

CIV/APN/365/96

IN THE HIGH COURT OF LESOTHO

In the matter between

**MOENO MOENO****Applicant**

and

**MOIPEI MAPHOMOLO MOENO**  
**PHAMOTSE MOENO**  
**MALEHLAHA MOENO**  
**THE PROPRIETOR, MANGWANE**  
**FUNERAL SERVICE**

**1st Respondent**  
**2nd Respondent**  
**3rd Respondent**  
**4th Respondent**

**JUDGMENT**

Delivered by the Honourable Mr. Justice M.M. Ramodibedi, Acting Judge,  
on 3rd day of December, 1996.

On 10th October 1996 the Applicant Moeno Moeno filed an urgent application with this honourable court praying for an order couched in the following terms:

- “1. The rules of Court as to form and service be dispensed with on account of the urgency of the matter.
2. A Rule Nisi be issued calling upon Respondents to show cause

on the day to be determined by this Honourable Court why:

- (a) The Applicant shall not be declared the sole heir of the deceased **ROSINA MOENO** and as such the person entitled to bury the deceased.
- (b) The first, second and third Respondent shall not be interdicted from removing and burying the deceased **ROSINA** at any place save the one determined by the Applicant herein.
- (c) First, Second and third Respondent or any person whatsoever shall not be restrained from removing and burying the deceased **ROSINA** pending the outcome of this Application.
- (d) Fourth Respondent shall not be restrained from releasing the body of the deceased **ROSINA** to any person whatsoever pending the outcome of this Application.
- (e) First, Second and third Respondents pay costs of the Application.
- (f) Applicant be granted further and/or alternative relief.

3. Prayers 1, 2(c) and (d) operate as Interim Order with immediate effect.”

The matter came before me ex parte on the same day and after having read the papers filed of record and heard Applicant's attorney Mrs. Kotelo I duly granted the Rule Nisi as prayed returnable on 15th October 1996. On the latter date the matter was again postponed to 23rd October 1996 to enable Mrs. Kotelo to file a replying affidavit.

On 23rd October 1996 when the matter finally proceeded it became apparent to me that there were disputed facts which could not properly be resolved on paper. I accordingly directed that oral evidence be heard on specified disputed issues which were identified by all concerned as follows:-

- (1) Who has the duty or right to bury the deceased **ROSINA MOENO** between Applicant and First and Second Respondents?
- (2) Whether the applicant is the heir to the deceased either by appointment or by descent.
- (3) Whether the first Respondent's husband Lesole was adopted by Letokoto.
- (4) Whether the document Annexured "RMA1" to the applicant's founding affidavit was executed by the deceased **ROSINA**.
- (5) Whether First Respondent's son is the rightful heir to the deceased **ROSINA**.
- (6) Whether First Respondent herself is **Rosina's** heir.

Before proceeding to examine the evidence in relation to each of the aforesaid six (6) issues it is necessary to refer to the issues which are admitted or are not strictly denied in the affidavits.

The applicant Moeno Moeno avers in paragraph 4 of his founding affidavit:-

- "4.1 I am the heir of the deceased **ROSINA MOENO** having been duly appointed by her as such in her lifetime. I am also the head of the **MOENO** family at Ha Majane.
- 4.2 I am the son of **MAILE MOENO** and the grandson of **PHILEMON MOENO** who was the head of the **MOENO** family."

First Respondent's response to this allegation is contained in paragraph 4 of her founding affidavit in the following words:-

"I have no knowledge of the contents hereof and do not admit the same. As will appear later on in this affidavit, the deponent herein has no personal knowledge of the contents of his founding affidavit."

In view of the fact that the respondents have not filed any supporting affidavits I find that the denial raised in paragraph 4 of the answering affidavit of the first Respondent is not genuine or is no more than a bare denial in as much as she claims no knowledge of the contents of the founding affidavit of the Applicant Moeno Moeno on the issue. I find therefore that the respondents herein are in no better position than the respondent was in the case of Steven Mokone Chobokoane v Solicitor General C of A (CIV) No.15 of 1984 in which Aaron JA had this to say:-

“In motion proceedings, it is not an adequate answer to say “I put the applicant to the proof thereof.”

The affidavit made by the appellant constitutes contains not only his allegations but also his evidence, and if this evidence is not contraverted or explained, it will usually be accepted by the Court. In other words the affidavit itself constitutes proof, and no further proof is necessary. The position is different where pleadings are filed; these contain no evidence, and the evidence will be led later at a trial. An admission by defendant will obviate the need for plaintiff to call evidence. But there is also room for one party to plead that he has no knowledge of an allegation made by the other party, and that he does not admit it; in this way, he requires the other party to prove his allegation by evidence at the trial. But this is not competent in motion proceedings, and as there has been no denial, the matter must be approached on the basis that these allegations by appellant are proved.”

I respectfully agree.

See also Tsele Mohoshela v Officer Commanding Thaba Tseka Police and Another  
CIV/APN/2/95 (unreported).

It is significant that paragraphs 5 - 7 of the founding affidavit of the Applicant Moeno Moeno were admitted without any reservations. Those paragraphs were as follows:-

- “5.1 The deceased ROSINA MOENO is my aunt she was the wife of LETOKOTO (also known as Monnamoholo) who was my uncle.
- 5.2 LETOKOTO is the grandson of TUTUBALA who was the younger brother of my grandfather PHILIMON.
6. LETOKOTO had two wives namely ‘MAKHETHOLLO & ROSINA. ‘Makhethollo had a son who died at the mines leaving no male heir or any heir at all. The second wife ROSINA did not bear any children.
7. First Respondent is the wife of the deceased LESOLE MOENO who was a nephew (mochana) in the MOENO family.”

The court was informed at the commencement of the matter on 23rd October, 1996 that the applicant Moeno Moeno was hospitalised due to illness. Mrs. Kotelo then called PW1 Ts’oanyane Moeno to testify on all the aforesaid issues except issue number (4) relating to the document Annexure “RMA1”.

It was the evidence of PW1 Ts’oanyane Moeno that he is aged 59 years. He knows the litigants before court and that he is closely related to them. The Applicant Moeno Moeno comes from the senior house. He was unchallenged in his evidence of the Moeno family tree and that the applicant Moeno Moeno “stands solely responsible for the family of Letokoto” from which the deceased ROSINA came.

This is because Letokoto had no son and therefore had no male heir. He had been married to two wives namely ‘Makhethollo and the deceased Rosina.

It is common cause that 'Makhethollo had a son who, as earlier stated, died at the mines leaving no male heir and that the deceased Rosina did not bear any children.

PW1 Ts'oanyane Moeno was also unchallenged in his evidence that Letokoto's first wife 'Makhethollo herself died somewhere in Johannesburg.

It is further common cause that Letokoto had a sister by the name of 'Manyaoale who was unmarried. She gave birth to first Respondent's husband the late Lesole. It is therefore common cause that the said Lesole was illegitimate and that he was born a nephew in the Moeno family. Letokoto was clearly Lesole's maternal uncle. This indeed is common cause. In fact in his cross examination of PW1 Mr. Pheko for the respondents expressly conceded that Lesole was illegitimate. The cross examination went something like this:-

"Q: Because he (Lesole) was not a legitimate issue of his father -  
in other words he was an illegitimate child.

A: Lesole was definitely illegitimate."

*I have no hesitation therefore in coming to the conclusion that the said Lesole was an illegitimate child in the Moeno Family.*

In my judgment an illegitimate child has no legal right to inherit from his maternal uncle. He can only inherit from his own mother herself and nothing more unless he can show that he was lawfully adopted by his mother's parental family. As I understand respondents' defence in this matter it is exactly that, namely that Lesole was adopted by his maternal uncle Letokoto and the late Rosina. I shall return to this aspect later.

It is the evidence of PW1 Ts'oanyane Moeno that all the time during his lifetime the said Lesole was treated by the Moeno family as a nephew even though he was brought up by Letokoto. In like manner the Moeno family treats first Respondent as a nephew.

PW1 Ts'oanyane Moeno denies respondents' allegation that Letokoto ever adopted Lesole as his son. He is not specifically challenged in his evidence that the deceased Rosina expressed a wish in his presence that the applicant Moeno Moeno should bury her. As I see it the cross examination by Mr. Pheko for the respondents was confined to showing that this witness had not mentioned this fact in his affidavit. It was never put to him that he was not telling the truth as such.

For my part I wish to state that I saw this witness PW1 as he gave evidence and watched his demeanor in the witness box. He gave his evidence in a straightforward manner and impressed me as a truthful witness.

Then there was the evidence of PW2 Chief Ramakau Sekhonyana which was to the effect that the letter Annexure "RMA1" to the Applicant's founding affidavit was brought to him by the late Rosina Moeno. He is unchallenged on this aspect and that his own signature appears in the said letter. I am therefore satisfied that this letter came from the deceased Rosina Moeno herself. It is true PW2 stated that he was not familiar with Rosina's hand writing but I do not see that that particular issue detracts from the fact that the letter was brought to the witness by the deceased herself. That letter reads:-

"Moeno Family

I hereby allocate my estate (lefa) to Moeno Moeno. The estate runs from the flats/flat roofed rooms including the kraals up to the garden above Lethoko's also the field at Koaring and the field at Sekoting next to Tenane's. All those things I bequeath to Moeno/ are Moeno's because he supported me as though he were my son."

I find it significant that Mr. Pheko put the following question to PW1 Ts'oanyane Moeno with the obvious reference to the said letter Annexure "RMA1":-

“Q: I want to suggest to you that if Rosina knew applicant as the heir she would not have left written instructions to say I am leaving Moeno this and that.

A: As far as I know she has left Moeno as her heir.”

A close look at this question has left me in no doubt that Mr. Pheko was actually conceding that the deceased Rosina executed the said letter Annexure “RMA1”. Indeed Mr. Pheko put the issue of Rosina’s writing of Annexure “RMA1” beyond question when he later put the following question to PW1:-

“Q: I am saying she (Rosina) did so because she knew if she hadn’t said so that property would not be Moeno’s but the heir’s.

A: It belongs to the heir who is Moeno.”

In the circumstances I am satisfied on a balance of probabilities therefore that the document “RMA1” to applicant’s founding affidavit was executed by the deceased Rosina.

The evidence of PW3 ‘Mafrank Gladys Moeno was to the effect that she is the wife of the younger brother of the applicant namely one Lethoko Moeno.

She testified that the handwriting on the letters annexures “RMA1” and “RMA2” in applicant’s founding affidavit was that of the deceased Rosina Moeno. According to her she knew the hand writing because she used to see the deceased write adding “I was always with Rosina every time she was writing.” The latter used to work in the church writing cards and baptismal certificates of children at the Anglican Church at Masite. She was also the holder of the prayer in the village and was a leader. PW2 herself was a



messenger “delivering whatever documents she (Rosina) had written to the church.” She worked with the deceased Rosina for about 3 - 4 years.

The last witness for the Applicant was PW4 Mosheno Moeno who is applicant’s younger brother. His evidence was that the deceased Rosina in her lifetime elected to be helped by the Applicant Moeno Moeno by ploughing her fields and feeding her.

It was PW4’s unchallenged evidence that he knew Letokoto quite well. He also knew Lesole and that the latter was calling Letokoto his maternal uncle. As earlier stated this is common cause.

Letokoto and his wife the late Rosina called Lesole their nephew (mochana). According to PW4 the first respondent in this matter is therefore a “nephew” in the Moeno family. He confirms that the applicant Moeno Moeno is the head of the Moeno family at Ha “Majane where the deceased Rosina lived. He denied the suggestion put to him in cross examination that Letokoto had adopted Lesole.

After PW4 had completed his evidence Mrs. Kotelo informed the court that the applicant Moeno Moeno had sadly passed away at hospital. She then moved for substitution of Moeno Moeno by his eldest son and heir Masheane Moeno in this matter. Mr. Pheko had no objection and the application for substitution was accordingly granted. Mrs. Kotelo then closed applicant’s case.

It is significant that the first respondent elected not to give evidence in this matter despite the fact that she attended the proceedings daily without fail. She has thus avoided cross examination on the allegations she made in her answering affidavit.

The third Respondent ‘Malehlaha Celina Moeno gave evidence as DW1. She got married into Moeno’s family in 1958. She conceded that the applicant Moeno Moeno came from the senior house.

It was her evidence that Lesole was the son of Letokoto. I find that her evidence in this respect is totally in conflict with the admitted evidence in this matter namely that Lesole was the son of Letokoto's sister. I have come to the conclusion therefore that DW1 was lying and/or deliberately trying to mislead the court on this issue.

According to DW1 Lesole was regarded by the Moeno family as the child of the family of Letokoto. The latter and his wife Rosina also regarded him as their son. According to her Lesole was not illegitimate. Well I have no hesitation in coming to the conclusion that DW1 lied to this court. Lesole was clearly illegitimate.

DW1 further testified that the deceased Rosina was illiterate. She stayed with her for more than 5 years and during all that time she had never seen her write. According to her PW3 'Mafrank Gladys Moeno was chosen as Rosina's secretary precisely because the latter was illiterate.

DW1 'Malehlaha Moeno did not impress me as a truthful witness. She was evasive in her answers to direct questions. I got the impression that she was all out to mislead the court as much as she could.

PW3 'Mafrank Gladys Moeno was on the other hand impressive as a witness. Consequently I prefer her version to that of DW1 particularly on the question of the literacy of the deceased Rosina. I find it highly unlikely that the latter could have been chosen to lead the village for so many years if she was illiterate.

Then there was the evidence of the second Respondent Phamotse Moeno who gave evidence as DW2.

He told the court that he is aged 64 years. It means therefore that he was born in 1932. He conceded that first respondent's husband Lesole was a nephew in the Moeno

family. He however sought to impress upon the court that Letokoto adopted Lesole at his birth in 1942 because Letokoto and his wife Rosina had no children.

I find that in 1942 DW2 Phamotse Moeno was only 10 years old. I therefore find it most improbable that a child of 10 years could get to know about adoption of another child. In any event I have taken note of the fact that DW1 Phamotse Moeno claims he was absent when such adoption took place. He was out in the veld herding animals. It is obvious to me therefore that his evidence that Letokoto adopted Lesole is nothing more than hearsay. In the circumstances therefore I reject it as not only inadmissible but also false. In coming to this conclusion I have drawn comfort from the fact that respondent's claim that Lesole was adopted by Letokoto remains unsubstantiated. It is my considered view that if such claim was true witnesses from the Moeno family could have been forthcoming on the issue. In my judgment the evidential burden is on the respondents to prove their allegation that first respondent's husband Lesole was adopted by Rosina's husband Letokoto. They have failed dismally to discharge the onus.

I have also taken into account the fact that DW1 Phamotse Moeno has made a very poor impression on me as a witness. For instance he initially denied that Lesole himself had a sister but his lie in that respect was soon exposed by the following cross examination by Mrs. Kotelo:

“Q: Lesole has a sister?

A: He doesn't have a sister.

Q: Who is “Mampe?”

A: I want to withdraw that statement, Lesole has a sister who is called ‘Mampe.’”

DW1 Phamotse Moeno later sought to contradict PW1 Ts'oanyane Moeno by denying that Letokoto was buried by his wife Rosina and that even the coffin was bought by her. DW1 insisted that the coffin was bought by Lesole. He was then asked:-

“Q: Did you accompany Lesole to the place where the coffin was bought?

A: Yes.

Q: You are telling this court a terrible untruth - where did you accompany him?

A: In shops where coffins are being bought.

Q: Where?

A: We bought the coffin at the shops at Bus Stop I forget the name of the shop. We bought the coffin at the shop at the mortuary right here.

Court: Where?

A: This Lesotho Funeral Service (indicating to a building adjacent to the High Court).

Court: Is that the Bus Stop?

A: No.”

As I observed DW1 Phamotse Moeno give evidence I gained the impression that he was not a truthful witness.

In the circumstances I have accordingly come to the conclusion that neither first Respondent 'Maphomolo Moipei Moeno nor her son is the rightful heir to the deceased Rosina Moeno in as much as first Respondent's late husband Lesole was never legally

adopted by Rosina's husband Letokoto. In fact I find that in 1942 when Lesole was born both Letokoto and Rosina were in their prime as far as child bearing age was concerned. DW1 Phamotse Moeno concedes that Letokoto was 32 years while Rosina was 23 years then. He further concedes that the couple was "still expecting children." I accordingly reject as false therefore the suggestion that Letokoto and Rosina adopted Lesole as their heir simply because they had no children at that stage.

I am satisfied from the evidence before me that Letokoto brought up Lesole not because he had adopted him as his son but simply because the latter was a child of his sister. I find that this is exactly a situation envisaged by Sebastian Poulter: Family Law and Litigation in Basotho Society at page 238 wherein the learned author states as follows:-

"It is not sufficient to show that the deceased brought up the child and treated him as his own, for instance by paying the expenses of his circumcision or compensation for his delicts or *bohali* on his marriage. These are equivocal acts and may represent no more than kindness and it is a very frequent occurrence for children to be reared by their uncles or grandparents or other relatives without the permanent transfer of parental rights or duties. This latter practice is often found convenient for personal or economic reasons and serves to cement family relationships; it is only temporary and the child may be recalled at any time by its parents."

This statement commends itself to me.

Mr. Pheko submits that if Letokoto's first wife 'Makhethollo is still alive then she is Letokoto's heir. The difficulty with this submission is that, as earlier stated, PW1 Ts'oanyane Moeno was not challenged in his evidence that 'Makhethollo passed away somewhere in Johannesburg. In the circumstances I accept the evidence of PW1 on this issue and reject that of DW1 and DW2 as false.

In the result therefore I have come to the conclusion that the applicant is the rightful heir to the deceased Rosina Moeno by descent and by being the nearest senior male related to the deceased by blood and that consequently he has the duty or right to bury the deceased.

I draw comfort from the statement of Sebastian Poulter (supra) at p 231 - 232 to the following effect:-

“If the deceased died without any male issue there is no heir stricto sensu, unless one is born posthumously through the kenelo system or otherwise and, even so, such a son may not necessarily gain recognition today as the heir.

Next, in descending order of precedence come the people listed below; if any person within the appropriate category is alive at the deceased's death he or she succeeds to the estate in preference to those in subordinate categories:

- (1) The deceased's widow in terms of section 11(2) of Part I of the Laws of Lerotholi;
- (2) the deceased's father;
- (3) the deceased's grandfather;
- (4) the deceased's brother, in the following order of precedence -
  - (a) the eldest brother in the deceased's own house;
  - (b) the eldest brother in his father's senior house;
  - (c) down through the order of houses from senior to junior; within any house the eldest in age taking precedence over younger members.

Where any brother has died before the deceased, leaving male issue alive, such a son will inherit in his place. Similarly in the absence of a son, that brother's widow will take.

(5) The nearest male related to the deceased by blood."

I feel it must also be recorded that a sense of what is right tells me it would be against public policy to let the deceased be buried by an illegitimate nephew in preference to family members. This court is not prepared to be part of such a novel situation in Sesotho law and custom.

See Lebohang Sello v 'Mamotlatsi Semamola and 2 others  
CIV/APN/319/96 (unreported).

In the circumstances I confirmed the Rule in terms of prayers 1(a) and (b) of the Notice of Motion.

For the avoidance of doubt the order of court shall read as follows:-

(a) The applicant **Masheane Moeno** is hereby declared the sole heir of the deceased **Rosina Moeno** and as such the person entitled to bury the deceased.

(b) The first, second and third Respondents are hereby interdicted from removing and burying the deceased **Rosina Moeno** at any place save the one determined by the Applicant **Masheane Moeno**.

(c) In exercising his right of burial of the deceased as aforesaid the Applicant **Masheane Moeno** shall act in consultation with first

Respondent in order to bring about a decent burial to the deceased but the Applicant Masheane Moeno shall however have the final say in the event of a dispute arising therein.

(d) First, second and third Respondents shall pay costs of this application.

  
M.M. Ramodibedi  
ACTING JUDGE

**For Applicant :** Mrs. Kotelo  
**For Respondents:** Mr. Pheko.