IN THE COURT OF APPEAL OF LESOTHO

HELD IN MASERU **C OF A (CIV) 44/2018**

CIV/APN/239/2018

In the matter between:

MOTSIELOA DONALD MAFOMANE **1ST APPELLANT**

MKHULU MAFOMANE **2ND APPELLANT**

'MATSOEU MAFOMANE **3RD APPELLANT**

MOQOCHOA MAFOMANE **4TH APPELLANT**

And

'MAJABULILE MAFOMANE **1ST RESPONDENT**

MASTER OF HIGH COURT **2ND RESPONDENT**

ATTORNEY GENERAL **3RD RESPONDENT**

LESOTHO FUNERAL SERVICES - LERIBE **4TH RESPONDENT**

FNB LESOTHO LTD - MAPUTSOE **5TH RESPONDENT**

CORAM: DR. K.E. MOSITO J.P

DR. P. MUSONDA A.J.A

M. MAHASE A.J.A

HEARD : 15 MAY 2019

DELIVERED : 31 May 2019

SUMMARY

An appeal against the judgment of the High Court – Two applications having been consolidated by consent of the parties – Court a quo having initially granted the whole of CIV/APN/239/2018 and had dismissed the whole of CIV/APN/241/2018 – The order of court having been drawn and Judge induced to erroneously sign it – Court a quo seeking to change its judgment in relation to first respondent's rights to bury the deceased.

JUDGMENT

MAHASE A.C.J

[1] This is an application in which the parties are having a dispute over the rights of burial of the deceased – The deceased having remarried the first respondent after the passing on of his first wife – The deceased having set up a separate matrimonial estate for his second wife far away from that of the first wife – Parties fighting over burial and other rights of the deceased husband – Consolidation of both applications on grounds that the issues in both applications were intertwined – Both applications being heard together.

[2] The deceased in both applications, one Mbuiseloa George Mafomane had initially married his first wife and had set up his first matrimonial home at his home village of Linots'ing Ha Makokoane. He and his wife had children born of their union; Moqochoa Mafomane; and 'Mantoa Mafomane.

[3] After the death of his first wife, the deceased married the first respondent, one 'Majabulile Mafomane. He set up his second matrimonial home at the place called Konkotia, also in the district of Leribe but far apart from his first estate. One child, Oratiloe Mafomane was born out of the second house.

[4] The deceased's first wife was buried at Linots'ing Ha Makokoane where the Mafomane family actually originally come from.

[5] As a result of the above, after the deceased death, the Mafomane family decided that the deceased's body should be laid to rest at Linots'ing. However, due to later developments his body was finally laid to rest at Konkotia where he had set up a second matrimonial home.

[6] The above was as a result of an order of the court a quo through which the first respondent was declared as the rightful person to bury the deceased.

[7] The real complaint which has triggered the filing of this appeal being that the learned Judge a quo erred in making a determination on the existence or otherwise of a marriage between the first respondent and the deceased without the leading of viva voce evidence as this marriage was highly disputed. This is the first and a critical ground raised on appeal.

[8] Grounds of Appeal

The first ground of appeal centres around the alleged customary marriage between the first respondent and the deceased Mbuizela George Mafomane.

[9] It is the appellants argument that the learned Judge a quo erred and misdirected himself in law by making a decision on the issue of marriage between the parties without having viva voce evidence adduced on the factual matrix providing the context in which the marriage was being challenged and

for which it was being supported. There was no evaluation of the rivalry allegation as to who had a better right and qualified to bury the late Mbuezeloa George Mafomane.

[10] As stated above, this is the most critical issue which brought about all the attendant ramifications in existence in this matter.

[11] This ground of appeal and that raised as the fourth ground, namely that the Judge a quo erred in holding that the enquiry into the factual dispute raised no question of a customary rule of inheritance notwithstanding that the applicant in CIV/APN/239 2018 never contracted a valid customary marriage with the deceased in 2012, taking into account the rejected annexure "A" dated the 7th April 2018; are actually intertwined and will therefore be dealt with simultaneously. Annexure "A" being the purported agreement of marriage of the first respondent to the deceased.

[12] Obviously and without much ado, there is a material dispute of fact with regard to the marriage of the first respondent to the deceased. This is a fundamental material

dispute which goes to the very root of the parties obligations and duties with regard to the devolment of the estate of the deceased herein.

[13] It is not only fundamental and material; but it is the pivotal point from which all issues in relation to the devolment of the deceased's estate are premised. This remains so whether or not the Mafomane family ever accepted the first respondent as a daughter in law.

[14] The above is particularly so in the light of the fact that the first respondent has issued directly conflicting versions in relations to her having been accepted as a daughter-in-law by the deceased's mother.

[15] In fact, it was only when she learned that the deceased's mother had long passed on at the time when she averred that it was her who had accepted her and performed the giving of koae ceremony. This giving koae being one of the ceremonies through which a daughter in law is welcomed into the husband's family after marriage. However, this is not the most critical ceremony nor the only one to be performed in order to validate a customary law marriage.

Refer to a book by Mr. W.C.M. Maqutu (a former Judge of the High Court) in his book – Contemporary Family Law (The Lesotho Position) page 151 dealing with essentials of a customary marriage.

[16] Anyway, this is not the crux of the appellants appeal before this Court nor was it canvassed in the Court a quo.

[17] The appellants' case centres around the fact that no evidence was adduced in relation to the existence and the validity of the marriage between the first respondent and the deceased.

[18] The way I understand it is that no order of court in relation to who between the first respondent and the appellants have the right to bury should have been issued before the court first made a determination on the validity, existence or not of the marriage between the first respondent and the deceased.

[19] The issue whether a marriage, be it customary or not, was ever validly contracted, can only be determined by the leading of viva voce evidence, where as in the instant

application, there is a material and fundamental dispute of fact on this particular issue.

[20] To that extent, regard being had to the other grounds of appeal raised and which are intertwined, this Court is left in no doubt that viva voce evidence on the issue of the parties' marriage should have been adduced before a final determination over who of the parties had a duty to bury the deceased was made.

[21] It would not matter whether or not the Judge a quo had limited the scope of enquiry to the "*sense of what is right*" and gave it a strict and narrow interpretation, such evidence should have been adduced.

[22] All the issues raised in the other grounds of appeal could, in all seriousness, and with the exception of the issue pertaining to the Teba Beneficial Nomination Form (annexure MM1) which is a contract for the benefit of the third party, could validitly have been dispose off only after evidence in relation to the marriage between the first respondent and the deceased had been determined.

[23] As such it is the considered view of this Court that the disputes of fact which are in existence in this application particularly with regard to the existence and the validity of the marriage in question, are such that they could be resolved by the leading of viva voce evidence. They could not be determined on papers herein filed of record.

[24] The Court a quo should indeed have been reluctant, in motion proceedings to decide finally genuine and fundamental disputes of fact purely on the basis of probabilities disclosed in contradictory affidavits.

[25] There is a plethora of decided cases in which this Court has previously dealt with issues such as those raised in the current application with regard to how a court should exercise its discretion in regard to which relevant issues and relevant factors should be allowed to influence it on the issue of burial rights.

[26] One of such issues being what it is that has been pleaded and what the evidence before court is. The Court cannot speculate on what is being pleaded. The litigants should clearly themselves make out their case in the pleadings.

[27] In the instant applicant, the first respondent changed goal posts with regard to who in the Mafomane family welcomed her as a daughter in law in that family. In other words, and contrary to the normal rules of procedure, she directed the attention of the Court a quo to an event which never occurred; only to change that when faced with a strong and credible truth and opposition by the appellants.

[28] The other issue relates to the grounds of appeal numbers two, up to eight. Ground of appeal number 2 is that the learned Judge erred and misdirected himself in concluding that the fourth appellant (son of the deceased) does not qualify for a right on intestacy to any part of the estate of his late father in the control of the first respondent notwithstanding that the Beneficiary Nomination Form described the existing relationship between the fourth appellant and the late Mbuezele George Mafomane as that of father and son.

[29] The dismissal of the claim on the above ground also let to the present appeal. The fact that on the basis of this beneficiary form, the fourth appellant is a beneficiary to the terminal benefits of his late father, should not have formed

part of the dispute because this form constitutes a contract between the deceased, his employers and his son.

[30] The situation whereby the fourth respondent (the son of the deceased) was denied the right to claim the terminal benefits referred to above could have been avoided had all parties in this CIV/APN/239/2018 been given a hearing prior to the granting of this order. As indicated above and as a matter of common cause, no one denies that the benefits reflected in that form are meant only for the biological son of the deceased who is the fourth respondent.

[31] Even the fact that the fourth respondent is the biological son of the deceased was never contested, nor was the fact that he was born from the marriage of the deceased and his late first mother, and the late first wife of the deceased.

[32] In fact, these being a contract as indicated above brought about by this beneficiary nomination form, it is not understandable how the first respondent was able to claim any such benefits for herself to the total exclusion of the nominated beneficiary.

[33] Now all having been said and done one could only point out that, aside from the above, the Mafomane family council were obliged by law to have formally appointed the fourth respondent an heir to his father's estate because one does not become an heir automatically.

[34] This is because according to the laws of Lerotholi, Part II, section 11 to 14 the family Council plays a very important role in matters of succession; because disputes arising in matters of succession are the primary responsibility of the family. Refer to contemporary family law (supra) page 131.

[35] The above explains why a half-hearted attempt was made by the Mafomane family to meet to plan a way forward for the burial and the division of the deceased's estate.

[36] Now, in the current application, the issues were compounded by the order of court dated the 22 August 2018, which is allegedly an erroneous order that was never granted by his Lordship Monapathi J. In this order of court, only prayer (f) was granted. It is an order in which the seventh respondent was directed to release the remains of

the late Mbuizeloa George to the applicant for purposes of burial.

[37] This order has been signed on the 23 August 2018 by both the Judge and the Registrar of the Court. However, it is argued on behalf of the appellants that the judgment herein was delivered sometime in October 2018. That, at that time, the initial orders the court had granted had all been enforced and executed without service of the said Court orders on the appellants' attorneys nor upon the appellants personally.

[38] This, it is argued on behalf of the appellants resulted into a serious injustice because execution of such orders smacks of "collusive" under handed dealings to undermine the fourth appellant's right to equality before the law and equal protection of the law much as there was never a valid order of court warranting the release of those monies to the first respondent.

[39] An attempt by the appellants' counsel to remedy this situation was unsuccessfully argued. It was to the effect that the Honourable Judge (Hon. Monapathi J) had been

rendered funtus officio and as such, could not revisit his own order or judgment.

[40] Reliance in this regard is based on the case of Firestone South Africa (PTY) LTD. v. Gentiruco A.G. 1977 (4) S.A. (A) at 306 F – G where the court observed that: (quote)

> *"The general principle, now well established in our law, is that, once a Court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it therefore becomes funtus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased".*

[41] It has been argued and submitted on behalf of the appellant that both orders of court dated the 22 August 2018 and 28 August 2018 (although the later was delivered at the end of October 2018) are equally appealable. Refer to Court of Appeal Act No. 10 of 1978, section 16(1) which provides as follows:- An appeal shall lie to the Court.

a) From all final judgments of the High Court;

b) By leave of court from an interlocutory order, an order made ex parte or an order as to costs only".

[42] It is further argued on behalf of the appellants that in effects, the judgment of the 28 August 2018 is such as to dispose of any issue or any portion of the issue in the main action or suit. The crux of the appellants' argument is in fact that an erroneous order was issued and that the first respondent had it executed although she or her attorney were well aware of its defective contents.

[43] The fact that the said order of court had defects and or was erroneously granted has not been seriously challenged by and or on behalf of the first respondent. He only submits, without demonstrating whether or not the order(s) in question were obtained on an erroneous, underhand collusive dealings as argued on behalf of the appellants that the Court was in all circumstances justified in arriving at the decision, it did on the affidavits.

[44] Reliance in support of this argument is placed on the case **of Plascon-Evans Paints LTD and Van Riebeeck Paints (PTY) LTD 1984 (3) S.A. 623** and other cases therein cited in his written submissions.

[45] With the greatest respect, the above cited authorities do not support the first respondent in light of the factual issues pertaining to the alleged customary marriage between the first respondent and the deceased.

[46] The first respondent has nowhere attempted to explain the discrepancies in the issues pertaining to the alleged customary marriage to the deceased; nor to the issues pertaining to the court order(s) which have been appealed against.

[47] The many questions which have been raised on behalf of the first respondent do not at all address the pertinent serious issues which go to the merits of this application raised by the appellants such as, but not limited to:-

- Why did the appellants feel the need to negotiate the place of burial with the first respondent if she was not married?
- Why would they have to consult her on the issue, or to inform or notify her? Etc.

[48] In fact the fact that the orders in question were obtained on an urgent ex parte basis, without notice to the other parties

necessitates a more robust response on behalf of the first respondent.

[49] The fact that the issue of the existence or not of a customary marriage between the first respondent and the deceased was not determined upon the basis of the leading of viva voce evidence whilst there was a dispute about that has really not been denied.

[50] Such oral evidence should have been adduced in the light of the dispute by the appellants that such a marriage ever existed; and also regard being had to the contradictory averments by the first respondent as to how, when and by whom she was accepted as a daughter in law in the Mafomane family.

[51] None of counsel has denied that the issue of the existence or not of the marriage or non-existence of same is a factual issue which must ordinarily be proved by oral evidence if disputed especially if the proceedings are on motion.

[52] To this extend, this Court is satisfied that since there was a genuine and material dispute of fact on this issue, the

learned Judge a quo should have ordered for the leading of evidence on this issue before having granted the first respondent any rights to bury the deceased.

[53] Assuming, without conceding that the ground of appeal number 3 is vague as the counsel for the first respondent submits, it is not his argument that the Judge a quo has not had recourse to CIV/APN/241/2018 which he avers was beset by errors, factual and procedural misdirection as a result of which an erroneous order of court was issued and signed by the Judge with catastrophic results.

[54] In Fact, counsel for the first respondent has hardly ever refuted the submissions of the appellants in relation to the two orders of Court which have been appealed against, and the prejudicial net effect of the execution of such erroneous orders of Court against the fourth respondent in particular.

[55] For the foregoing reasons, and regard being had to the surrounding circumstances of this case, the inescapable order of this Court is that the appeal must succeed.

The following order is therefore made

1. That the appeal succeeds

2. The order of the Court a quo is set aside and replaced with the following:- "The appeal successes with costs"

3. The first respondent shall pay the costs of appeal.

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MASEFORO MAHASE

ACTING CHIEF JUSTICE

I agree: _____

DR. K.E. MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree: _____

DR. P. MUSONDA

ACTING JUSTICE OF APPEAL

Counsel for Appellants: Adv. C.J. Lephuthing

Counsel for first respondent: Adv. S. Ratau

No appearance for the rest of other respondents.