IN THE HIGH COURT OF LESOTHO

CIV/APN/73/2013

In the matter between:

'MANTSUBISE KHASAKE - MOKHETHI	**1ST APPLICANT**
PUSETSO KHASAKE-MALAKOANE	**2ND APPLICANT**
And	
TSABALIRA MOLOI	**1ST RESPONDENT**
SEITHATI NALE-MASUPHA	**2ND RESPONDENT**
CHEMANE NALE	**3RD RESPONDENT**
NTHATI MOKITIMI	**4TH RESPONDENT**
MOSIUOA KHASAKE	**5TH RESPONDENT**
STANDARD-LESOTHO BANK	**6TH RESPONDENT**
NEDBANK LESOTHO LIMITED	**7TH RESPONDENT**
CENTRAL BANK OF LESOTHO	**8TH RESPONDENT**
LAND ADMINISTRATION AUTHORITY	**9TH RESPONDENT**
MASTER OF THE HIGH COURT	**10TH RESPONDENT**
ATTORNEY GENERAL	**11TH RESPONDENT**

JUDGMENT

Coram : Honourable Acting Justice E.F.M. Makara
Dates of Hearing : 25 April, 2013

Date of Judgment : 22 August, 2013

Summary

An application for a Will to be declared invalid since it hasn't complied with the requirements in sec 3 (b) of the Administration of the Intestate Procl No. 19 of 1935 and for interdicting the executrix from alienating the family matrimonial home - The testetrix having not stated that she had abandoned the African way of life so that her estate could not be devolved in accordance with the Customary Law but according to the terms of the Will – The testatrix having initially been married customarily to resurrect the house following the death of the applicants' mother who is the 1st wife of their late father – the testatrix and her late husband having subsequently converted their marriage to a civil one – There being evidence that she was a professional woman who led a modern mode of life, was a Christian and had bank savings accounts – The testatrix having directed that her matrimonial family home estate be given to her own maiden family relatives and basically the same with the immovable properties – The court finding that the Will is invalid because of its failure to meet all the sec 3(b) essentials – Her endevour to alienate the family homestead land held to be against the Basotho public policy, social norms and the legislative scheme from the inception of the Land Act of 1979 – Land having in principle been scheduled for inheritance within the family – The estate to devolve in accordance with customary Law - The court declining to declare the applicants as the customary heirs over the estate since that is within the remit of the Local Court save where the High Court grants a dispensation under sec 6 of the High Court Act 1978 – The court's refusal to follow a foreign decision which based on a constitutional provision of the State concerned, accommodated an interpretation upholding the equality right over a custom which discriminates on a sexual ground – The Lesotho Constitution providing otherwise – International Law to be considered for application conscientiously that Lesotho follows a dualist approach which necessitates its prior domestication.

ANNOTATIONS

CITED CASES

Sebakeng Mokete and 4 other V Lerato Mokete & 2 others C of A (CIV) NO.19/2004
Khatala V Khatala (1963-1966) HCTLR 97 at 100 B-C.
Ntloana and Another v Rafiri C of A (CIV) No. 42 of 2000
Quirico V Pepper Estate (1999) 22 B.C.T.C 32 at 15 and 16
Ketcham V Walton 2012 BCSC 175.

Edith M MMusi & Other v Ramatele and 2 Others MAHLB -000836-0
Northman v Borough of Barnet 1978(1) All ER 1243
Seluka v Suskin and Salkow 1912 TPD 265

STATUTES & SUB-LEGISLATION
Administration of Estates Proclamation No 19 of 1935
Land Procedure Act No 25 of 1967,
Land Act No 20 of 1973,
Land Act No17 of 1979
Land Act No8 of 2010.
High Court Act No 5 of 1978
Laws of Lerotholi
The Constitution of the Republic of Botswana
Lesotho Independence Constitution of 1966
Lesotho Constitution of 1993

INTERNATIONAL CONVENTION
Convention on the Elimination of Discrimination against Women (CEDAW)

MAKARA A.J

[1] This judgment is a consequent result of the motion proceedings initiated in this court by the two (2) applicants against the eleven (11) respondents listed therein. The applicants have, in summarized terms, approached the court for the issuance of a *rule nisi* order calling upon the respondents to show cause why the court may not make an order:

> 1. Declaring as null and void *ab initio* all the wills, codicils and other testamentary acts executed by the late Sefora Melita Khasake (S.M.Khasake);
>
> 2. Interdicting or restraining the 1st respondent Tsabalira Moloi from alienating and spoiling or dealing in any manner, whatsoever with the side bearing a lease number which is the subject of the last will and testament of the late S.M.Khasake under registration number 73/2003 pending the finalization of this application;

3. Interdicting and restraining the 2nd respondent Seithati Nale Masupha and the 3rd respondent Chemane Nale from accessing and operating the bank accounts of the late S.M.Khasake held at NED Bank Lesotho Ltd, Standard Lesotho Bank and The Central Bank of Lesotho (Treasury Bills) under account numbers 022000020234, 012102187901 and 182-10092003 respectively pending the final determination of this case.

4. Directing the 6th, 7th and 8th respondents which are the banks in which the said accounts are held, to freeze the operation of the involved bank accounts pending the finalization of the present proceeding challenging the authenticity and the validity of the last will and testament of the said deceased.

5. Interdicting or restraining the 9th respondent being the Land Administration Authority (LAA) from authorizing any transfer, mortgage or any form of disposal of the site of the late S.M.Khasake situated at Ha-Matala and numbered 1433-212 pending the finalization of this matter.

6. Declaring the applicants as the customary interstate heirs in the balance of the half share of the estate of their late father Basia Israel Khasake situated at Ha-Matala in Maseru.

[2] The court had on the 22ndFebruary 2013, which was the date on which the application was moved by Adv Mathe for the applicant in the company of Adv Mohapi for the 1st and 5th respondent; issued the desired *rule nisi*. The respondent's counsel had consented to the order being sought for and to the incidental prayer for the amendment of the application. The matter was scheduled for hearing on the 25th April 2013 and the interim rule was accordingly extended to that date.

[3] The common cause facts which constitute the landscape of this case are that the applicants are both the daughters of Basia

Israel Khasake and his wife Masalang Matseliso Khasake who died in 1992 and 1978 respectively. They were blessed with four(4) children namely Morakane Khasake who is deceased, Mantsubise Khasake Mokhethi the 1st applicant , Pusetso Khasake Malakoane the 2nd applicant and their only brother Salang Khasake who passed away in 2004. The family had established its own homestead in the district of Mohale's Hoek. The late Basia Khasake married S.M.Khasake in 1980. The marriage was initially contracted customarily and was subsequently concluded civilly at the District Administrator's office in Maseru. The couple consequently established another home at Ha Matala in the district of Maseru. The marriage was, by operation of law, in community of property.

[4] S.M.Khasake's soul was summoned to heaven on the 1st February 2013 and she was buried at Ha-Matala in Maseru. It has transpired that she had prior to her death executed a will which constitutes the subject matter in this case. She had submitted the will before the Master of The High Court who accordingly accepted and registered it as No.73/2003. The will proceeds from the premise that the late revokes cancels and annuls all the testamentary documents previously written by her. She has thereafter directed that the estate which she owns after the inheritance from the properties of her late husband be not administered under customary law, but under the **Administration of Estates Proclamation No. 19 of 1935** or any other comparable legislation.

[5] To facilitate for the execution and the ultimate realization of her intentions in the Will, the testatrix appointed Nthati Mokitimi who is the 4th respondent as its executrix and endowed her with the power of Assumption. In the same vein, she granted Adv. N.G.Thabane to provide guidance in the execution of the Will.

[6] The testatrix has in the Will bequeathed the estate thus:

1. A site situated at Ha-Matala and the developments therein held under lease number 1433-212 to Tsabalira Moloi who is the 1st respondent and whom she describes as her beloved nephew.

2. All immovable property in the above mentioned home held under lease number 1433-212 to Seithati Nale-Masupha who is the 2nd respondent and whom she has called her niece.

3. Moneys held in her account number 022000020234 held at Nedbank to be shared equally between the 2nd respondent and Chemale Nale who is the 3rd respondent.

4. The moneys held in account numbers 012102187901 and 182-10092003 held at Lesotho Bank and the Central Bank respectively to the 2nd respondent. It must be highlighted that the testatrix was born from the family of Moloi.

[7] Mosiuoa Khasake who is the 5th respondent is fathered by the late Salang Khasake who as aforementioned is the only son of the deceased Basia Israel Khasake and his 1st wife. He is presently employed as an engineer for the China Gio Engineering Cooperation and he is recognized by the parties as the customary heir of his father Salang Khasake. This renders him to be resultantly the customary heir of the estate of his late grand parents. Notwithstanding the background credentials which he commands

and the fact that he has been featured in this case as the 5th respondent, it is worth noting that he has not contested the application. On the contrary he has filed as supportive affidavit in favour of the executrix Nthati Mokitimi who is the 4th respondent in the matter. He has in a nutshell, deposed that he is not interested in the inheritance of the estate which its deceased owner S.M.Khasake did not want him to benefit from and he did not controvert the authenticity of the will which constitutes the subject matter of this case. The implication is that he subscribed to its validity both in form and content.

[8] There is a divergence of views between the parties which hinges primarily on their respective interpretation of the content and the form of the Will regarding its compliance with the law and on their conception of the status of the marriage of S.M.Khasake to Basia Israel Khasake. The *substratum* of the applicants' case is that the Will is in law defective both in form and content in that it does not comply with **sec 3(b)** of the **Administration of Estates Proclamation No 19 of 1935.** They have, in relation to the status of the subsequent marriage, projected their position to be that the marriage constituted a second house of their father. Their indication hereof is that their late biological mother had represented the 1st house. In the circumstances, they have asserted that the children of the 1st house were adopted into the second house and that they as a result, reciprocally maintained at all material times, the mother and children harmonious relationship.

[9] The applicants have described the 5th respondent Mosiuoa Khasake as a legally universal intestate heir of the whole estate of their late father Basia Israel Khasake under the Basotho customary law. They have, nevertheless, disclosed it to the court that the 5th respondent has unequivocally demonstrated lack of interest to protect his own universal intestate inheritance and thereby also protect their half share as applicants. The impression which the applicants portray to the court is that they, given the inaction of their nephew who is the 5th respondent, be recognized as the intestate heirs to the whole estate of their late father. The indication being that the estate comprises of all the properties in the district of Mohale's Hoek and Maseru inclusive of all the moneys held in the banks referred to in the application.

[10] It is the applicants adamant and consistent standpoint that their stepmother S.M.Khasake led a Basotho customary way of life throughout her lifetime and that she never abandoned her customary way of life. They have illustrated this by explaining that she had at all material times observed and practiced the Basotho customary ritual practices. In support of this assertion, they pointed out that after the death of their late sister Morakane Khasake, she wore a black mourning dress, she bore allegiance to the chieftainess Posholi who is the chief of their village at Ha-Marite

in Mohale's Hoek, she attended the lithlobohanyo[1] when the 5th respondent got married and as a stepmother gave koae to the newlywed as a customary gesture of her welcome into the family. Against this backdrop, they maintain that their stepmother was not qualified to execute a Will in accordance with the **Administration of Estates Proclamation No.19 of 1935.** They on the contrary, hold a view that given her mode of life, her estate should be devolved in accordance with the Basotho Customary Law.

[11] The irony in this case is that the beneficiaries of the Will being the 1st, 2nd and 3rd respondents have not opposed the application or contested it in any manner whatsoever. The peculiar aspect of it is that it is principally the executrix Nthati Mokitimi who is the 4th respondent who has opposed the application and filed her counter papers. She has in this respect enjoyed the support of the 5th respondent Mosiuoa Khasake. In the meanwhile, it is worth noting that the 6th to the 11th respondents did not oppose the application. The implication being that they had respectively decided to maintain their neutrality in the matter and thereby leaving it for contestation by whoever may have direct and substantial interest therein.

[12] Nthati Mokitimi who is the executrix and also the 4th respondent has given the content of her answering affidavit featured

[1] This is a traditional sitting between the families if the bride and groom which is held on the evening of the day on which the marriage was celebrated. Its focus is to provide an opportunity to be introduced to one another and to providence to the newlyweds.

as the main respondent in the matter. This is demonstrated by the fact that her response therein constitutes a foundation of the respondents' counter papers to the application. The content of her testimony traverses her status as an executrix to that of a person who seeks to demonstrate a command of the intricate affairs of the family of the decease Basia Israel Khasake in particular about the properties of the estate and how it is being administered. She has further in the same connection, vehemently contradicted the applicants' deposition that their stepmother's marriage constituted a second house by counter arguing that this could not be so since the marriage was concluded in terms of civil rights.

[13] The 4th respondent has in her executrix status, denied that the late S.M.Khasake was leading a Basotho way of life during her lifetime. She attributed this to the fact that the deceased was a teacher, had obtained a loan from Lesotho Bank to build her house at Ha-Matala, she possessed bank accounts, had no cattle, went to church regularly, her funeral was conducted by the church and not by customary rights and that though she was initially married customarily this was superseded by a civil rights marriage. Thus according to her, the deceased S.M.Khasake had by virtue of having abandoned the Sesotho mode of life and adopting a European one, enjoyed an unlimited freedom to execute a Will in accordance with **Administration of Estates Proclamation No.19 of 1935.** She ultimately maintains that the Will is valid.

[14] Mosiuoa Khasake being the 5th respondent has in his support of the 4th respondent's founding affidavit, averred that it ultimately came to his discovery that the Will in question is authentic, reflective of the wishes of the deceased and therefore uncontestable. He has in this regard confided to the court that he had been guided towards this realization by the 4th respondent and stated that he has no desire to inherit the property contrary to the wishes of its owner. The deponent has rejected the applicants' assertion that the late S.M.Khasake had attended the *lithlobohanyo* as a sign that she was leading a customary mode of life. His explanation was that she had attended the customary event in compliance with a special request from him and his uncles and that, nonetheless, she never participated in that custom. He consequently joins the 4th respondent in calling upon the court to dismiss the application.

[15] In the forgoing landscape of facts which are of common cause nature, and those in which the parties share divergent views, the court identifies the following key issues:

1. The question of the legal nature of the marriage between the Basia Israel Khasake and the late executrix S.M.Khasake and its consequence upon the estate and the children of the deceased Basia Israel Khasake and Masalang Matseliso Khasake.

2. The validity of the Will in the light of the **Administration of Estates Proclamation No19 of 1935** and other applicable laws.

3. Whether considering the legislative scheme in Lesotho, Customary Law and the sense of righteous reasoning it would be morally and or legally permissible for a married woman to exploit

the freedom of testation in such a way that she alienates the land of her matrimonial family by executing a Will by which she bequeaths it to her maiden relatives.

4. The qualification of the applicants to inherit as customary intestate heirs in the half-share of their father's estate.

[16] The court interprets the nature of the marriage between Basia Israel Khasake and S.M.Khasake to have been a civil marriage. This holds despite the fact that the marriage was preceded by a customary law one. Their intention in subsequently solemnizing the marriage through civil rites appears on the balance of probabilities to have been calculated at converting the initial type of marriage into the civil one. This notwithstanding, the perception of the court is that immediately when the customary marriage was concluded between Basia and his second wife, she had by operation of the Basotho Customary Law resurrected the 1st house. The reasoning behind this conclusion is that the second wife had stepped into the shoes of the 1st wife. This in custom is known as *ho tsosa ntlo(to resurrect the house).* Even if she had from the onset been married civilly she would nonetheless still had stepped into the shoes of the 1st wife. By the dictates of Customary Law, she automatically assumed the position of the deceased mother and thereby becoming a substitute mother of the children born from the late Basia and his 1st wife. The motherhood bestowed upon her the parental obligations over the children. The later deserve from her the treatment which she would comparatively expect from her own mother.

[17] The status of being a wife which 2nd wife attained after her marriage to Basia Israel Khasake had, in addition to the motherhood and its corresponding duties, assigned her a responsibility to protect and manage her marital family properties in its best interests. The responsibility transcended the lifetime of her husband. This holds regardless of whether or not she was married customarily or civilly. The consideration applies more to the immovable assets of the family particularly over the land.

[18] The question of the validity or otherwise of the Will in consideration is determinable on the basis of the **Administration of Estates Proclamation No.19 of 1935.** In principle, this legislation is intended to address the devolution of the estates of the non Africans in Lesotho. It only applies to them by operation of a special dispensation therein. The relevant provision which elucidates this position is **sec 3 of the Proclamation** which decrees that:

This proclamation shall not apply to-

(a) .....

(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.

[19] Given the legally based attack leveled against the validity of the Will, **sec 3(b)** constitutes the basis upon which the controversy surrounding the sufficiency or otherwise of the document is to be

tested. It transpires from the section that the essential requirements for a Will to satisfy its validity test are that its executor must have:

> 1. if married, done so under European law
>
> 2. abandoned the Basotho customary way of life.
>
> It appears imperative that the two requirements must each be fulfilled by the executor for him to qualify for the indulgence provide for a specified class of Africans under the section.

[20] The two requirements in the section when juxtaposed with the content and the form of the Will in question, reveal that its *executrix* has not included these pre conditions therein. The technical legal effect of the omission is indicative that she has not *ex-facie* the document demonstrated that she commanded the credentials to qualify for the dispensation. In the understanding of the court, the section has been couched in mandatory terms to designate a class of Africans to whom the Proclamation in principle applies.

[21] In the view of the court, there is no merit in the respondents' argument that it suffices for the *executrix* to have inscribed it in the Will that she was civilly married to her late husband and that she led a modern way of life to prove that she had abandoned the African life style. It would be unrealistic and over simplistic to come to an inferential conclusion that since the executrix was a professional woman, had bank accounts, acquired a loan, had no cattle, attended church regularly and was buried by the church and not customarily; are indicative that she had adopted the European

system of life. The reality is that the socio-economic dictates of our times demand that everybody irrespective of ones ethnicity background and or cultural orientation should lead a similar lifestyle. There is absolutely nothing exceptional about her way of life such that it could be concluded that she had abandoned the African mode of life. The decisions in which these were taken to be some of the criterion indications of a Mosotho who has abandoned the Basotho way of life and adopted a European one, were basically inspired by a Eurocentric and colonial way of thinking. This jurisprudence must be contextually applied.[2] The indispensability of the two prerequisites to be taken on board by the executor of a Will to render it valid and authentic, was enunciated in **Sebakeng Mokete and 4 other V Lerato Mokete & 2 others C of A (CIV) NO.19/2004**. It had, per Smalberger JA, been articulated that:

> In holding that the Common Law governed the estate of the deceased, the court *a quo* appears to have been of the view that the proviso to **sec 3(b)** of the proclamation is satisfied where there has been a marriage by civil (European) law. This is clearly not the case…….. The proviso excludes from the operation of **sec 3(b)** Basotho who have abandoned tribal custom and adopted a European way of life, **and** who, if married, have married under European Law. It therefore postulates **two** requirements, both of which have to be present for the proviso to come into operation. Only the second (marriage under European Law) has been established. The first (abandonment of tribal custom and adoption of European mode of life) was not raised in the affidavits and has received proper consideration in this matter.

[22] In its postulation of the law on the interdependence of the two requirements under the section, the Court of Appeal had cited with

[2] The test prescribed for the determination of a Mosotho who has abandoned the African mode of life could have made sense in 1935 and perhaps up to the late 1940s. At present every Mosotho uses modern facilities of life without necessarily having abandoned the African way of life.

approval the law pronounced on the subject in the celebrated **Khatala V Khatala (1963-1966) HCTLR 97 at 100 B-C.**

[23] On the strength of the court's stated analysis of the section and the reinforcement which it has enjoyed from the **Mokete and the Khatala cases *(supra)*,** the perception of the court is that the failure by the *executrix* to have stated the mode of life abandonment dimension in writing the Will was a fatal mistake. It cannot resultantly be regarded as being valid.

[24] The court attaches great significance to the fact that the legislature has in the same section, entrusted the Master of the High Court with the obligation to satisfy herself that the testator has abandoned the African mode of life and adopted the European one. The understanding of the court is that the master would conscientiously of this duty; satisfy herself that the abandonment has indeed happened, by mounting some investigation to ascertain the fact. It is not conceivable that the legislature had intended the master to simply from the comfort of her chambers, make the determination. The approach would be a disservice to the section. The master should not rely solely upon the appearance of the two **sec 3(b)** prerequisites in the Will. She must be seen to have embarked on some investigative inquiry into the matter. This would be imperative to guard against a possible deprivation of the customary heir (where there is one) from being disinherited at the

stroke of a pen based upon a desire to technically circumvent the law through a deceitful claim.

[25] It has not in the instant case been disputed that the *testatrix* had initially been customarily married to her deceased husband and that it is doubtful that their subsequent civil marriage converted the original marriage to a civil one. It is only the *testatrix* and her late husband who could explain their intention for moving from one valid regime of marriage to the other. There are socio-economic challenges on the grounds which compel customarily married couples to subsequently conclude a civil marriage such as the Christian religious pressures or a need for a certificate to prove a marriage. The interpretation that the act amounts to a conversion, would risk the court basing its finding on sheer speculative thinking since it would not be fortified with the relevant and material evidence in that determination. The court is however, mindful of the Court of Appeal decision in **Ntloana and Another v Rafiri C of A (CIV) No. 42 of 2000** that the move is indicative of a conversion. It accordingly unavoidably adheres to that view.

[26] Notwithstanding the conversion of the marriage from a customary rights marriage to a civil one, it is yet another challenge for the respondents to **prove** that the *testatrix* had abandoned the customary way of life. It has in this respect, not been contested that she had worn a black mourning cloth after the passing away of the applicants' elder sister in accordance with the customs of the

Basotho people. It should suffice to state that the court does not believe the 5th respondent's averment that the *testatrix* had simply attended the *lithlobohanyo* but did not participate in that traditional event. Her presence was sufficient since it is not unusual for some people to be inactive in that families' sitting. The silence of the person present would be tantamount to the endorsement of the deliberations. **The conclusion is resultantly that the *testatrix* had not abandoned the Basotho way of life.**

[27] The court attaches little or no weight to the testimony of the executrix to the extent that she purports to traverse the subject of the mode of life which the *testatrix* had led during her lifetime. This is because she has in that regard, exceeded the parameters of status as the *executrix*. She as the agent of the Master of the High Court should have maintained her neutrality in relation to that contestation between the parties. Hers should simply have been a matter of executing a Will after she had exhibited her credentials to do so subject to the direction by the Master. It is only the beneficiaries, the 5th respondent and the Master who are qualified to respond to the merits in the applicants' founding affidavit. The latter could do so to demonstrate that she had satisfied herself that the *testatrix* had abandoned the African way of life. The disqualification of the *executrix* from deposing beyond matters within her official capacity was captured in **Quirico V Pepper Estate (1999) 22 B.C.T.C 32 at 15 and 16 in these terms**:

> [15].....It is a matter of indifference to the executor as to how the estate should be divided. He or she need only comply with the Will or any variation of it made by a court.
>
> [16] For all these reasons, the law anticipates the executor will remain impartial between the opposing beneficiaries where the proceedings are taken under the act all the executor need do is to appear at the trial if required and deliver to the court the Letters of Probate and financial documents showing the value of the estate. Even this may be unnecessary if the parties agree to admit copies of those documents into evidence without the attendance of the executor.
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> The legal principles postulated in **Quirico V Pepper Estate(supra)** were relied upon in **Ketcham v Walton 2012 BCSC 175.**

[28] The court considers it that the various phases of the evolution of the law pertaining to the rights over land has historically been legislatively shifted from the purely customary law era where these rights were dependable upon the will of the chief. It has from there, progressively been developed through the **Land Procedure Act No 24 of 1967, Land Act No 20 of 1973, Land Act No17 of 1979** and the present **Land Act No8 of 2010.** The latter two statutory regimes have introduced lease holding title to land. The underlying philosophy is that in contrast to the pre 1979 era, the right to own a lease over a residential or agricultural land is inheritable within the family. This is an antithesis to the times when the chief could through the annual land inspection process, unilaterally reallocate the land or simply be unilaterally expropriated by the State without any compensation. The foundational scheme is to guard against the alienation of the land from the family.

[29] The Basotho attach profound significance and value to land, particularly to residential sites. They relate their religious and cultural convictions thereon. The ash heap[3] is *inter alia* used for the traditional burial of the stillborns and the placentas of the children of the family. The ash heap is recognized as a point of reference for one to identify his roots and to develop a clear sense of belonging. A residential site is, in the same thinking, regarded as a foundation of the development of the family members and their aspirations in life and a place for the honoring of the ancestors. The fields, the kraals and tree plantations if any, are treated as an integral part of the homestead. It is in this context, that land, particularly a residential place is inheritable. The idea is to preserve the family soil for its perpetuity of the self determination of its members and the community. All these factors explain the Basotho inquiry in search of the ascertainment of the true homestead origin of a person by asking where one's grandmother's ash heap is situated. The expectation would be that the answer would describe the place with precision. The question is usually asked in these terms, *"Thotobolo ea nkhon'ao e hokae?"* (Where is your mother's ash heap?)

[30] The presented sociological landscape pertaining to the Basotho's perception of the land, dictates that the jurisprudence around the subject would primarily have to be developed within that context. In this background, the court must address a

[3] This is a homestead spot where the ashes are dumped.

necessarily incidental question as to whether or not the t*estatrix* as a widow who was married in community of property had the authority to execute a Will that bequeaths her matrimonial homestead to her maiden relative. The technical effect of the planned transaction is to transfer the site from her matrimonial family to her maiden one. It has to be highlighted that according to the laws and customs of the Basotho nation, a woman is married into the family through her husband. She in that capacity attains the status of **a mother** of the family and not just **a woman.** The position spontaneously assigns her the trusteeship over the family assets. This is expected to subsist during and after the lifetime of her husband. The emphasis would be to protect the family assets particularly the land in the best interest of the future generations of the family concerned.

[31] The above sociological based assertions primarily derive their authority from the constitution. In terms of **sec 156(1)** of same, saves the operation of the laws which existed before it came into operation on condition that such laws shall be construed with such modifications, adaptations, qualifications and exceptions which bring them into conformity with it. It is trite knowledge that Customary Law which is documented in the **Laws of Lerotholi**[4]**,** represents one such major laws. **Sec 35(1) of the Constitution** declares the intention of the State to ensure that every citizen has an opportunity to freely participate in the cultural life of the

[4] The Laws of Lerotholi represent an in exhaustive written collection of the Basotho Customary Laws. They were published by the Paramount Chief Lerotholi in 1959.

community. These sections have to be considered against the already stated progressive developments in the post 1973 land law regimes which have introduced lease rights over land and made these rights inheritable. The interpretation that the right to freedom of testation is absolute to the extend that a married woman could unilaterally through a Will, alienate her matrimonial family land by bequeathing it to her maiden relative, would be a foundational antithesis of the customary psychology of the Basotho, their Customary Law and the scheme in the existing land legislation which should be read in conjunction with the customary laws on succession.

[32] In few words, the alienation under consideration could amount to an act of betrayal against the family and is contrary to public policy. A clear distinction must be drawn between the western conceptualization of land as a purely economic asset as opposed to the African socio-economic one. A Mosotho *inter alia* uses a homestead land for cultural purposes. His vision is that after his death his children should convey his body to the graveyard from the same land. This idea would be totally alien to the western thinking.

[33] The Will is ultimately held to be invalid for lack of its inclusion of the essential requirements prescribed under **sec 3(b) of the Proclamation**. On this basis, it is decided that the estate should be devolved in accordance with the dictates of the Customary Law.

[34] Having indicated that the Will lacks the essential requirements under **sec 3(b) of the Proclamation**, the court lastly turns to address the applicants' prayer that they be declared customary intestate heirs in the balance of the half share of their late father. In this respect, the court notes in passing that in terms of **sec 11 of the Laws of Lerotholi**, a customary heir is the 1st male child of the 1st married wife and that in the absence of such a male issue in the 1st house, it shall be the 1st male child of the next house. This notwithstanding, it must be highlighted that this Customary Law position has been superseded by the statutory intervention that a widow assumes the heirship of the land rights upon the death of her husband.[5]

[35] It sounds illogical for the applicants to claim the heirship of the homestead land and yet they are presumably married in community of property with their respective husbands. The result of the issuance of a declaratory order to that effect would be to facilitate for the alienation of the land from the Khasake family to their matrimonial homes. There has to be certainty as to the person who is the heir to the land rights. It can not be said that a multiplicity of natural persons have inherited the land rights. Otherwise, unnecessary complications and conflicts would be

[5] This is provided for under sec 8 of the Land Act which has been amended specifically to override Customary Law in order to empower widows and to protect them against the greedy and domineering male heirs. It is, nevertheless, inconceivable that given the explained sociological perception of land among the Basotho, the legislature had by necessary implication contemplated that a widow married in community of property, would be at liberty to use the status for the alienation of the land from the family such that she could even bequeath it to her maiden family relatives.

created. A sub division of the rights to the land would be a different thing.

[36] The court feels that it wouldn't be appropriate for it to pronounce itself on the customary heirship status of the applicants. The reasoning in support of that attitude is that the Local Court is legislatively entrusted with the primary jurisdiction to make that determination save where this court has ordered for a dispensation in terms of **sec 6 of the High Court Act 1978**. Be that as it may, the applicants deserve to be praised for their courage in defending the heritage of the family to protect the ashes of their fathers. They were in the view of the court, confronted with a typical challenge which in Sesotho is described as a situation in which a woman has no alternative but to ask a none responsive man to give her his trouser and take her dress. A Customary Law fact to be recognized is that the applicants have, albeit on a different reasoning, a direct and a substantial interest in the land in question. Besides their natural sentimental attachment to it, they as the daughters of their late parents, have a cultural right to identify themselves with it, use it as a place of refuge in the event of emergency situations. This occurs where for instance a married woman is forced by unbearable circumstances to have *ngalad*[6] from her matrimonial home or in the worst where she and her husband have been divorced. Moreover, the married daughters throughout retain a right to access their

[6] This is an act whereby a married woman leaves her matrimonial home to her maiden home. She does so to protest against some form of ill treatment against her by her husband or her in-laws. The act usually compels her husband's relatives to proceed to her place of refuge to initiate a discussion with her parents with the view to find a solution.

maiden homes for the purpose of having cultural rites performed upon them by their relatives such as cleansing them after the death of their husband and for the removal of the mourning clothing.

[37] It is worth noting that Customary Law doesn't exclude married daughters from inheriting the movable assets of the family and taking them away to their matrimonial homes. The custom further entitles an unmarried woman to inherit part of the family land provided that when she gets married it would remain within its property. The land would on account of the already stated Basotho sociological and philosophical reasons, represents another phenomena which is comprehensible to an African and more likely incomprehensible to a Westerner who may not be fortunate to have a profound appreciation of the values in the Basotho cultural system of life and its relevance to socio – economic development.

[38] The applicants counsel has in his supplementary heads of arguments, introduced what the court regards as one of the current novel arguments in the constitutional jurisprudence of the Kingdom. This has manifested itself through the emergence of cases such as the instant one where the constitutionality of Customary Law is being questioned due to its gender based classification which in some cases accords men a comparatively advantageous status over women. A common characteristic in all these cases is that this Customary Law categorization of people is challenged for its

constitutionality with reference to **sec 19 of the constitution.** The section provides:

> Every person shall be entitled to equality before the law and to the equal protection of the law.

[39] The challenges mounted against the consistency of the Customary Law gender based discriminatory provisions and practices with the equality clause under **sec 19 of the constitution**, are invariably *inter alia* directly or indirectly premised upon the International Law instruments. In this context, the **Convention on the Elimination of Discrimination against Women (CEDAW)** features as a more precise and a major international convention for reference. In the same connection, the challenges have demonstratively been inspired by the constitutional interpretations assigned to the impugned legislatively sanctioned discriminatory provisions in foreign jurisdictions. In some instances, the persuasion originates from the theoretical postulations by the academics or activists from various social backgrounds on the subject of *equality* and *discrimination*. The irony is, however, that the advanced internationalized legal scholasticism seems to be more often exploited before the Lesotho constitution is holistically studied for a sound appreciation of its relevant provisions and their underlying socio – economic considerations.

[40] An intriguing legal proposition maintained by the applicant's counsel is that his counterpart is wrong in stating that the applicants cannot inherit the estate under Customary Law since

that would be in conflict with **sec 19 of the constitution** and the modern thinking within the SADC countries. He has, in specific terms, submitted that **sec 11 and 14 of the Laws of Lerotholi** were unconstitutional by virtue if their discriminatory effect against women. The counsel has, in support this view, referred the court to the Republic of Botswana case of **Edith M MMusi & Other v Ramatele and 2 Others MAHLB -000836 -10.** The central issue in that case was on the constitutionality of the Bangwaketse custom which denied women to inherit the family residence. There the customary discrimination was being challenged on the basis that it was inconsistent with the equality provision under **sec 3 of the Constitution of Botswana**. The case is relatively analogous to the instant one before this court in so far as it concerns the applicants' prayer that they despite the fact that they are females be declared as the customary heirs to their parents' estate. The constitutionality of **secs 11 and 14 of the Laws of Lerotholi** which respectively qualify only males according to their seniority to become the customary heirs is being tested for its consistency with the stated **sec 19 of the constitution**. In addressing the constitutional issue placed before him Dingake J conceptualized the predominance of **sec 3 of the Constitution of the Republic** over the custom of the Bangwaketse in these terms:

> .....It seems clear that the right to the protection the laws in sec 3 of the constitution leads to the principle that all laws must treat all people equally save as may legitimately be expected by the constitution. Consequently the conclusion seems inescapable that to the extent that the rule sought to be impugned denies the rights of females to inherit intestate solely

> on the basis of their sex, violated their constitutional right to equality (protection of the law) under **sec 3.**[7]

[41] The learned Judge had in the above case, cited with approval the judgment of the revered Denning JA in **Northman v Borough of Barnet 1978(1) All ER 1243 @ page 1246 F-G** where he remarkably stated:

> It sounds to me like a voice from the past I heard many 25 yrs ago. It is the voice of those who go by the letter. It is those who adopt the strict literal and grammatical construction of the words heedless of the consequences. Faced with the glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court.

[42] The court is highly appreciative of a milestone development of the law achieved in Botswana in furtherance of the constitutional equality of every person before the law and to their equal protection under it. This appears to have been achieved through the instrumentality of constitutional interpretation and the ability to reconcile International Law and the Municipal Law in the advancement of *human dignity, freedom* and *equality* which are the key values in a democratic constitutional dispensation. Whilst that is so, this court is not persuaded that the constitutional scheme in the Kingdom would accommodate the constitutional interpretation which was applied in **Edith M MMusi v Molefi S Ramantele and Others *(supra).*** This court maintains that in seeking to develop the law for the protection and promotion of the indicated values which are the pillars of a democratic constitution, it must do so within the framework of *the letter, the spirit and the purport* of the Constitution

[7] Found @ paragraph 111 of the judgment.

of Lesotho and its laws including Customary Law. This would also be in accordance with the terms of the oath of judicial office in the country. It should be in that background that the constitutionality or otherwise of the laws, the customs, the decisions and the actions could be interrogated. In the process, foreign decisions and International Law would be referred to for persuasive or inspirational purposes. This in the understanding of the court should be the approach regardless of how appealing or progressive a foreign decision might be. The socio – economic realities of Lesotho as a sovereign State and its aspirations as foreshadowed in the constitution would have to be accorded their paramount significance. The approach should indispensably be adhered to in seeking to apply a foreign judgment or any International Law instrument regardless of how appealing or progressive it may sound. The decisions from other jurisdictions are equally circumscribed by the constitution, the laws and the realities on the ground in each sovereign State.

[43] It would appear that, as a result of the enthusiasm by the counsel for the applicants to convince the court to follow the interpretative route taken in **Edith M Mmusi and Others v Molefi S Ramantele and Others (supra),** it had, inadvertently, escaped his learned mind to realize that sec 19 (*the equality provision*) must be read in conjunction with sec 18 (*the equality limitation clause).* The latter section provides:

> 18(1) subject to subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.

(4) Sub. (1) Shall not apply to any law to the extend that that law makes provision –
(a)……
(b)……
(c) **for the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law;** or
(d)……
(e)……
Nothing in this subsection shall prevent the making of laws in pursuance of the principle of state policy of promoting a society based on equality and justice for all the citizens of Lesotho and thereby removing any discriminatory law.

(4) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to standards of qualifications (not being standards of qualifications specifically relating to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) to be required of any person who is appointed to any office in the public service, any office in a disciplined force, any office in the service of a local government authority or any office in a body corporate established by law for public purposes.

The nature of the facts which constitute the basis of this case and the identified key issues involved therein, render the above quoted **sec 18(4) (c)**, to be the determinative provision for reference in resolving the raised constitutional issue.

[44] The effect of **sec 18 (4)** and **(5)** is to lay down in clear terms the parameters of **sec 18(1)** which is the main anti discrimination and technically an equality clause in the constitution of Lesotho. **Sec 18 (4) (c)** is in the instant case, the most relevant since it specifically introduces a Customary Law limitation to **sec 18(1).** It effectively sanctions a Customary Law based inequality. The discrimination which the applicants are complaining about is one of those which the legislature has in its wisdom found it necessary to make it an exception from the principle rule enunciated under **sec 18(1)**. At the time of the enactment of constitution, the legislature should certainly have been aware of **sec 11 and 14 of the Laws of Lerotholi** and the Basotho customary practices and therefore, to have conscientiously found it necessary to perpetuate the custom perhaps for as long as it would serve a legitimate societal purpose

for the Basotho. This is how the Constitution of Lesotho stands and it would certainly be heresy to reach, in any manner, a conclusion which would have a technical implication that a constitutional provision is itself unconstitutional because it is against International Law or not in tandem with modern thinking (in some incidences actually meaning not in rhythm with western values). It is a historic fact that the constitution was made after the nation wide consultations and *pitsos*[8] held by the Constitution Draft Committee headed by Adv. K Maope KC.

[45] It is necessary to visit in passing the fact that besides the differences in the constitutions of different nations regardless of their common characteristics as democratic covenants, the countries approach towards the domestic application of International Law also differs. This is dictated by a diversity of political and economic interests including the sociological facts in each State or region. It is for that reason that there are some international conventions which the leading countries in democratic governance and economic advancement have not ratified despite their noble intentions for mankind. The logically asked question in the International Law jurisprudence as to *whether International Law is law,* originates from the basic fact that its universal and equal application ever remain uncertain. This further explains the reason

[8] This is a traditional gathering of people at which the public affairs are discussed and a way forward mapped. It is usually the chief who calls it for himself or for others who may have a message to convey to the people. The forum also serves as a place for the ascertainment of the public view on a particular subject. It turns to be a more reliable mode of obtaining public opinion when compared with the sponsored surveys which are invariably calculated for the achievement of the results desired by the sponsorship.

why different countries follow either a *monist* or a *dualist* approach in the domestic application of specified international instruments. Lesotho belongs to the latter category of states.

[46] The *dualist* position of Lesotho would, for the purpose of this case, be indicative that notwithstanding the fact that the country has ratified the CEDAW albeit with reservations, it still has to legislatively domesticate its provisions and ideals for their local enforcement. In the meanwhile, its equality oriented provisions would continue to remain purely inspirational. The 'revolutionarization' of the Basotho sociological structures, religious convictions, philosophies however scientific or otherwise and their stereotypes be they African or Western inspired; must be done by the Basotho through the constitutionally provided democratic processes and be genuinely reflective of their sentiments and self determination.

[47] **Sec 18** is commendably concluded with a visionary provision that Parliament is at large to enact the laws which would in fulfillment of the state policy inscribed in the constitution, remove the inequalities so as to create an egalitarian society. The understanding is that this would be progressively legislated for subject to the instructions detailed to parliament from time to time by the electorate in response to the national challenges. It should be acknowledged that the provision introduces a hope that there shall at all times be a commitment in that direction especially when

there was no such expressed mandate in the **Lesotho Independence Constitution of 1966**. The separation of powers theory dictates that the Judiciary has a circumscribed jurisdiction to introduce the contemplated social challenges since it has to exercise its powers within the constitutional framework. In the meanwhile, however, it remains a challenge for the courts to develop the law in pursuit of the democratic values through a restrained and *evolutionary process* and not through a social *'revolutionarization'*[9] approach styled *Judicial activism* with no research based results.

[48] The end result is that:

1. The Will is held to be invalid and therefore the estate is to be devolved in accordance with Customary Law.

2. The court declines to declare the applicants as the customary heirs since the relief is jurisdictionally available in the Local Court. They are thus directed to

[9] The conception here proceeds from the premise that courts have a constitutional role to develop the law through their interpretative powers over legislation. The courts have recognizably long moved away from the traditional notion that theirs was simply *jus decare* and not *jus facere* – Seluka v Suskin and Salkow 1912 TPD 265. This notwithstanding, the power should not be over stretched to the extend that the courts technically usurp the constitutional powers of Parliament. A typical example of that would be where the court strives to identify a somehow imperceptible *lacuna* in the law and uses that in favour of a judicial pronouncement that impacts profoundly upon an existing social order and thereby risking a social disorder which may have catastrophic results in future. It may, therefore, at times be unhealthy for the courts to follow the decisions from the well developed jurisdictions with different social, economic, political and cultural environment and who happen to be exploring the other planets while we are still engaged in developing a village with the most basic infrastructure. It may in some countries make sense that one is constitutionally free to sleep with a dog because of the right to sexual orientation but be an abomination in another democratic State. The male based customary heirship in Lesotho must be comprehended within its sociological setting among the Basotho and its philosophical basis and so the role of the heir. The activists should realize that unlike in Europe, there are no old aged homes in Africa and an effective social welfare systems. Some court decisions should be preceded by research. *Judicial Activism* (as it is termed by its advocates) without certainty of parameters may cause unnecessary conflict with Parliament.

approach the initial court of competent jurisdiction for the declaration sought save this court grants them the dispensation under **sec 6 of the High Court Act** to bring the matter before this court. It would be from there that the raised constitutional issue could be procedurally mounted in accordance with the Constitutional Litigation Rules 2000 and facilitate for the court to accordingly assume a constitutional sitting over the constitutionality or otherwise of **sec 11 and 14 of the Laws of Lerotholi.**

3. There is no order as to costs. Each party will, therefore, bare its own costs.

E.F.M. MAKARA
ACTING JUDGE

For Applicant : Adv. M. Mathe
For Respondent : Adv. N.G. Thabane