

**IN THE COURT OF APPEAL OF LESOTHO
HELD AT MASERU**

**C of A (CIV) 34/2022
CIV/APN/0073/2022**

In the matter between-

MPHETHE NTOAMPE

APPELLANT

and

**MOSA PAUL MOSUOE, EXECUTOR
RESPONDENT**

1st

MASTER OF THE HIGH COURT

2nd RESPONDENT

ATTORNEY GENERAL

3rd RESPONDENT

CORAM: PT DAMASEB, AJA
J VAN DER WESTHUIZEN, AJA
NT MTSHIYA, AJA

HEARD: 12 OCTOBER 2022

DELIVERED: 11 NOVEMBER 2022

SUMMARY

It is a basic requirement of fair litigation that all parties with a direct and substantial interest in the proceedings must be able to participate in them. In an application to have the appointment of an executor of an estate set aside by a court, close family members of the deceased, like a daughter and daughter-in-law, who reported the estate to the Master of the High Court, have such an interest. The non-joinder of such parties renders the application fatally flawed.

JUDGMENT

J VAN DER WESTHUIZEN, AJA

Introduction

[1] This appeal against a judgment of the High Court is about the struggle between the appellant, Mr Mphethe Ntoampe, family members and the Master of the High Court (the second respondent) regarding the estate of his grandmother, the late Ms 'Mamaitse Gladys Ntoampe. Aggrieved about the way the estate was being dealt with, he approached the High Court, inter alia to have the appointment of the first respondent, Mr Mosa Paul Mosuoe, as the executor of the estate set aside.

[2] As is often the case in inheritance and related family matters, the facts and legal issues in this case are potentially very complicated. They involve a longish family history, the question as to whether customary law or so-called European law governed their marriage, what their mode of life was and the consequences of the above for the administration of the estate.

[3] The appellant's case and the judgment of the High Court on several issues are summarized below. However, the point that could dispose of the matter relates to the failure of the appellant, as the applicant in the court *a quo*, to join allegedly interested parties.

Factual background

[4] Upon the death of the deceased, the estate was reported to the second respondent by the daughter and daughter-in-law of

the deceased, the aunts of the appellant. The second respondent investigated the mode of life of the deceased, in order to determine whether the estate had to be administered under the Administration of Estates Proclamation of 1935. The second respondent concluded that the Proclamation was applicable and that she could lawfully appoint the first respondent as executor.

[5] On 11 January 2022 the second respondent appointed the first respondent. The letters of administration were issued.

Submissions by the parties

[6]] In his application to the High Court the appellant's Notice of Motion asked that the matter be regarded as urgent; and for an interim order that the first respondent be interdicted and restrained from administering the estate and executing his duties as executor thereof, pending finalisation of the matter; the decision by the second respondent to appoint the first respondent be reviewed, corrected and set aside as unlawful, null and void and of no legal effect; and costs on the punitive scale of attorney and client. The interim order was granted. Finally, the application was dismissed though and the first respondent's appointment as executor was found to be lawful and valid.

[7] In the court *a quo*, as in this Court, the appellant argued that his grandparents lived under customary law. The estate had already been administered under customary law, he contended. The family appointed him as the heir. Thus, an

executor could not have been appointed to administer the estate again.

[8] In his grounds of appeal and orally through his counsel in this Court, the appellant argued that the High Court had erred and misdirected itself by applying the mode of life test. The court misconstrued the issue that was at stake and reached the wrong decision.

[9] The first respondent submits that in his founding affidavit the appellant himself alleged that his grandparents had solemnised their marriage under European law. They thus abandoned the customary marriage and adopted a civil rights regime.

[10] According to the first respondent, the appellant was present at a meeting called and chaired by the Assistant Master of the High Court, regarding the appointment of an executor. The nomination and appointment took place in his presence. The second respondent acted within her powers and the process was legally in order. The first respondent submits that the appellant confuses the appointment of an executor with the appointment of an executor.

[11] The second and third respondents presented similar arguments.

High Court judgment

[12] The High Court dismissed the application. It dealt with several points, including the failure of the appellant to disclose all relevant facts about his own involvement in the process of

the appointment of an executor. He participated in the appointment and did not complain.

[13] The court specifically dealt with the question of non-joinder, raised *in limine* by the respondents. The appellant did not join the deceased's estate, as well as Leratang Ntoampe and Mmookho Ntoampe, the appellant's aunts who reported the estate to the second respondent, who were referred to by the appellant in his founding affidavit. The court found the non-joinder as fatal.

[14] Like the High Court's other findings, its conclusion regarding the non-joinder is also attacked by the appellant as a ground of appeal.

Non-joinder

[15] The parties argued at length about customary law and civil rites marriages, including on points like the appropriateness of the mode of life test. Should the High Court be correct on the relevance of the non-joinder, however, it would not be necessary for this Court to interrogate the other grounds of appeal. The application would be fatally flawed from the outset. Even if it were meritorious on other points, those would not be reached, because the process would be stopped in its tracks.

[16] Before even reaching legal authority from case law and academic writings, plain logic dictates that it is a crucial requirement in any fair litigation that all parties with an interest in a matter should be aware of and able to participate in it. A court of law is unable to render a fair judgment based on the law, without being aware of the views of all who are involved or

may be directly affected by the dispute and its outcome. Of course, a court may not always have the benefit of all possibly relevant views. Respondents may choose, as they often do, to abide by the decision of the court. However, the opportunity to participate must be available.

[17] That the failure to join a party with a direct and substantial party to the dispute can render the proceedings fatally defective, is fairly trite law. (See, eg, *Lesotho District of the United Church v Reverend Moyeye and Others* LAC (2007-2008) 103.)

[18] In this case the two women who reported the estate to the second respondent were not joined. They are the appellant's aunts and the deceased's daughter and daughter-in-law. The appellant argues that joining them was unnecessary, given the nature and focus of the application. In the papers the second respondent mentions though that their involvement and interest were in fact brought to the attention of the appellant in a telephone conversation. He was well aware of their relevance and interest.

[19] The High Court was correct on the fatality of the non-joinder. As close family members of the deceased, who also reported the estate to the second respondent, Leratang and Mookho Ntoampe had a clear and direct interest in litigation about the administration of the estate, the more so because the appellant's case is that the estate had already been dealt with under customary law and that he had been appointed as

heir. That there would be no need to join them in the proceedings, is quite unthinkable.

Conclusion

[20] The inevitable conclusion is that the High Court cannot be faulted for finding that the non-joinder was fatal for the appellant's application. It is not necessary for this Court to deal with the court's other findings and the appellant's attack on them.

[21] The appeal must fail. There is no reason why costs should not follow the result.


Order

[22] In view of the above, the appeal is dismissed, with costs.



J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

I agree:



PT DAMASEB
ACTING JUSTICE OF APPEAL

I agree:



NT MTSHIYA
ACTING JUSTICE OF APPEAL

FOR APPELLANT:

ADV MASOEU

FOR 1ST RESPONDENT:

ADV PV TS'ENOLI

FOR 2ND AND 3RD RESPONDENTS:

ADV T MOLISE