

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO. 19/2018

CIV/APN/429/2015

In the matter between:

‘MATEBOHO LETHULA

1ST APPELLANT

THAPELO LETHULA

2ND APPELLANT

AND

‘MARETHABILE LETHULA

1ST RESPONDENT

FIRST NATIONAL BANK

2ND RESPONDENT

MASTER OF THE HIGH COURT

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

CORAM : DR. K. E. MOSITO P.
P. DAMASEB AJA
N. MTSHIYA AJA

HEARD : 16 January 2019

DELIVERED : 01 February 2019

SUMMARY

Husband and wife. - Marriage in community - Widow of deceased to whom she was married in community of property money and property registered in names of deceased – respondent relying on deed of sale – Deceased husband having deposited money forming part of the joint estate into his mother’s bank account– Court a quo finding for widow – Appeal by deceased’s mother and brother dismissed.

JUDGMENT

DR. K. E. MOSITO P

BACKGROUND

[1] This is an appeal against the judgment of the High Court (**Hlajoane J.**) on 2 May 2018. The application was brought on the basis of urgency. In that application, the applicant sought an order in the following terms:

1. That normal rules pertaining to periods of notice and modes of service shall not be dispensed with on account of urgency of this matter.
2. That the third Respondent [First National Bank] be interdicted from releasing all funds held in flexi fixed deposited account number 74540211782 held by first Respondent [‘Mateboho Lethula] to first Respondent and or any other person whom she may designate pending finalization of this application.
3. That second Respondent [Thapelo Lethula] be directed to give an inventory to the Registrar

and or Deputy Sheriff of this Honourable Court immediately upon service of the interim order of all items in first and second Respondents' possession belonging to the late Teboho Francis Lethula and direct them further not to dispose and or alienate all the property in their possession belonging to the late Teboho Francis Lethula pending finalization hereof.

4. That the third Respondent be ordered and directed to furnish a statement of account pertaining to funds held in account number 74540211782 a FLEXI FIXED DEPOSIT ACCOUNT and a SMART ACCOUNT NUMBER 62540211547 held in the names of the first Respondent to the Registrar of this Honourable Court on or on the return date to be determined by this Honourable Court.
5. That the rule nisi be issued returnable on a date and time to be determined by this Honourable Court calling upon the Respondents to show cause (if any) why:
 - (a) That the Applicant shall not be declared the heir and owner to the funds in third Respondent's possession in Flexi Fixed Deposit account number 74540211782 and a Smart Account Number 62540211547 held and in the names of first Respondent.
 - (b) That the third Respondent be directed to pay out all funds including accrued interest in Flexi Fixed Deposit account number 74540211782 and a Smart Account Number 62540211547 held and in the names of first Respondent to the Applicant and or Applicant's legal counsel for her to administer it on her own behalf and the late Teboho Francis Lethula's children in consultation with third Respondent.

- (c) That first and second Respondent be directed to release all properties in the possession of first and second Respondent belonging to the late Teboho Francis Lethula to the Applicant.
 - (d) That Respondents pay costs of suit in the event of the opposition.
 - (e) Further and or alternative relief.
6. That prayer 1,2,3, and 4 operate with immediate effect as an interim Court order.

[2] On 19 November 2015, the learned Judge [Nomngcongong J.] granted an interim order as prayed. The application was opposed by the present Appellants. On 20 March 2018, the matter was heard by Hlajoane J. and judgement was handed down on 2 May 2018. In essence, the learned Judge granted the application with costs. It is against that judgment that the present Appellants approached this court on appeal.

ISSUES

[3] Before considering the grounds of appeal outlined above, it is apposite at this juncture to mention the issues that fall for determination in this appeal. They are as follows: First, whether the monies in account number 74540211782 in the names of the first respondent held with the third respondent belong to the applicant. Second, whether the deceased had the right to withdraw the monies from the deposit account and to alienate it to whomever he wished after such withdrawal. Third, whether the Appellant has been able to prove on the facts that the property and money subject

of dispute belonged to the Appellant. Fourth, whether upon a proper construction section 7(5) of the Legal Capacity of Married Person's Act, 2006, allows a spouse married in community of property to alienate, seed, or pledge a deposit held in his or her name in a bank.

THE FACTS

[4] In her papers, the Applicant (Marethabile Lethula who is now first respondent) avers that she was married by civil rites and in community of property to the late Teboho Francis Lethula on 10th June, 1996 as per the marriage certificate attached to the founding papers. The first appellant is her mother-in-law as mother to her deceased husband, so that their daughter 'Mateboho was named after deceased's mother. The second appellant is the son to her late husband's sister.

[5] The First respondent averred that, in his lifetime the deceased was a businessman with various business interests such as being a taxi operator and running an Auto Spares Shop in Butha-Buthe. They had also amassed together property such as private vehicles, a matrimonial home in Maputsoe and flats in Leribe and some investments accounts. One such account being a Smart Gold Account held with the third Respondent under account No. 62414076267. The First respondent was herself gainfully employed.

[6] At the beginning of 2015 the couple started having some differences which eventually culminated into a mutual understanding of each going his/her separate way by way of a divorce. When the husband died the divorce was already filed in Court but it was not yet finalized which left them still married and still living together as at the husband's death,

[7] After the husband's death, the First respondent was duly nominated as the beneficiary of their estate. The property has been identified and traces of funds which the deceased had withdrawn and deposited into first appellant's Bank Account were also identified per withdrawal and deposit slips by the deceased in his lifetime. It has become clear from those records that First respondent's deceased husband withdrew monies from their Bank accounts and deposited same in first Respondent's account without the consent of the First respondent. It was even discovered that even profits from the common estate were collected and deposited into first appellant's account.

[8] First respondent has further indicated that the first and the second appellants are not employed and there is no way that they could have accumulated such monies. From the record, it is clear that first respondent's husband passed away whilst their divorce was already filed and they were still negotiating the terms of the divorce settlement, which was not finalized, so that the whole estate in the circumstances remains with the First respondent. It has been the first respondent's case that the monies which the late Teboho Lethula deposited into the first appellant's account came

from a personal account of the deceased which did not form part of the joint estate.

THE LAW APPLICABLE TO THE APPEAL

[9] In *WT and Others v KT*,¹ the court correctly pointed out that, the proprietary consequences of a marriage in community of property are trite: assets acquired by either spouse - irrespective of who acquired, purchased or earned the said assets - form part of the joint estate of the parties. At common law, where persons marry in community of property there ensues by operation of law, but subject to certain exceptions, a pooling of the separate pre-marriage property of the spouses into one joint estate. The spouses become joint owners of the estate in equal undivided shares. A further consequence of marriage in community of property is that the husband becomes the administrator of the joint estate and, generally speaking, by virtue of the marital power he may bind himself and his wife by contract and other transactions in regard to the joint estate.² Among the assets owned by the spouses at the time of marriage which do not fall into the community are included property owned subject to a *fideicommissum* and the fiduciary's rights thereunder; only the gathered physical fruits of the property (and rents derived therefrom if the property is let) become part of the joint estate.³

¹*WT and Others v KT* 2015 (3) SA 574 (SCA).

²see *De Wet NO v Jurgens* 1970 (3) SA 38 (A) at 46A - H; *Hahlo South African Law of Husband and Wife* 4th ed at 214 - 6 218 - 9.

³see *Barnett and Others v Rudman and Another* 1934 AD 203.

[10] It is worth mentioning that, **Voet in 23.2.54**, which is one of the passages generally cited on the subject of the husband's powers, in instancing circumstances from which "fraud" would be clearly inferable, mentions the case of a man's giving a large part of the joint estate to near relatives on his own side. This would be consistent with his dominant motive being to benefit the relatives rather than to injure the wife. The same inference as to what Voet had in mind when speaking of fraud or mala fides is suggested by the reference in 36.1.54 to "the fiduciary who sought to promote the interests of his own relations . . . by exercising his liberality on his own kith and kin."

[11] The marital power is the guardianship of the husband over his wife, which includes the power of administration and alienation of her property, whether such property be her half share of the joint estate or property of which she is the sole owner. The subject of marital power is fully treated by **Voet (23-2-41 to 64)** and has been discussed in many cases in our Courts.⁴ But, as Watermeyer, CJ pointed out in ***Estate Sayle v Commissioner FOR Inland Revenue***,⁵ they do not include all those of an owner; the law does not allow him to commit a fraud upon his wife (see **Voet (23-2-54)**, **Rodenburgh (1-2-10)**).

[12] The broad common law powers of the husband have been truncated by Parliament.⁶ Part III of the ***Legal Capacity of Married Persons Act*** applies to a marriage in community of

⁴See, for example, *Erasmus v Erasmus* (1942 OPD 24) (1942 AD 265).

⁵*Estate Sayle v Commissioner FOR Inland Revenue* 1945 AD 388.

⁶*Legal Capacity of Married Persons Act* 9 of 2006,

property, irrespective of the date on which the marriage was entered into. Section 7(5) of the Act provides that, notwithstanding subsection 1(c) a spouse married in community of property may, without the consent of the other spouse, alienate, cede or pledge a deposit held in his name in a bank. Section 6 of the Act provides that, subject to section 7, a spouse married in community of property may perform any act which arises by virtue of operation of law with regard to the joint estate without the consent of the other spouse. Thus, as appears from the decision of this Court in ***Kobeli v Moseneke and Others***,⁷ subsection 7 (5) makes provision for certain exceptional situations where consent of the other spouse is not required.

EVALUATION OF THE APPEAL

[13] With the foregoing legal principles in mind, I now proceed to evaluate the present appeal. The Appellants advanced four grounds of appeal before us. The first complaint is that, the court *a quo* erred in holding that the first respondent is an heir to the monies in the appellant's account numbered 74540211782 held with the second respondent when there is no iota of evidence that the first respondent's deceased husband deposited an amount of M250,000.00 into that account. There is no merit in this complaint.

[14] In terms of section 3 of the ***Legal Capacity of Married Persons Act***, subject to the provisions of the Act, with regard to the administration of the joint estate, the common law, customary

⁷*Kobeli v Moseneke and Others C of A (CIV) 28/2014.*

law and any other marriage rules in terms of which a husband acquires the marital power over the person and property of his wife are repealed. Even the marital power which a husband had over his wife prior to the coming into operation of the Act is repealed.

[15] In terms of section 5 of the ***Legal Capacity of Married Persons Act***, spouses married in community of property have equal capacity in consultation with one another, to dispose of the assets of the joint estate. In terms of section 7(1)(j) of the Act, a spouse married in community of property cannot, without the consent of the other spouse, donate to another person any asset of the joint estate. In my opinion therefore, deceased husband had no legal power to, without the consent of the first respondent, donate to the first appellant, any asset of the joint estate, including the money deposited into her account. Such money had clearly been withdrawn from the deceased's account and deposited into the account of the deceased's mother (first appellant).

[16] There is no substance in the contention by the Appellants that the deceased told them that he was not married in community of property with the first respondent. It is clear from the record that the first appellant was married in community of property to the deceased. A marriage certificate to that effect is filed of record. The first respondent and the deceased were clearly married in community. In my opinion, this ground cannot succeed. As was said in ***Joint Stock Co Varvarinskoye v ABSA Bank Ltd and Others***,⁸ there is no universal and inflexible rule that only an

⁸ *Joint Stock Co Varvarinskoye v ABSA Bank Ltd and Others* 2008 (4) SA 287 (SCA).

account holder may assert a claim to money held in its account with a bank. Nor does the proposition that money deposited in an account becomes the property of a bank, necessarily militate against a legitimate claim by another party.

[17] What is also clear is that the deceased withdrew money from his matured investment accounts and deposited it into the bank account of the first appellant. Once the money had been withdrawn, it was no longer “deposit held in a... bank” as contemplated by section 7(5) of the ***Legal Capacity of Married Persons Act***. This was now money or property (part of the joint estate) and in respect of which he was obliged to secure the consent of the first respondent before he could donate it to the first appellant or any other person. The appellants sought to rely upon the decision of this Court in ‘**Maserai Kobeli v Joseph Moseneke Moseneke**.’⁹

[18] In **Kobeli v Moseneke and Others**, the first respondent therein complained that the deceased had “sold” his “*property lease*” to him as evidenced by a deed of sale, a copy of which he annexed to his affidavit. In terms of the deed, the deceased sold his leasehold interest in the said property to the first respondent for a purchase price of M150.000. The special power of attorney, a copy of which is also annexed, is dated 25 September 2003. The reference to the date, 5 November 2007, in the deed of sale as the date of the power of attorney, would seem therefore to be an

⁹Kobeli v Moseneke and Others (C of A (CIV) 28/2014) .

error. In terms of the power of attorney, which is stated to be irrevocable, the deceased authorised the second respondent to accept on his behalf any reasonable offer not less than M35 000 for the property and to “*to sign and execute any agreement of purchase.*” It appears to bear the signature of the deceased and, as I have mentioned, is dated 25 September 2003, being a date prior to the enactment of the Legal Capacity of Married Persons Act, 2006.” In summarising its decision, the court held that:

Section 11 makes provision for the court to grant consent if the consent is unreasonably withheld or cannot be obtained. Section 12 gives the court the power to suspend in certain circumstances a power afforded to a spouse under the Act. Subsection 7 (4) makes provision for the consent required under subsection 7 (1) (b) to (j) to be given by way of ratification within reasonable time after the performance of the act. Subsection 7 (5) makes provision for certain exceptional situations where consent of the other spouse is not required. None of these provisions is relevant in the instant case.

[19] That case is clearly distinguishable in that, that case did not deal with deposits of estate cash into a bank account while the present does. That case involved a dispute over a plot of land. It therefore did not consider this issue. The second complaint is that, the court *a quo* erred in holding and ordering the appellants to release all the properties of the deceased in their possession to the appellant when there is no evidence supporting such a decision and when the alleged property is not identified. As for the money held in the bank account of the deceased, I have no doubt in my mind that, those funds belonging as they did to the deceased, who

was married in community of property to the first appellant, the funds must be released to the first respondent. As for the amount of M250,000.00 deposited into the bank account of the first appellant, and claimed by the first respondent, it is clearly identified. There are deposit slips evidencing the same and which are not disputed. What is strange is that, in the letter appointing first respondent as heir to the monies with the First National Bank, the first appellant was part of the family that appointed the first respondent and she even signed as one of the members of the family.

[20] Since the other two grounds are the subsets of the above two main grounds, they do not merit separate consideration. The decision on the above two grounds should, in my view, dispose of this appeal.

DISPOSITION

[21] I am convinced that in this appeal, the first respondent did not prove her ownership of the vehicles. She has the obligation to approach the vehicle registration authorities for that purpose for her to be able to claim them. However, the appellants must hand over to the first respondent, all property belonging to her late husband to whom she was married in community of property. This being a family matter, there will be no order as to costs.

COURT ORDER

[22] In the result:

(a) The appeal is dismissed.

- (b) The decision of the Court a quo is confirmed.
- (c) There will be no order as to costs of the appeal.

DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:

P. DAMASEB AJA
ACTING JUSTICE OF APPEAL

I agree:

N. MTSHIYA AJA
ACTING JUSTICE OF APPEAL

For Appellants : Adv.T.A. Lesaoana

For Respondent : Adv Adv, L.D.Molapo