IN THE HIGH COURT OF LESOTHO

CIV/APN/462/2007

In the matter between:

'MASEEPHEEPHE MAHAO	**APPELLANT**
And	
JUDICIAL COMMISSIONER	**1ST RESPONDENT**
THE EXECUTOR, ESTATE OF LATE MARY PAANYA	**2ND RESPONDENT**
MASTER OF THE HIGH COURT	**3RD RESPONDENT**
HLOMELANG RAMARUMO	**4TH RESPONDENT**
ATTORNEY GENERAL	**5TH RESPONDENT**

JUDGMENT

Coram : Honourable Acting Justice E.F.M. Makara
Dates of Hearing : 30 April, 7 May, 2013
Date of Judgment : 20 May, 2013

Summary

Appeal from the Judicial Commissioner's Court (JCC) which had upheld the decisions of the Local and Central Courts that there was no evidence that the appellant had been adopted and, therefore, entitled to inherit the estate of his adoptive parents – The existence of evidence indicative that the appellant could have been adopted in the Republic of South Africa in terms of its adoption laws – The question of the appellant's subsequent change of surname by reverting to his original one – The effect of that change on his adoptive status and his right to inherit the estate of his adoptive parents – whether the Lesotho or the RSA Law would resolve the impasse – A need for foreign law to be proven -The competency or otherwise of the Local Court to have the foreign law proven before it or for it to take judicial notice of same – The proof of the appellant's adoption and his present status - The pre-requisites for the determination

of his successory rights to the estate – The matter to be decided upon by a court of competent jurisdiction – The appeal upheld in relation to the ground that the JCC has misdirected itself in its decision that the Local Court had the jurisdiction in the matter – The appeal fails on the ground that the appellant has proven that he is, presently, qualified for the inheritance. Whoever, including the parties that may have a direct and substantial interest in the estate to institute the proceedings in a court of competent jurisdiction.

[1] The appellant Maseephephe Mahao has brought an appeal in this court against the decision of the Judicial Commissioner's Court (JCC). The latter court had upheld the judgment of the Central Court which had basically dismissed the appellant's appeal against the decision of the Matala Local Court. The upheld decision of the Central Court was that, the Local Court had correctly declared in translated verbatim terms that:

a) The adoption of the appellant by the late Albert Malang Paanya and his late first wife 'Mamorongoe Paanya was inconsistent with the law and unlawfully made in that, the extended members of the Paanya family were not parties to the adoption and that it appears to have been a result of a mere friendship between the appellant's biological family and that of his purported adoptive parents;

b) Even assuming that the appellant had been so adopted, he had voluntarily reversed the adoption by abandoning the Paanya surname to reassume his original surname of Mahao and, thereby, reverting to the Mahao family;

c) The appellant has not produced any documentary proof of his adoption;

d) The appellant has as a result of reverting to the Mahao family, deprived himself of *a locus standi* to contest issues of succession rights over the estate of the deceased Malang and his wife 'Mamorongoe. On the contrary, it is the relatives of the deceased who have the credential to sue.

[2] The Central Court had, consequently, interdicted the appellant from evicting the 2nd respondent Mary Paanya from the home of the late Albert Malang Paanya and his late first wife and ordered him to pay the fees for litigation.

[3] The appeal originates from the factual scenario that the appellant was adopted by the late Malang and his late wife 'Mamorongoe before the Commissioner in Johannesburg Harrison street in The Republic of South Africa (RSA) in 1962. This was after he was given up for adoption by his biological parents Shadrack Mahao and Esther Mahao with the consent of 'Mammea Mamotloang Mahao. Thereafter, he was named Matete Paanya and lived with his adoptive parents in Welkom in the RSA.

[4] In 1971 he and his new parents came to Lesotho and it was then that he got to know about Malang's sisters 'Mantala Qhobo and 'Manthabiseng Lesoli. The two testified respectively as witnesses in the matter. The family stayed at its homestead in Lekhaloaneng under the chieftainship of Qoaling. The late first wife 'Mamorongoe, is the appellant's aunt.

[5] According to the appellant, sometime between 1972 and 1973, his adoptive parents brought him before the then Chief of Lekhaloaneng Motsokololi Mots'oane and introduced him to the chief as their heir. He explained that he has documentary evidence in support of the assertion. It, however, transpires from the record

of the proceedings in the local court that such documents were never advanced as exhibits.

[6] The appellant had in all fairness disclosed it to the court of first instance, that after his marriage he realized the importance of changing his surname from that of Paanya to Mahao in order that he may not lose his relationship with his roots for his sake and for that of his children. He explained that he had prior to that change, sought for its approval form his adoptive parents and that they had raised no objection to it. He presented to the court the impression that whilst he had officially changed his surname as described, he did not necessarily by so doing, revert to the Mahao family. The understanding is that he wanted the distinction to be drawn between a change of the surname as opposed to absolute reversion to original background.

[7] In 1984, 'Mamorongoe who is the adoptive mother of the appellant, passed away. It should, for the sake of brevity suffice to state that Malang ultimately married the 2nd respondent out of community of property. This is by operation of law, indicative that the 2nd respondent had simply stepped into the shoes of the late first wife. She had in the rich *Sesotho resurrected the house* (*o tsositse ntlo*). The court has in this respect, been conscientiously aware that the second respondent has resurrected the house in a special and limited sense in that she was married out of community of property. This regime of marriage automatically separated her

properties from that of her husband during their lifetime and after their deaths. Thus, she could not inherit Malang's property unless expressed otherwise in a will.

[8] Malang also passed away at a later stage. Shortly after his death, the appellant unilaterally took measures towards ejecting the 2nd respondent from Malang's homestead. He had apparently with reference to his pleadings sought to evict her on the basis that, according to him, she was not validly married to his late adoptive father and that he had been appointed as heir to the estate of Malang.

[9] 'Mantala Qhobo who was aged 75 during the proceedings in the Local Court, had testified that the late Malang was her brother and that 'Mamorongoe was the appellant's aunt. She had in the same vein registered her exception to the appellant's move to expel the 2nd respondent from the homestead of Malang. Her reasoning was that the appellant had abandoned his adoptive relationship with the Paanya family and reverted to his original family of Mahao in that he had changed his surname from the former to the latter. The witness had explained that she was present when the applicant took over the homestead keys and ejected the 1st respondent from the premises and that she rebuked him for that. She gave the court the impression that even his biological mother disapproved the act. She concluded her testimony by stating that the fact that the appellant had reverted to his original family of Mahao, was

demonstrated by his abandonment of Malang during his illness and hospitalization and that he had stopped visiting the home of his adoptive parents.

[10] 'Mathabang Kao who testified as the 2nd witness in support of the 2nd respondent had basically in her testimony corroborated the 2nd respondent by stating that the applicant had at the material time, expelled the 2nd respondent from the home of Malang on a note that she has to go since the person to whom she had come is no longer alive. She under cross examination described the 2nd respondent as the wife of Malang and that she had received that information from her grandfather Malang himself. The third witness Morongoe Paanya who was aged 29 at the time further corroborated the 2nd respondent's lamentation before the court.

[11] The last witness to feature before court was 'Manthabiseng Lesoli aged 77 at the time. Her testimony proceeded from the premise that she was not giving evidence in support of any one of the parties but simply for the purpose of providing the court with the relevant details. The salient aspects of her testimony were that the late Malang had upon his return from Gauteng settled at Lekhaloaneng. She testified that after some time, Malang informed her that he did not have a child of his own and that he showed her a boy whom he had adopted as his **heir** and that there were documents relating to the boy's adoption. He had never, however, showed her the papers. The witness had under cross examination

explained that she is the late Malang's sister from his extended family.

[12] It should, at this juncture, be recorded for the purpose of clarity regarding the present parties before the court, that the present appellant Maseephephe Mahao has substituted her late husband Matete Mahao. On the side of the respondents, Paanya Ramarumo who is the 4th respondent has substituted the now deceased Mary Paanya.

[13] It has transpired from the record of proceedings before the subordinate courts concerned, in particular the Matala Local Court, that the real issues in this case evolved around the jurisdictional competency of the latter court to have made a declaration on the adoption status of the appellant and incidentally, whether the same court was, in the circumstances, qualified to further declare that the appellant had no successory rights over the estate of the late Malang.

[14] The identified issues should be perceived against the background of the determination by the Matala Local Court that the appellant had no *locus standi* to challenge Mary Paanya's right to occupy Malang's homestead and, consequently, lacked the right to evict her from the site. The Central Court had after upholding the judgment of the Local Court gone further to declare that the

appellant had not proven that he had been appointed as the heir of Malang.

[15] Advocate Mohau KC appearing for the appellant argued that all the subordinate courts who were seized with the matter throughout their hierarchical order particularly the court of the first instance, lacked the jurisdiction to have pronounced themselves on the adoption status of the appellant or on whether by changing his surname from Paanya to Mahao, he had renounced his relationship with his adoptive family and reverted to his biological family, thereby, relinquishing his heirship rights over the estate of Malang.

[16] The appellant's counsel advanced the argument on the jurisdictional issue by drawing it to attention of the court that the adoption of the appellant, was made in the RSA and therefore, under a foreign law. This according to him, indicates that the adoption of the appellant had been done on the basis of the law of that country and that as such, the issue regarding its status, the legal effect of an adoptee's change of surname, the legal effect regarding the rights of such a person to retain the heirship rights to the estate of his adoptive parents and whether the change of the surname would tantamount to absolute reversion to his biological background; are issues for determination with reference to the RSA law.

[17] Advocate Setlojoane counter argued that the adoption issue, *per se* could not have ousted the jurisdiction of the Local Court. He explained that it transpired that the appellant had reversed his adoption status by reverting to the Mahao family. He, however, conceded that it was wrong for the subordinate courts to have declared that the adoption of the appellant was invalid. He subsequently submitted that it has, nevertheless, became imperative for the High court to make a declaratory finding on the adoptive status of the appellant and on the ancillaries thereof. The counsel for the respondents appeared to have decided to refrain from addressing the subject of the significance of the South African law in the matter.

[18] This court adopts a view that the evidence given before the Matala Local Court on the question of adoption of the appellant could, on the balance of probabilities indicate that he was so adopted. The testimony that he was adopted had initially been presented before the court by the appellant. He had categorically explained that his adoptive parents had adopted him in Johannesburg in the RSA. This evidence has somehow credibly been corroborated by the evidence of the 77 year old 'Manthabiseng Lesoli. She had told the court that her late brother Malang had upon his arrival in Lesotho from the RSA informed her that he had adopted a boy whom he intended to become his heir. There is further some circumstantial evidence which could be supportive of the position that the appellant had indeed been adopted by Malang

and 'Mamorongoe. This constitutes the undisputed fact that the appellant had since childhood left his biological family and stayed with the late Paanyas when they were living in RSA and even when they moved into the country, the late were childless and would normally desire to have an heir of their choice and that 'Manthabiseng Lesoli has also testified that her late brother had told her that he had adopted a boy to be his heir.

[19] The Matala Local Court, the Matsieng Central Court, the Judicial Commissioner's Court and the counsel for the respondent seem to have inadvertently failed to have realized the significance of the evidence that the appellant had been adopted through the foreign law and to be elaborate, not the Lesotho law. The mere fact that the appellant had testified that he was adopted in the RSA in terms of the laws of that country, presented a challenge for him to prove that he was so adopted. This would *inter alia* imply that the relevant foreign law and its adoption procedures would have to be proven before the Local Court. The principle of law applicable in this respect is that a foreign law would have to be proven by whosoever sought to rely upon it. This was stated in **S v Masilela 1968 (2) SA 558 (A).** Alternatively, the court could, on the strength of **S v Khanyapa 1979 (1) SA 824 (A),** take judicial notice of the foreign law. It is clearly abroad the jurisdiction of the Local Court to have the foreign law proven before it or for it take judicial notice of same. This is not expressly or impliedly contemplated within the purview

of **Sec 9 of the Central and Local Courts Proclamation No. 62 of 1938**. The provision circumscribes the jurisdiction of these courts.

[20] The 2nd respondent's evidence that the appellant has abandoned the Paanya family and reverted to that of Mahao, is an admission that he has previously been adopted by the Paanyas. In the same connection, there has been no evidence that the appellant has ever been customarily adopted. The only evidence which was tendered before the Local Court was that the appellant had been adopted before the Commissioner in Johannesburg in the RSA. This obtains irrespective of whichever weight that evidence commands. The net effect of this picture is that it had been rendered probable that the man had been adopted through the foreign law and, therefore further reinforces the view that the alien law, its procedures and implications had to be proven. This could have been done through testimonial evidence by the appellant, the officials from the said Commissioner's office or by way of documentary evidence. It could also have become necessary for someone who is conversant in the South African law regarding adoption and the consequence of changing of a surname, to evidentially assist the court. The local court is not empowered to address that challenge. The same would apply to the Magistrate Court save where it exercised its incidental jurisdiction under **Sec 22 of Subordinate Courts Act, 1988**.

[21] The trial court had misdirected itself by deciding that there was no evidence that the Mahao and Paanya families had ever met to discuss and agree on the adoption of the appellant. The misdirection has been authored by the court's disregard of the fact that the law, under which the adoption was alleged to have been made, may not have necessitated such a meeting. The court had instead applied the customary law imperatives in a totally different environment.

[22] In the premises, regard been had to the grounds upon which the appellant has appealed against the judgment of the learned Judicial Commissioner, the decision of this court is that:

a) The ground that the Judicial Commissioner had erred in law, in finding that although the appellant was the adopted son of Malang Paanya, he could not be the heir to the estate of Malang Paanya despite the fact that he was the only child of the deceased; does not succeed since the heirship in issue is tied to the adoption made in terms of the foreign law. The Local Court lacked the jurisdiction to determine its consequent effect upon the appellant's change of surname from Paanya to Mahao especially concerning the right to inheritance.

b) The ground that the Judicial Commissioner had erred in law and misdirected himself in disregarding marriage certificates forming part of the record which would show that the 2nd respondent was married untenuptially and, therefore, not entitled to inherit the estate of Malang Paanya; is upheld since the ascertainment of the status of the 2nd respondent and that of the appellant were respectively crucial for being proven or disproved for the purpose of the determination of who between them would have a right to inherit the estate. The foreign law concluded adoption would, nevertheless, still pose a legal obstacle.

c) The ground that the Judicial Commissioner erred in law in finding that the appellant relinquished his right to inheritance by change of surname; succeeds in that the Local Court had no jurisdiction

to make a declaration on the status of the appellant after changing his surname and correspondingly on his right to inheritance. The basic reason is because the adoption had been made in accordance with the foreign law which could not be proven before a Local Court. The same would apply to the implications thereof.

d) The ground that the learned Commissioner erred in law in disregarding the evidence tendered that the appellant was the only son and beneficiary to Malang's estate; fails since it is only through the said foreign law that these could have been ascertained. The Local Court had no jurisdiction to have the foreign law tested before it for the purpose of the determination of the status of the appellant and his right to the inheritance of the estate of the late Malang Paanya and his first wife 'Mamorongoe.

[23] It is, consequently, directed that the parties and or any other person who may have a direct and substantial interest in the matter, should institute the proceedings in a court of competent jurisdiction. The action would culminate in the ascertainment of the South African Law on the effect of the appellant's change of surname especially concerning the question of whether it would automatically amount to a renunciation of the adoptive family and a reversion to his original family. This would, resultantly, provide an answer to the question of who would have the right to the inheritance of the estate.

[24] This being an intrinsically a family matter, and given the nature of the judgment, each party would bear its own costs.

E.F.M. MAKARA
ACTING JUDGE

For Appellant : Adv. K. Mohau KC
For Respondent : Adv. Setlojoane