

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) NO.46/2020  
CIV/APN/358/2018**

**IN THE MATTER BETWEEN:**

**BERENG  
APPELLANT**

**MOLAPO**

and

**NKUEBE MOLAPO  
RESPONDENT**

**1<sup>ST</sup>**

**NKEKELETSE MOLAPO  
RESPONDENT**

**2<sup>ND</sup>**

**THE MASTER OF THE HIGH COURT  
RESPONDENT**

**3<sup>RD</sup>**

**THE ATTORNEY-GENERAL  
RESPONDENT**

**4<sup>TH</sup>**

**CORAM:** P.T. DAMASEB, AJA  
P MUSONDA, AJA  
J VAN DER WESTHUIZEN, AJA

**HEARD:** 20 APRIL 2021

**DELIVERED:** 14 MAY 2021

## **SUMMARY**

*Administration of estates - Late-reporting of the deaths - jurisdiction to grant condonation for non-compliance with s 13 (1) - whether the first and second respondents should be allowed to belatedly report the deaths of the parents and - whether the joint estate should be reported to the Master - whether the deceased parents abandoned tribal customs or married under European law remains undetermined by the Master.  
Appeal is dismissed, with costs.*

## **JUDGMENT**

### **P T DAMASEB, AJA**

[1] This is an all-too-familiar case of a family dispute over a deceased estate. The protagonists are siblings who are unable to agree on how the joint estate of their late parents is to be administered and divided. Their father, who died intestate on 31 December 2005, predeceased their mother who also died intestate on 4 May 2018.

[2] It is common cause that both deaths were never reported to the Master of the third respondent ('the Master').

[3] The joint estate of the parents comprises two homes, several 'fields', household goods and a bank account. Although the deaths of the deceased parents had never been reported, property forming part of the joint estate had been appropriated in one form or another by the appellant by his own admission.

[4] The issue we are confronted with in the appeal is whether the first and second respondents should be allowed to belatedly report the deaths of the parents and whether the joint estate should be reported to the Master.

[5] After hearing oral argument, Monapathi J on 25 November 2020 granted an order in favour of the first and second respondents in the following terms:

*'a) Condonation of late filing of the Death Notice in terms of Section 13 of the Administration of Estates Proclamation for the estate of the late Mooki and Mankekeletse Molapo is granted.*

*b) The Master of the High Court is ordered to make a determination whether the estate is to be administered under Customary Law or Roman Dutch Law in terms of Section 34 of the Proclamation.*

*c) Each party to bear its own costs'.*

[6] The appeal lies against that order which was granted without written reasons.

[7] A remarkable feature of the case is how, as I will demonstrate, the appellant's case is in significant respects

different to the one pleaded *a quo*. It will be seen from the pleadings that the nub of the appellant's case *a quo* was that the High Court did not have jurisdiction to condone the late reporting of the deaths; that since such relief is not competent the relief seeking referring the joint estate to the Master could not be granted; the Master could not appoint an executor in the absence of a determination that the estate fell for administration under the 1935 Proclamation and that the appellant had in the meantime begun to administer the estate under customary law without protestation by the first and second respondents.

[8] It will also be apparent from the pleadings that the appellant accepted that the Master had the jurisdiction to make a determination whether the joint estate should be administered in terms of the 1935 Proclamation. His objection rather was that since the reporting of deaths had not occurred, the Master was denuded of jurisdiction.

### **The pleadings**

[8] By way of notice of motion, the first and second respondents instituted proceedings in the High Court (as first and second applicants) against the appellant (as first respondent) and the Master and the Attorney-General *nomine officii*.

[9] In that application they asked the High Court to 'condone' the late reporting of the deaths of the deceased parents in

terms of s 13(1) of the 1935 Proclamation; directing the Master to make a determination which legal regime the estate is to be administered under; directing the Master to appoint an executor of the estate, and costs.

[10] The first applicant deposed to the founding affidavit on behalf of both applicants and made the following salient allegations. The failure to report the deaths of the parents was 'due to ignorance of the Law' and the expectation that they would come to an 'amicable agreement on how to divide the Estate'.

[11] According to the deponent, the first respondent insists that the estate is not subject to the jurisdiction of the Master and that the other family members 'should not be allowed into the affairs of our parents' estate.' In particular, that the second applicant is a twice-married female who under customary law has no right to inherit from the deceased parents. It is also alleged that the second respondent 'has been withdrawing sums' from the deceased mother's Standard Bank account 'for his sole benefit'. The deponent alleged that it 'is in the best interest of all the siblings' that the estate is placed under the control of the Master so that the Master decides under which law the estate is to be administered.

[12] The appellant opposed the application and filed a single affidavit to meet the case of the first and second respondents and also in support of his claim in reconvention. In the latter, he

sought an order that *he* be declared 'customary law heir over the joint estate' of the late parents; and costs.

[13] According to the appellant, the estate devolves under custom and not the civil law. Since the second respondent is in a second marriage, she is not entitled to inherit from the joint estate of the late parents.

[14] He deprecated the fact that the deaths of the parents were unreported with the Master 'for purposes of administration of the joint estate and neither has there been any initiative to report the mentioned deaths even after learning that the said estates must be reported'. He added, without accepting responsibility, that the first and second respondents 'application aims to remedy the criminal act of failure to report the deaths of my late parents'.

[15] Since the non-reporting of the deaths is a criminal act, he maintained that the court lacked the jurisdiction to condone it; nor does the Master have the 'residual discretion to receive the notice and consequently make a determination in terms of the law whether the estate evolves (sic) in terms of custom or civil law'. The relief seeking condonation for the late-reporting of the two deaths should therefore be refused, he alleged.

[16] The following assertion by the first respondent bears quoting in full in view of the posture since adopted on appeal:

*'I aver duly advised by my attorneys of record that the reporting of the death with the [Master] does not automatically mean that the estate falls to be administered by the [Master]. [It] merely confers a statutory obligation on the part of the [Master] to make a determination whether the estate falls to be administered under the [1913 Proclamation] or under customary law. No such reporting has been made before the [Master] and as a result the estate of my father for the past thirteen years has been run in line with customary law dynamics and the same applies to that of my mother for the past five years'.*

Crucially, he adds:

*'I aver that [the prayer seeking an order that the Master make a determination under which law the estate is to be administered] is superfluous because that is exactly the mandate conferred upon the [Master] by the law. I aver that the success of this relief is dependent upon the success of [the prayer seeking condonation for the late-reporting of the deaths] in the sense that the [master can only exercise the said mandate provided the deaths of the deceased persons have been reported.]' (My underlining for emphasis).*

[17] The case of the first respondent at the close of pleadings is that (a) condonation for the late-reporting of the estates was not appropriate relief because (i) the court did not have the jurisdiction to grant it and (ii) because of the failure to report the deaths to the Master the estate was being administered by him under the customary law regime; (b) the relief sought to report the estate to the Master was conditional upon the granting of the prayer for condonation; (c) the Master could not appoint an executor to administer the estates in the absence of

a prior determination that the estates fell to be administered under the civil law.

## **The appeal**

[18] The grounds of appeal allege that the High Court misdirected itself in granting condonation for the late reporting of the deaths. It is further alleged that the court *a quo* misdirected itself by directing the Master to determine which marital regime should govern the joint estate. In the alternative, it is said that the court 'erroneously declined to exercise its judicial discretion by determining the regime under which the estate falls to evolve given the evidence presented before it'.

[19] Mr Rasekoai for the appellant argued on appeal that the joint estate fell outside the scope of the 1935 Proclamation considering that the deceased parents had not abandoned tribal customs and that they lived as a 'customary law family'. Counsel further argued that the deceased patriarch and the appellant were both customary headmen and that the appellant 'assumed control of various properties belonging to the estates' in that capacity as headman without any objection by any of the siblings during the lifetime of the deceased mother. In effect suggesting that whilst the mother was alive, he had become heir to the father's estate under customary law.



[20] The gravamen of the appellant's case on appeal is that given that the estate falls outside the scope of the 1935 Proclamation, it was not necessary to report the deaths of the deceased parents and that the Master lacks the jurisdiction to determine which legal regime governs the joint estate. The High Court alone could and must determine the governing law and that it would ineluctably hold that the estate should be administered and distributed under customary law.

[21] On the premise that the Master has no such jurisdiction, Mr Rasekoai asked this court to allow the appeal and set aside the order of the High Court and remit the matter to the High Court to make a determination on the applicable legal regime.

[22] The first and second respondents support the High Court's order and ask that the appeal be dismissed. Mr Matooane for the first and second respondents submitted that the question of the mode of life falls within the purview of the Master. He relied on *Khale v Khale and Others*<sup>1</sup> in support of that proposition.

## **Discussion**

### *Late-reporting of the deaths*

[23] Although the appellant cavils the failure to report the deaths, curiously he accepts no responsibility for such failure. Why should it have been the other siblings and not he? The

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<sup>1</sup> 2007-2008 LAC 194 at 201 para [18].

other problem for the appellant is that he does not explain why the late mother had not reported her late husband's death since he predeceased her. To meet that criticism, Mr Rasekoai took the posture on appeal that since the appellant proceeded from the premise that the estate devolved under customary law, under that legal regime there is no obligation to report a death.

[24] The proper procedure, counsel submitted, is that after a death the family meet and decide on the issues of inheritance. In other words, since the first and second respondents seek to have the estate administered it was upon them that the legal duty rested to report the deaths to the Master. That is a rather circular argument: Either there was a duty to report the deaths or there was not. The argument also conflates two separate issues: The reporting of an estate and the legal regime according to which the estate assets are to be distributed.

[25] In the view that I take of the matter, the real issue to be decided is one of law: Does the 1935 Proclamation apply to the joint estate as regards the reporting to the Master of the deaths and the estates?

[26] The starting point is the 1935 Proclamation whose preamble states:

*'To make provision for the administration of the estates of deceased persons, minors and lunatics and of derelict estates and to regulate*

*the rights of beneficiaries under mutual wills made by persons married in community of property.'*

[27] Section 3 of the 1935 Proclamation provides the ambit of the proclamation by identifying two categories of persons to which it *does not* apply. The first is under paragraph (a) relating to the property belonging to '*any person belonging to and serving with any of Her Majesty's regular naval, military or air forces who dies within the Territory while on service.'* Paragraph (b) of s 3 states:

*"(b) to the estates of Africans which shall continue to be administered in accordance with the prevailing African law and custom of the Territory: 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."*

[28] The effect of the *proviso* can be summed as follows:

- (a) customary law does not apply to the estate of a Mosotho who has abandoned tribal customs and adopted a European lifestyle;
- (b) customary law does not apply to the estate of a Mosotho married under European law;
- (c) once it is established that a deceased is Mosotho, the 1935 Proclamation does not apply unless it is shown 'to the satisfaction of the Master' that either of (a) or

- (b) apply. In other words, the *onus* rests on the person who seeks to exclude the estate of a Mosotho from customary law to satisfy the Master that the estate should be administered under the 1935 Proclamation.
- (d) the question whether a Mosotho abandoned tribal custom or married under European law is one to be decided by the Master;
- (e) once the Master decides that a deceased Mosotho abandoned tribal customs or married under European law, the estate is to be administered in terms of the 1935 Proclamation.
- (f) if the Master decides that a Masotho had not abandoned tribal customs or did not marry under European law, the estate is to be administered under customary law.
- (g) either decision under (d) and (f) can be challenged in the High Court.

[29] It follows that if the Master decides that a Mosotho's estate falls to be administered under the 1935 Proclamation, its provisions apply both as to the administration machinery (such as the appointment of an executor) and the rights to inheritance.

[30] The conclusion above shows that the appellant's ground of appeal that the High Court should have assumed jurisdiction and determined which legal regime applied to the deceased parents' estate, is bad in law. That is a matter for the Master, in the first instance.

[31] The only issue that remains is whether the High Court erred in granting condonation for the late-reporting of the deaths.

[32] Section 13 of the 1935 Proclamation states:

*"13. (1) Whenever any person dies within the Territory leaving therein any property or a will, the nearest relative or connection of the deceased at or near the place of death, or in default of any such near relative or connection, the person who at or immediately after the death has the control of the premises at which the death occurs, shall within fourteen days thereafter cause a notice of death to be framed in the form "A" in the First Schedule to this Proclamation, and shall cause that notice, signed by himself, to be delivered or transmitted -*

- a) if the death occurs in the district wherein the office of the Master is situate, to the Master; or*
- b) if the death occurs in any other district, to the District Commissioner of that district, in which case the notice shall be accompanied by a true copy thereof.*

[33] The proposition that the High Court lacks jurisdiction to grant condonation for non-compliance with s 13 (1), implies

that once a failure has occurred an estate remains in limbo and people can deal with it as they please. That can lead to lawlessness.

[34] Section 110 of the 1935 Proclamation makes a failure to report a death a criminal offence subject to a fine or imprisonment in default. The statute therefore provides a remedy for a failure to report and that excludes the inference that failure is to result in voidness.

[35] The first and second respondents explained why the deaths were not reported. On his own admission, the appellant had assumed dominion over the assets of the joint estate. It appears to me that he too was under a legal duty to report the deaths in terms of s 13 (1). If we are to accept his argument, the estate should remain unreported to the Master so that he benefits from his failure to comply with the law.

## **Disposal**

[36] The question whether the deceased parents abandoned tribal customs or married under European law remains undetermined by the Master. A very peculiar feature of this case is that neither party states in the pleadings whether the deceased parents were married according to customary law or under European law. For a proper and orderly administration of the deceased parents' joint estate that issue has to be decided. It is the Master who is clothed with that jurisdiction. In order for

that to occur, the deaths must be reported to the Master. The High Court decided in favour of the first and second respondents on both questions.

[37] It is only if the Master makes a determination that the deceased parents abandoned tribal customs or married under European law that an executor may be appointed in terms of the 1935 Proclamation. Although asked to do so, Monapathi J quite properly refused to grant an order appointing an executor.

[38] The High Court's order of 25 November 2020 is sound in law and cannot be interfered with.

[39] There is no cross-appeal in respect of the costs order that each party bear its own costs. That order should therefore also stand.

[40] In respect of the appeal, the first and second respondents have achieved success and are entitled to their costs.

## **Order**

[41] The appeal is dismissed, with costs.



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**P.T. DAMASEB**  
**ACTING JUSTICE OF APPEAL**

I agree:



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**P. MUSONDA  
ACTING JUSTICE OF APPEAL**

I agree:



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**J VAN DER WESTHUIZEN,  
ACTING JUSTICE OF APPEAL**

For the Appellant:                      Mr M.S. Rasekoai

For the Respondent:                      Mr T Matooane