavit the signatories said:-

> "We as the family of Rasekoai we introduce [her] as the person responsible within the family of [the deceased]. [she] is the eldest married person in the family of [the deceased]. She is the wife of the late Mohlomi Cyril Rasekoai who was the eldest son of [the deceased]."

The decision relied on by the respondents is referred to in a letter dated 2 September 2006 and records the following:-

> "(T)he family met to appoint an heir. The family reached a decision that [the first respondent] should be the heir... With this letter the family announces that [he] should be the heir in all his father's properties. And it is by him that any changes could be made in respect of all the properties of his father..."

[40] The first of these recordals did not purport to appoint the first appellant as heir. Indeed the language used is in keeping with her being put forward as a non-beneficiary, as indeed would befit her filling a role as guardian or administrator pending the second appellant's majority. Whether the decision to draw up this recordal was reached by "the family" is in dispute. However as it does not clash with his status as heir it does not affect the outcome of the case.

[41] The decision allegedly reached to appoint the first respondent specifically as heir stands on a different footing. That is because, on the face of it, it appears to affect the second appellant's status as customary heir. I say "appears" because the legal reality is that he is heir "by right of birth" and the appointment relied on by the first respondent cannot weaken the second appellant's position (save, that is, for the provisions of section 14 (1) of the Laws of Lerotholi referred to above). In this

regard I refer to what was said in Thatho's case (supra) in the unreported judgment at pp9 – 10.

> "The meeting of the family to appoint an heir or an administrator in place of the heir does not create the heir. Even where the families have met and appointed an heir if such appointment ignores the provisions of section [presumably 11(1)] Laws of Lerotholi Par I such appointment is illegal. Ndlebe v Ndlebe CIV/T/256/78 (unreported). The heir is there by right of birth."

[42] It follows that, accepting the appointment relied on by the first respondent as truly having been made by the family, and leaving aside how it may conflict with the distributions and instructions referred to by the deceased in the document (an issue we are not called on to decide) the legal position is that, applying section 14 (1) of the Laws of Lerotholi, the second appellant is entitled to inherit one half of the deceased's estate and other beneficiaries the other half: Poulter, in the cited work, at p320.

[43] Even although the first appellant set out to obtain a declaration as heiress and the second appellant sought no relief, it is clear that they have established the first appellant's entitlement to some declaration and interdictory relief pending decisions to be taken by the respondents, with or without the involvement of other appropriate persons. Obviously the longer it takes to reach such decisions the longer the interdictory relief will have to apply. Included in the relief to which the first appellant is

entitled is a declarator that she is guardian of the second appellant and entitled in terms of section 12 (1) of the Laws of Lerotholi to appointment as administrator of his half of the deceased's estate pending his majority. Some of the relief to be granted was either stated in the notice of motion or constitutes a series of relevant and necessary corollaries which can justifiably be accommodated under the prayer for alternative relief without any prejudice to the respondents.

[44] As to costs, the fifth respondent appears to have joined to protect her interest in the site transferred to her by the deceased. The claim against her in that regard was withdrawn during the oral hearing. No ground has been advanced as to why she should pay any of the appellants' costs on appeal or in the court below. Naturally no costs should be paid by the second to fourth respondents who, as I have said, took no part in the litigation. In so far as costs in the case of the first respondent are concerned, the lack of direct authority and the provisions of the document lead me to think that the contestants in this litigation were entitled to come to court to support their respective contentions and that there should be no order as to costs in either court.

[45] The deceased's assets and liabilities will have to be divided for the purposes of identifying and allocating the second appellant's half of the estate. This will be a matter chiefly for the first appellant in her

capacities referred to and, having regard to the deceased's instructions to them, the first and fifth respondents.

[46] The court's order is as follows:-

1. The appeal is allowed and the order of the court below dated 30 September 2010 is set aside.

2. Substituted for the order of the court below is the following-

"1. It is declared that first applicant is the guardian of the second applicant pending his majority.

2. It is declared that the second applicant, being the heir in customary law of the late Philemon Molefi Jacob Rasekoai (the deceased), the first applicant is entitled to be appointed administrator of that half of the estate of the deceased which is his inheritance, pending his majority.

3. Pending division of the deceased's estate so as to indentify and allocate the second applicant's half of the estate

a) The first and fifth respondents are interdicted from in any way disposing of, or alienating the rights in, any property, movable or immovable, in the deceased's estate.

b) The second respondent is interdicted from issuing any lease in respect of the deceased's sites and fields wherever situated.

c) The third respondent is interdicted from issuing any consent in terms of the Land Act, 17 of 1979, for the purposes of any transfer or mortgage, or any other form of disposal or encumbrance, of the said sites and fields.

4. It is declared that the first applicant is entitled, upon allocation of the second applicant's half of the deceased's estate and pending his majority, to be placed in possession of the relevant assets, together with such documents as record entitlement to such assets.

5. No order is made as to the costs of the application."

3. No order is made as to costs of the appeal.

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C.T. HOWIE

JUSTICE OF APPEAL

I agree:

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L.S. MELUNSKY

JUSTICE OF APPEAL

I agree:

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D.G.SCOTT

JUSTICE OF APPEAL

For the appellant : Adv. M.S. Rasekoai

For the respondents : Adv. N. Manyeli