IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) N0.5/13

In the matter between

'MANTHABISENG LEPULE **APPELLANT**

And

TEBOHO LEPULE **RESPONDENT**

CORAM: RAMODIBEDI P
SCOTT JA
THRING JA

HEARD: 9 APRIL 2013

DELIVERED: 19 APRIL 2013

SUMMARY

Succession – A widow's right to succeed to her deceased husband's landed property – Section 5 of the Land (Amendment) Act 1992 amending s 8 of the Land Act 1979 – The widow given the same rights in relation to the land as her deceased husband – The court a quo upholding the present respondent's claim that he should be declared the heir to the deceased's estate – Non-joinder of an interested party – Appeal by the widow upheld with costs.

JUDGMENT

RAMODIBEDI P

[1] The present respondent, as applicant, launched notice of motion proceedings against the present appellant. He joined the Master of the High Court and the Attorney General. Principally, he sought an order in the following terms:-

(1) That the appellant be interdicted and restrained from disposing of the property constituting the estate of deceased Thomas Lepule ("the deceased") and 'Mateboho Lepule pending the finalisation of the application in question. In annexure "A" attached to his founding

affidavit he listed the property forming the subject matter of the dispute as follows:-

(a) A developed residential plot at Lower Moyeni, Quthing.
(b) Mountain Side Hotel.
(c) Mountain Side Off-Sales.
(d) Aiskop Off-Sales.

(2) That he should be declared the heir to the estate of the deceased and 'Mateboho Lepule.

(3) That the appellant be interdicted and restrained from interfering with his administration of the estate of the deceased and 'Mateboho Lepule.

[2] On 26 April 2012, the respondent filed an amended notice of motion. He repeated the same prayers as reflected in paragraph [1] above, the only difference being that he omitted annexure "A" or any reference to it.

[3] After hearing submissions in the matter the High Court (Mahase J) granted the application as prayed. Hence this appeal.

[4] The appellant relies on the following grounds of appeal:-

"-1-

The Court a quo erred and misdirected itself in not holding that there was a material dispute of fact whether the property listed in annexure "A" formed part of the estate acquired or accumulated or developed during the lifetime of Respondent's mother. The Court a quo ought to have proceeded on the assumption of the correctness of appellant's version.

-2-

The Court a quo erred and misdirected itself in not upholding Appellant's contention that consequent to the death of the husband (Respondent's father) all the fixed property forming part of the joint estate passed to her through the operation of the law. The court a quo ought to have held (as it was submitted at the hearing) that the provisions of section 35 (3) (b) of the Land Act, 1979 (as amended by section 8 (2) (a) of the Land (amendment) Order 1992) applied to the circumstances of the Appellant.

-3-

The Court a quo erred and misdirected itself in holding, as it did, that the marriage between Appellant and her late husband was a polygamous one, such that Appellant's house constituted

a distinct and separate house from Mateboho's house (i.e. Respondent's mother's house). The Court a quo ought to have found that there had always been one house, inasmuch as it was common cause that Appellant got married to her late husband after the death of Respondent's mother. Consequently, the maxim 'malapa ha a jane' (houses do not eat one another) did not apply.

-4-

The Court a quo erred and misdirected itself in not holding that the property listed in annexure "A" formed part of the joint estate between Appellant and her late husband inasmuch as the said parties were married by civil contract and in community of property.

-5-

The Court a quo erred in its summation and application of the law to the facts in holding that the Respondent had made out a case for the relief sought."

[5] For his part the respondent filed a cross-appeal. His main ground of appeal is that the Judge a quo erred and that she did not apply her mind to "the pleadings and/or the totality of facts, more particularly, but without limitation, the fact that all the deceased's property was all unallocated or at least allocated to one house of which respondent is the heir."

[6] The appellant has since filed additional grounds of appeal in the following terms:-

(1) That the court a quo erred in not holding that the appellant's eldest son had a direct and substantial interest in the matter. Accordingly, she contends that the application ought to have been dismissed on the ground of non-joinder.

(2) That the court a quo erred in not holding that the respondent brought his claim to court prematurely without having first exhausted local remedies by referring the dispute to the family for arbitration.

(3 That the court a quo further erred in not holding that s 35 (3) (b) of the Land Act 1979 as amended by s 8 (2) (a) of the Land (Amendment) Order 1992 protected the appellant's land rights as the deceased's widow.

[7] The essential facts, which are common cause between the parties, are the following. On an unspecified date in the record of proceedings, the late Thomas Lepule ("the deceased") was married to one 'Mateboho Lepule ("'Mateboho"). Although not expressly

mentioned anywhere in the record, it seems to have been accepted by both parties that this was a customary marriage. The respondent was the first male issue born of the marriage. 'Mateboho subsequently passed away in 1987.

[8] On 9 December 1987, and after 'Mateboho's death, the deceased married the appellant, who is 'Mateboho's younger sister, by civil rites. The marriage was in community of property, as the marriage certificate shows. I conclude at once, therefore, that the respondent lied in paragraph 8 of his founding affidavit to the effect that the marriage was "out of community of property."

[9] The parties are on common ground that during his lifetime, the deceased accumulated a vast estate, comprising several residential as well as commercial sites. These included a hotel and two bottle stores.

[10] Upon the deceased's death, and on 6 February 2006, the family council, comprising the respondent himself and others, duly nominated the appellant as the heir to the deceased's residential and commercial sites. These were described in annexure "M.L. 2(a)" of the answering affidavit of the appellant as follows:-

"Borokhong Porotong	*17684-162*
Mamabalo	*17684-160*
Ellerines I	*17684-146*
Cheapest	*17684-186*
Lower Moyeni Residence	*17684-150*
Mountain Side Hotel	*17684-*
Aiskop Bottle Store	*Unnumbered site*
Motse-mocha Residence	*Site N0.046*
Ellerines II	*Deed of Sale*
T Lepule Bottle Store (Lower Moyeni)	*Deed of Sale*
Leburu	*Deed of Sale."*

[11] Crucially, the respondent appended his signature to the resolution of the family council in question. Thereafter, and as is the custom, the resolution was presented to the headman, who duly endorsed it by affixing to it his date stamp as well as his signature. I shall return to this aspect of the case later in this judgment. I should stress at this stage, however, that the respondent withheld this material fact in his founding affidavit. He is thus guilty of material non disclosure in my view.

[12] It is instructive to observe that in paragraph 9 of his founding affidavit the present respondent made the following averment:-

> *"During their lifetime, my deceased parents accumulated property as appears in annexure "A" to the Notice of Motion herein."*

[13] As alluded to in paragraph [1] above, the property listed in annexure "A" in turn was (1) a developed residential plot at Lower Moyeni, Quthing (2) Mountain Side Hotel (3) Mountain Side Off-Sales and (4) Aiskop Off-Sales. It does not require magic to realise immediately that two of those properties, namely, the Lower Moyeni residential site (item 1) and the Mountain Side Hotel (item 2) were included in the property which the respondent agreed that it should be inherited by the appellant in terms of annexure "M.L. 2 (a)." It seems to me that it is highly unlikely that the respondent would have agreed to do so unless these items of property were developed by the deceased and the appellant as she claims they were.

[14] Indeed, the appellant's case, as foreshadowed in paragraph 5.2. of her answering affidavit, is that <u>all</u> the property listed in respondent's annexure "A", with the exception of the Aiskop Off-Sales, was jointly developed by herself and the deceased. She frankly admits that the Aiskop Off-Sales was already there when

she married the deceased. She avers, however, that she has single-handedly "continuously improved" it herself. In these circumstances it is trite that the appellant's version, as the respondent in the court below, should have been accepted as correct on the authority of **Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)**. But the appellant's case does not end there.

[15] The respondent's amended notice of motion in which he effectively seeks to be declared the heir to all of the deceased's property is strange, apart from his own support of the appellant as the heir in terms of annexure "M.L.2 (a)." This is so because in paragraph 6 of his replying affidavit he says the following:-

> *"I reiterate that I was still a minor when my father died as under custom, I became a major only upon my marriage. I also reiterate that I am heir to the estate of my deceased parents. Deponent cannot inherit both the property she accumulated with my father and that belonging to my parents. I have been genuine and fair enough in this matter and excluded the former property. For instance, I have excluded Ellerines I, Ellerine II, a building rented to Cheapest Supermarket, Leburu, 'Mamakalo, Borokhong Porotong, 'Mamuso Mpobole, Motse Mocha site No. 046, a Nissan truck, a Nissan van, a Toyota van, Toyota twin*

cab, a tractor. These I understand to be property due for inheritance to deponent's eldest son. With all respect deponent is just being greedy. The above immovable property appears in annexure M.L.2 translated M.L.2 (a). If I intended to deprive her of her property as she suggests, there is no reason I would have excluded the above property."

The truth of the matter, however, is that the respondent was admittedly an adult aged 31 years when his father died and when he executed annexure "M.L.2. a." Importantly, the respondent's replying affidavit is at variance with his prayer in the amended notice of motion seeking to be declared the heir to all of the deceased's estate. Interestingly, on the respondent's own account the appellant's son has a direct interest in the estate, which begs the question, why was he not joined? I shall return to this point briefly later in this judgment.

[16] As indicated above, the appellant's case goes further. In paragraph 5.2 of her answering affidavit she makes the point that she succeeded to <u>all</u> of the deceased's property by operation of the law. Apart from the fact that her marriage to the deceased was irrefutably in community of property, she relies on s 5 of the Land (Amendment) Act 1992 which amended section 8 of the Land Act 1979. The amended section reads as follows:-

"(2) Notwithstanding subsection (1), where an allottee of land dies, the interest of that allottee passes to,

(a) where there is a widow – the widow is given the same rights in relation to the land as her deceased husband but in the case of re-marriage the land shall not form part of any community property and, where a widow re-marries, on the widow's death, title shall pass to the person referred to in paragraph (c)."

The "person" referred to in paragraph (c) in turn is defined as "a person nominated as the heir of the deceased allottee by the surviving members of the deceased allottee['s] family."

(The Land Act 1979, as amended, was subsequently repealed by

s 93 of the Land Act 2010 but was in force at all times relevant to the present proceedings)

[17] As this Court held in **Mokoena v Mokoena and Others 2007 – 2008 LAC 203** at 212 para [14], this section has further strengthened the position of widows in this country. See also

Makhutla and Another v Makhutla and Another 2000 – 2004 LAC 480 at paragraphs [25] and [26]. Historically, under customary law widows had been regarded as minors who could not hold landed rights. This was the mischief which the Legislature intended to remove, and did remove, by enacting the amended s 8 (2) (a) of the Land Act 1979 in terms of s 5 of the Land (Amendment) Act 1992. In terms of this new regime, widows are now given the same rights in relation to the land as their deceased husbands. Nothing can be much clearer from the language of the section. I conclude, therefore, that the appellant's right as the heir to the deceased's estate, coupled with the respondent's own consent as reflected in annexure "M.L.2 (a)," is unassailable on this ground alone. Similarly, bearing in mind that the disputed estate comprised landed property only, I hold the view that s 8 decides the matter in favour of the appellant.

[18] **Adv Thulo** for the respondent made heavy weather of the fact that the matter was not reported to the Master. He submitted accordingly that the matter falls to be decided according to customary law in terms of which the respondent is the principal heir to the deceased's estate. I consider, however, that this argument is hit by the provisions of s 8. The fact that the respondent is the customary heir does not detract from the stark reality that the appellant is given the same rights in relation to the landed property as her deceased husband. Whether one applies

customary law or the received law, the result is the same in a matter such as this. It cannot be otherwise.

[19] I pause here to return to a consideration of the appellant's point on non-joinder. It will be remembered from paragraph [15] above that the respondent conceded that the appellant's eldest son stands to inherit the specified property belonging to her. According to the respondent's own version in paragraph 6 of his replying affidavit the items of property involved are, Ellerines 1, Ellerines II, a building rented to Cheapest Supermarket, Leburu, 'Mamakalo, Borokhong Porotong, 'Mamuso Mpobole, Motse Mocha site N0. 046, a Nissan truck, a Nissan van, a Toyota van, Toyota Twin cab, and a tractor. Crucially, the respondent averred as follows:-

> *"These I understand to be property due for inheritance to deponent's [appellant's] eldest son."*

[20] There cannot be the slightest doubt in my mind in the foregoing circumstances, therefore, that the appellant's eldest son is an interested party in the matter. He has a direct and substantial interest in the disputed property. In my view, he ought to have been joined. I should stress that this Court has repeatedly deprecated non-joinder of interested parties. Thus, for example, in **Matime and Others v Moruthoane and Another 1985 – 1989**

LAC 198 and 200 the Court expressed the point in the following terms:-

> *"This [non-joinder] is a matter that no Court, even at the latest stage in proceedings, can overlook, because the Court of Appeal cannot allow orders to stand against persons who may be interested, but who have had no opportunity to present their case."*

See also **Masopha v Mota 1985 – 1989 LAC 58**. **Basutoland Congress Party and Others v Director of Elections and Others 1995 – 1999 LAC 587**at 599; **Theko and Others v Morojele and Others 2000 – 2004 LAC 302** at 313 – 314. **Lesotho District of the United Church v Rev. Moyeye and Others 2007 – 2008 LAC 103**; **Nalane (born Molapo) and Others v Molapo and Others 2007 – 2008 LAC 457** at para [17].

[21] I should be prepared in light of these considerations to dismiss the respondent's application for non-joinder.

[22] Finally, I deal next with the respondent's cross-appeal. It will be remembered from paragraph [5] above that he complains principally that the judge a quo erred and that she did not apply

her mind to the fact that all the deceased's property was unallocated or that it was at least allocated to one house, being the house in which the respondent is the heir. There are no factual averments to support this contention. It seems to me that the respondent's argument is based on a misconception that the deceased was a polygamist with two separate houses. That is clearly not the case. It is common cause that the deceased married the appellant after 'Mateboho's death. He always maintained only one house. Accordingly, the question of "allocation" of property did not arise. As indicated earlier, the appellant is given the same rights to the landed property as her deceased husband. Furthermore, she is in my view further entitled to the disputed property simply by virtue of her marriage in community of property in the circumstances of this case.

It follows from these considerations that the respondent's cross-appeal must fail.

[23] There is one further point to consider. To the extent that the respondent applied for a final interdict, the law is well-settled that in order to succeed he had to establish a clear right. See the celebrated case of **Setlogelo v Setlogelo 1914 AD 221** which has been consistently followed in this jurisdiction. In paragraph 6 of his replying affidavit the respondent made the following averment:-

"My rights to that estate were held in expectation or as a spes upon my birth as the eldest son and customary heir."

That statement formed the high-water mark of **Adv Thulo's** submission on the respondent's behalf, a submission which was upheld by the court a quo. I hold the view that this submission is untenable in the circumstances of this case. As this Court held in **Mokhutle N0 v MJM (Pty) Ltd and Others 2000 – 2004 LAC** 186, the alleged "expectation" or "spes" is not sufficient to confer a clear right on the respondent. This is so because at customary law the property vests in an heir on the death of the deceased. Until then he has no rights of ownership and control of the estate. The same situation obtains under the Administration of Estates Proclamation No. 19 of 1935. In the latter regime, as the Mokhutle case shows, the heir merely has a right to claim the property from the executor when the latter is appointed and after he has discharged his functions under the Proclamation. See also **Executor of the Estate Khakale v Khakale and Others 2007 – 2008 LAC 193**. In fairness to him, **Adv Thulo** was forced to concede, and properly so in my view, that the respondent could not have claimed ownership of the property during the deceased's lifetime. The same situation obtains in favour of the appellant by operation of s 8 of the Land Act 1979 as amended. She enjoys the same rights in relation to the landed property as her deceased husband. I conclude, therefore,

that the respondent's application should also have been dismissed on the ground that he failed to establish a clear right.

[24] In all the foregoing circumstances the following order is made:-

(1) The appellant's appeal is upheld with costs and the judgment of the court a quo is altered to read:-

"The application is dismissed with costs."

(2) The respondent's cross-appeal is dismissed with costs.

M.M. RAMODIBEDI

PRESIDENT OF THE COURT OF APPEAL

I agree _____

D.G. SCOTT

JUSTICE OF APPEAL

I agree _____

W.G.G. THRING

JUSTICE OF APPEAL

For Appellant **:** Adv Z. Mda

For Respondent **:** Adv P.R. Thulo