

CIV/APN/317/2011

IN THE HIGH COURT OF LESOTHO

In the matter between:

‘MANKHOKO MAKHOALI

Applicant

And

RETHABILE LEBONA

1st Respondent

COMMANDER LDF

2nd Respondent

ATTORNEY GENERAL

3rd Respondent

MASTER OF THE HIGH COURT

4th Respondent

JUDGMENT

Coram: **Hon. Hlajoane J**

Dates of Hearing: **7th May. 2012.**

Date of Judgment: **18th September, 2012.**

Summary

First respondent having raised some points of law – Points of Law not going into the roots of the matter – Points of Law raised being dismissed – Parties being allowed to argue the merits of the case.

[1] This is an Application wherein the applicant approached the Court on urgency praying for amongst other an interdict and restraining order.

[2] Some points *in limine* were raised in the first respondent's answering affidavit, and they are the following:

- (a) Non-joinder
- (b) Dispute of fact
- © Inordinate delay
- (d) Lack of Urgency
- (e) Wrong forum and breach of **Rule 6 of the High Court Rules.**
- (f) Non-disclosure of material facts.

[3] **On non-joinder**

The first respondent argued that applicant has failed to join the following:

- (a) The Lebona family
- (b) The Chief of Letuka Mantsonyane
- (c) The Principal Chief of Matsieng
- (d) The District Administrator – Maseru
- (e) The Master of the High Court.

- [4] First respondent said that in motion proceedings, once a party takes a point *in limine* of non-joinder, such cannot be rectified as it is considered fatal to the proceedings. That a party in motion proceedings stands or falls by its founding papers. That is trite law that such a party cannot be allowed to rectify, amend or buttress its founding papers either in reply or through an application to so amend or rectify.
- [5] But the Applicant on the other hand had a contrary view. He showed that the pinnacle of law in pleadings in regard to non-joinder is that parties sought to be joined must have a direct and substantial interest in the outcome of the matter, or they must be necessary parties. Necessary parties being people or parties that are likely to be affected by the outcome, the fundamental consideration being the existence of a right of relief in relation to such a party.
- [6] In *casu*, can it then be said that the list of people as shown by the first respondent, are likely to be affected by the outcome in these proceedings. The Court will take a judicial notice of the fact that it is always the family which has to appoint the heir or the beneficiary.
- [7] That once the family will have decided on the name to succeed, then the name will be forwarded to the area Chief for authorization

and onward transmission of such a name to the Principal Chief. The Principal Chief will in turn write to the District Administrator of the district concerned and the last office will be the office of the Master of the High Court to be informed.

- [8] But as I see things a procedure has been designed for reporting on the succession or heirship in the estate of the deceased, but such cannot be taken or considered as necessary parties. Certain people and offices will be involved because of the procedure that has been designed and the office of the Master being the last office to report to in terms of the law.

[9] **Dispute of Fact**

The point here has been that Applicant was quite alive to the fact that there would be a dispute of fact between him and the Lebona family. But Applicant in response showed that first respondent was not being bona fide because it was difficult for him as applicant to have foreseen that the Lebona family would dispute her beneficiary rights which are totally not governed by the customary law or even need the Lebona family. That being the case the Court considers that there is no dispute of fact.

[10] **Inordinate Delay**

First respondent here argued that the deceased died in April 2011 and was aware of the fact that he, first respondent, was

immediately appointed heiress to her father's estate. That despite that knowledge, she only approached this Court on the 22nd June 2011, when every process by all relevant authorities to recommend, endorse and appoint first respondent had been given effect.

[11] But the applicant considered the time she took before bringing this application to have been reasonable under the circumstances of this case. Her reason being that she had been requested by the Lesotho Defence Force as she presented the letter for their nomination as beneficiary, to bring a letter from the family entitling her to receive the monies of her late husband. But the family was refusing to give her such a letter and had to seek assistance from relevant authorities.

[12] The Court under such circumstances feels that the period of two months can therefore not be considered as unreasonable as there has been an explanation for the time spent before bringing this case to Court. According to the applicant the decision to appoint first respondent was made during the time that they had become aware of applicant's appointment as the beneficiary.

[13] The applicant even had to go to the chief of Ha Letuka, the Principal Chief of Matsieng and to the Master of the High Court in

her attempts to secure the letter that was needed by the Lesotho Defence Force. The delay was therefore reasonable.

[14] **Urgency**

Considering what has been said above under inordinate delay, it became evident that the matter cried out urgency. Applicant had a fear that if she did not come to Court for relief the first respondent who had a letter from the family entitling her to receive monies from the Lesotho Defence Force was going to jump at once and frustrate the whole efforts of applicant claiming the monies which she considers to belong to her.

[15] **Wrong Forum**

First respondent's counsel argued that applicant has been in breach of **Rule 6 of the High Court Rules** in that interdicts are cognisable and justiciable in the Subordinate Courts. She considered the remedy sought by applicant as a matter of succession and its consequences.

[16] Applicant in response held a different view in that the application is not about succession but about the *stipulario alteri* (a contract for the benefit of the third party). That the application is about the declaration of rights which is a matter that can only be heard before this Court and not the subordinate Court. That the similar

issue was decided before this Court in **Mohau v Lesotho Electricity Corporation and Others**¹.

[17] **Non-disclosure of Material Fact**

It was argued that applicant failed to disclose that she is a married woman, not to the deceased but in the family of Makana in Koro-Koro Maseru. That the marriage to Makana preceded her alleged marriage to the deceased.

[18] The marriage to Makana family has been vehemently denied by the applicant who instead mentioned that she was only cohabiting with the said Makana but not before her marriage to the deceased. The question being that of enforcement of rights and not about succession.

[19] The points *in limine* raised must all be dismissed and the parties are allowed to argue the merits of this application. Costs to be costs in the concise.

A. M. HLAJOANE
JUDGE

For Applicant: Mr Khumalo

For Respondents: Ms Maapesa

¹ C of A (CIV) No.8 of 2009

