IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.5/2013

In the matter between

TEBOHO LEPULE **APPLICANT**

and

'MANTHABISENG LEPULE **1ST RESPONDENT**

LEHLOHONOLO LEPULE **2ND RESPONDENT**

THOMAS LEPULE TRADING COMPANY (PTY) LTD **3RD RESPONDENT**

CORAM : LOUW, AJA
DR MUSONDA, AJA
CHINHENGO, AJA

HEARD : 14 APRIL 2016

DELIVERED : 29 APRIL 2016

SUMMARY

Intestate succession - deceased wife married in community in terms of the common law - no evidence that estate reported to the Master - Intestate Succession Proclamation, 2 of 1953 not applicable by virtue of proviso to paragraph 3(b) of Administration of Estates Proclamation, 20 of1935 - estate administered in accordance with customary law - rescission of judgment of Court of Appeal - requirements discussed.

JUDGMENT

LOUW, AJA

[1] This is an application under the common law for the rescission of the judgment and orders made on appeal by this court (per Ramodibedi, P and Scott and Thring, JJA) on April 2013.

[2] The litigation which culminated in the judgment on appeal commenced with an application brought by the first applicant in the High Court, seeking orders declaring

him to be the heir to certain properties held in the estate of the late Thomas Lepule (the deceased) who died on 6 February 2006 and interdicts restraining the first respondent from interfering with the administration of the estate.

[3] The deceased married 'Mateboho Lepule ('Mateboho) in 1974. The applicant, Teboho Lepule, was born in 1975 and is the first born male child of this marriage. 'Mateboho died during 1987. After her death, on 9 December 1987, the deceased married 'Mateboho's younger sister, 'Manthabiseng Lepule (the first respondent) by civil rights in community of property.

[4] The first respondent opposed the relief sought by the applicant on the basis that after the death of the deceased in 2006, the Lepule family council nominated the first respondent as the heir to the deceased's estate and introduced her to the Master as heir.

[5] The High Court found in favour of the applicant and declared the applicant to be the heir to the deceased's

estate in regard to the properties set out in Annexure "A" to the notice of motion, being:

1. A developed residential plot at Lower Moyeni Quthing;
2. Mountain Side Hotel;
3. Mountain Side Off-Sales; and
4. Aiskop Off-Sales

The first respondent was interdicted and restrained from interfering with the administration of the estate assets.

[6] This Court upheld the first respondent's appeal and set aside the orders made in the High Court. This Court held that the first respondent's right as the heir to the properties in the deceased estate, which included the properties that were acquired during the time that the deceased was married to Mateboho, the applicant's mother, was unassailable for three reasons:

1. In terms of the provisions of section 8(2) of the Land Act (as amended by section 5 of the Land

Amendment Act, 1992) as it provided at the time of the death of the deceased in 2006, widows were given the same rights in relation to land as their deceased husbands;

2. The applicant, who was an adult of 31 years of age at the time, took part in and consented in writing to the family council's resolution that the first respondent be nominated as the heir to the estate of the deceased. The nomination was reduced to writing and although the applicant disputed this, this Court considered the evidence and held that the applicant was both a party to the resolution and that he appended his signature to the document. The document was thereafter duly endorsed by the headman with his date stamp and signature;

3. and the first respondent is entitled to the disputed properties by virtue of her marriage in community of property to the deceased.

[7] In upholding the appeal, this court proceeded (wrongly, as it later turned out) on the assumption that the marriage between the deceased and 'Mateboho was a customary union. In the course of the judgement, Ramodobedi, JA commented that *'Although not expressly mentioned anywhere in the*

record, it seems to have been accepted by both parties that this was a customary union'.

[8] In this application, the applicant contends that the court should exercise powers under the common law to rescind the judgment and orders made in this Court on two bases. First, so it is contended, the judgment was obtained through fraudulent conduct by the first respondent. Secondly, documents, *inter alia* in the form of a marriage certificate that came to light after the judgment was delivered, demonstrate that this Court proceeded on the wrong assumption namely, that the marriage between the deceased and 'Mateboho was a customary union while, their marriage was in fact a civil union and in community of property.

[9] In **Schierhout v Union Government 1927 AD 94** the applicant sought the rescission of a judgment of the then Appellate Division of the Supreme Court of South Africa on the basis that relevant documents had come to light after the judgment and that a party had

committed fraud by falsely representing facts in evidence. At 98 the Court (per de Villiers, JA) stated:

> *"Now a final judgment of a court of law being res judicata is not lightly to be set aside. On the other hand it stands to reason that a judgment procured by fraud of one of the parties whether by forgery, per jury or in any other way such as fraudulently withholding material documents, cannot be allowed to stand. That was the Roman Law (C.7.58), and that is our Law (Voet 42.1.28) but baseless charges of fraud are not encouraged by the courts of law. Involving as they do the honour and liberty of the person charged they are in their nature of the greatest gravity and should not be lightly made, should not only be made expressly, but should be formulated with a precision and fullness which is demanded in a criminal case."*

[10] The contention regarding fraudulent conduct is based on the allegation that, both during the course of the proceedings in the High Court and again on appeal, the first respondent knowingly concealed the fact that some of the properties in contention (the Mountain Side Hotel, two of the Off Sales and a certain rental building) were the property of a separate legal entity, the company Thomas Lepule Trading (Pty) Ltd (the third respondent who was joined in the rescission application). The fraud was that the first respondent had the deceased's family council nominate her as the

heir to the properties which she well knew did not form part of the estate itself, but belonged to the third respondent company. The fraud was further perpetuated so it was contented, during the course of the proceedings in the High Court and in this Court on appeal, when the first respondent knowingly laid claim to properties which belonged to the third respondent company and not to the deceased estate.

[11] The evidence relied upon by the applicant does not establish that any of the properties in question belong to the third respondent company. The high water mark of the evidence was that an entity trading under the name and style of Thomas Lepule Trading had let certain business premises to retail shops in terms of written leases. There is no indication in these leases that the immovable properties on which the premises are situated, belonged to the third respondent company. The alleged fraudulent conduct relied upon is therefor not established.

[12] In regard to the discovery of relevant documents after the judgment was given, the court in **Schierhout** (per Gardiner, AJA) stated at 105 that:

> *"....a person who seeks to re-open a case on the ground of instrumentum noviter repertum, must if there is such a remedy, at least show that he could not by the exercise of due diligence have discovered the documents before the judgment was given against him."*

[13] The applicant found the marriage certificate after the judgement by this court which shows that the deceased and 'Mateboho entered into civil marriage in community of property during 1974. This court assumed their marriage to have been a customary union where there is no community of property. Mr Thulo on behalf of the applicant submitted that by reason of the marriage in community of property, their joint estate was divided when 'Mateboho died in 1987. Thereafter the deceased was the holder of no more than one half share in the properties in dispute that formed part of the joint estate when it was dissolved in 1987 by the death of Mateboho. Consequently, the argument goes, the first

respondent could not, under section 8(2) of the Land Act nor under the family council's nomination as heir, acquire more rights than what the deceased had, namely one half share to the properties in question. In the result, it was contended, when the community of property between the deceased and 'Mateboho came to an end with her death in 1987, 'Mateboho's half share remained with her estate and now falls to devolve upon the applicant as her sole descendant and heir.

[14] 'Mateboho was married in community of property to the deceased. She had not made a will prior to her death and she died intestate. The Intestate Succession Proclamation, 2 of 1953 governs the position of every person (subject to an exclusion mentioned hereunder) who died after the commencement of the proclamation. Paragraph 1 (1) (a) deals with the case where the spouses were married in community of property and the deceased leaves any descendant who is entitled to succeed *ab intestato*, and provides that the surviving spouse inherits:

> *'to the extent of a child's share or to so much as, together with the surviving spouses share in the joint estate, does*

not exceed one thousand two hundred rands in value (whichever is the greater).'

[15] Paragraph 3 of the proclamation provides, however, that the provisions of the proclamation shall not apply to any African unless the estate is required to be administered in accordance with the provisions of the Administration of Estates Proclamation, 20 of 1935 by virtue of the proviso to paragraph 3 (b) of that proclamation, which provides that the estates of Africans shall continue to be administered in accordance with the prevailing African Law and custom of Lesotho.

" . . . Provided that such law and custom shall not apply to the estates 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."

[16] Applied to this case, the proviso relates to 'Mateboho's mode of life at the time of her death in 1987. It must have been shown to the satisfaction of the Master that at the time of her death, she had not only married under European law, but that she had also abandoned tribal custom and adopted a European mode of life

(Hoohlo v Hoohlo 1967-70 LLR 318 (LCA) 318 at 323 BD.

[17] While the evidence shows that 'Mateboho and the deceased became co-directors and shareholders of the second respondent company when it was incorporated in 1979 and that during the life time of 'Mateboho the deceased had developed certain properties and set up businesses, it is not clear at all to what extent 'Mateboho was herself involved in the business. Apart from the fact that there is no clear evidence of the mode of life 'Matheboho had adopted, crucially, there is no evidence that the Master had been satisfied that 'Mateboho had at the time of her death abandoned tribal custom and adopted a European mode of life, or that the Master had even been approached to make such a determination.

[18] The fact that 'Mateboho had entered into a civil marriage in community of property is therefor not conclusive. (**Ntsane v Thato, LAC (2000 – 2004) 248 at 252 B-H.)**

[19] For purposes of this judgement I accept that the appellant could not by the exercise of due diligence have discovered the marriage certificate of the deceased and his mother before the judgement was given against him.

[20] This leaves the question whether, if it had been known that the marriage between the applicant's parents had been a civil marriage in community of property, it would have resulted in a judgement in his favour. The answer to this question is to be found in the judgement of Schreiner, JA delivered in August 1964 in the leading decision of this court in ***Khatala v Khatala*** LAC (1955-1969) 73. This is a case where a widow's common law claim to half of the joint estate of a marriage in community of property was contrasted with the intestate claim under customary law of the deceased's eldest son from a previous marriage, also in community of property. The matter concerned the right to a Post Office Savings Account book with an amount of £ 300 to the credit of the deceased. Schreiner, JA held:

> *. . . It is enough to say, as here, that Basuto living 'according to Basuto custom' marry according to Basuto rites as well as well as according (to) Christian rites, their proprietary relations during their joint lives and* ***their***

> ***intestate succession rights after the death of one of them are governed by Basuto law.***
> (my emphasis).

[21] The court held that the eldest son of the previous marriage was the rightful successor under customary law. He was the lawful successor to all his deceased father's property, including the savings book and the credit reflected therein as against the widow who was solely entitled to maintenance in accordance with customary law. Under customary law the surviving widow's half share in the erstwhile joint estate was not recognised at all. *A fortiori,* where in this case, the wife who was married in community of property dies, the customary law does not recognise the half share in the joint estate as a separate estate which could devolve upon her son.

[22] In ***Tsosane v Tsosane*** (1971-1973) LLR 1 at 2F - 3B, the decision in *Khatala* was followed in a case where there was only one marriage, namely, one under civil law in community of property, and not as in *Khatala*, where the civil marriage had been preceded by a marriage under customary law.

[23] The import of these decisions is that the marriage in community of property of applicant's parents did not have any effect on the manner in which the joint estate should be dealt with after Mateboho's death. Under customary law and on Mateboho's death, her half share did not pass to the applicant but remained part of the estate of her surviving spouse.

[24] *Maqutu: Contemporary Family Law (The Lesotho Position*) 2nd Edition (2005), states with reference to a marriage in community of property:

> *"The idea of a woman having an estate of her own is foreign to indigenous law. How this affects succession has never been cleared. In practice at the death of a Mosotho the joint estate is often never divided. As a general rule (the) heir inherits the whole estate of the deceased, the widow, becoming his dependent towards whom he has duties in accordance with indigenous law. The fact that the widow might have half the joint is in general disregarded despite the fact that Roman Dutch Law is the common law of Lesotho."*

[25] This is what appears to have happened in this case. There is no evidence that the death of 'Mateboho was reported to the Master or that the joint estate was divided or that any steps were taken to administer

'Mateboho's part of the estate. Soon after 'Mateboho's death, the deceased married the first respondent and they continued to increase the estate which was treated as one estate until the death of the deceased in 2006. After the death of the deceased the family council confirmed the first respondent as heir to the immovable property of the estate.

[26] The applicant's contention that as her oldest son, he inherited Mateboho's half share in the joint estate under customary law cannot be sustained. It follows that the subsequent discovery of the marriage certificate relied upon by the applicant would not have led to a different result. It cannot constitute a valid ground for the rescission of the judgement and orders made by this court on appeal. The application for rescission of this court's judgment and the orders made, must be dismissed.

[27] The following order is made:

The application for rescission is dismissed with costs.

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W J LOUW
ACTING JUSTICE OF APPEAL

I agree:

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DR P MUSONDA
ACTING JUSTICE OF APPEAL

I agree:

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M H CHINHENGO
ACTING JUSTICE OF APPEAL

For Appellants : Adv P.R. Thulo

For Respondent : Adv Z. Mda KC