

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

MOROESI GETRUDE TAU-THABANE (N.O) Applicant

And

SELOMETSU NTLHAKANA 1st Respondent

PALESA NTLHAKANA 2nd Respondent

MASTER OF THE HIGH COURT 3rd Respondent

ATTORNEY GENERAL 4th Respondent

JUDGEMENT

Coram : Hon. Monapathi J

Date of Hearing : 16 October 2012

Date of Judgement : 18 October 2012

SUMMARY

*Once an estate is liable to be administered in terms of **Administrational Estates Proclamation 19/1935**, it is not feasible for any party or beneficiary who has even benefited to renege and to claim, instead, to be subject to customary law and that the estate be administered by custom.*

*The requirement of **High Court Rule 8 (19)** (to file copy of application with Master of the High Court) is not so inflexible and iron-cast so as to render the application before the High Court which has not been served on the Master nugatory or invalid where the Master of the High Court is herself a party before the court like in the present application.*

STATUTES

Administration of Estates Proclamation 19/1935

[1] This is an application for an interdict against collection of rentals and occupation one of the properties of the Deceased estate of the late Ephraim Thabo Ntlhakana (Thabo Ntlhakana). It is essentially against the First and Second Respondents who are son and daughter of the Deceased.

[2] The Applicant is an Executrix of the said estate of Thabo Ntlhakana. The First and Second Respondents are the children of Thabo Ntlhakana. The First Respondent is the only biological son of Thabo Ntlhakana. Thabo Ntlhakana had been predeceased by his wife. The Second Respondent is not opposing this application. The First Respondent opposes the application.

[3] It is common cause that after the death of Thabo Ntlhakana, his estate was reported to the Master of the High Court (the Master) by one Nthutsoa Ntlhakana (one of the beneficiaries). The Applicant said that such a report was in terms of Section 13 of the ***Administration of Estates Proclamation No. 19 of 1935***. Subsequent to the reporting, the family meetings were convened. In one such meetings one of the relatives by the name 'Mamoliehi Ntlhakana was appointed the Executrix though she later resigned.

[4] It is undisputed that after the appointment of (the Applicant Executrix) she had explained all the implications and modalities of how all the beneficiaries were going to benefit out of the estate in question. The Master had also called the meeting(s) for all those concerned, including the First Respondent. This was in order to explain the laws that were to govern the estate in question.

[5] All the parties were said to have cooperated well with the processes mapped out by the Applicant, though the First Respondent would later claim that he had not fully appreciated what was happening. One of the instances of such cooperation was pointed out to be that all the children of Thabo Ntlhakana, the First Respondent included, had been making requests for financial assistance from the Executrix, and those requests had been duly honoured.

[6] The main bone of contention which brought about this application is however that, the First Respondent continues to collect the rentals from some of the estate's property and is said to use such rentals money for his sole personal use to the detriment of the other beneficiaries.

[7] The Court was informed that the First Respondent had handed over the leases or title documents of the estate's property to the Applicant after being served with the application. What remains in issue among others is essentially a refusal to hand over some of the estate's property and a refusal to let go the collection of the rentals from the mentioned properties.

[8] In response to the application, the First Respondent raised two points-*in-limine*. Counsel for both parties commendably agreed that those points be argued together with the merits.

[9] The first point was to the effect that the application was defective since it failed to comply with **Rule 8 (19) of the High Court Rules**. Further that there was no allegation by the Applicant that a copy of the application had been forwarded to the Master. The Applicant submitted that it was shown on the papers in terms of Annexure “MG2” that the authority of the Master was given and in addition to that, the Master is cited on the papers “although not served with copy before” application is filed with the Registrar. I would condone this in the circumstances of the application.

[10] One of the reasons is that the **Rule 8 (19) (a)** in issue requires that the Master to be served so that she can provide a report. In my view that the Rule has been duly complied with, or that failure ought to be condoned in the circumstances of the case. Mainly because the Master herself is a party to these proceedings. I agreed that there is no merit in the First Respondent’s contention that **Rule 8 (19)** had not been complied with and the point is accordingly dismissed.

[11] The First Respondent further raised a point to the effect that the Executrix was appointed by the Assistant Master and not personally by the Master. The point here is that the Assistant Master had no authority to make such an appointment, that it was only the Master who could personally do that. No authority however shown for the submission. The Applicant correctly submitted that the point was not well taken ***Administration of Estates Proclamation*** clearly clothed the Assistant Master with such powers. This point ought to be dismissed as well. See section 4 (2).

[12] The basis upon which the First Respondent refused to hand over the estate's property in issue to the Applicant as he submitted was that he was opposed to the fact that his late father's estate should be administered by the Master. He claims that in terms of Section Eleven (11) of the ***Laws of Lerotholi***, he is the heir to his father's estate and had all the rights to collect the rentals from such property. This was not surprising because First Respondent had glibly referred to

family meetings which were held at which he was appointed as heir.

[13] To the First Respondent's claim of heirship the Applicant on the other hand contended that the First Respondent's words were not consistent with his conduct since he had always been present in meetings which were convened by the Master. At those meetings he did not raise the issue that his father's estate was to be administered in terms of custom. On the contrary, the First Respondent fully co-operated with all the processes. To this, the First Respondent claims that he had never understood such processes. When shown that that was not a good defence, Counsel for the First Respondent would not issuably respond. Again it was not surprising because this had all the hallmarks of an afterthought.

[14] The Applicant contends that if anything, the First Respondent had waived his right for the estate to be administered according to customary law. Further that it was not for the Court to decide whether the estate in question was to be administered in terms of custom and not in terms of the **Administration of Estates Proclamation** section 3 (b) (*supra*). It is not disputed that the issue of the administration of the estate according to custom or **Proclamation** had never been raised nor challenged before the Master, unless it could be claimed that the latter had ignored such an objection. Counsel could not help but conceded.

[15] It is now settled and there is a wealth of authorities to the effect that it is the Master who should be satisfied and not the court as to whether the estate should be administered by custom or in terms of the **Administration of Estates Proclamation** (*supra*). (See: s. 3 (b) of the **Proclamation**). It follows as day follows the night that the claim or defence by

the First Respondent is made before a wrong forum and cannot be sustained.

[16] This proposition about the characterization of the estate (as one to be admitted according to customary law) is further vitiated by the fact that the First Respondent had at all material times been duly complying with the administration of the estate by the Master without any problem but the difficulty is just to let go the issue of rentals money so that it could be for the benefit of all the beneficiaries. Indeed the Applicant has to have full and effective control of the estate in order to be able to administer it.

[17] For the foregoing reasons, the application succeeds. There is no order as to costs.

T. E. MONAPATHI
JUDGE

For Applicants : Mrs. Tau-Thabane
For Respondents: Ms. Mocheko