

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/265/14

In the matter between

THABO LEHASA

APPLICANT

AND

**TAUMANE MAKOKO
MOKHELE MAKOKO
TSIE MAKOKO**

**1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT**

JUDGMENT

CORAM:

HON. J. T. M. MOILOA J.

DATE OF HEARING:

17 MAY 2017

DATE OF JUDGMENT:

27 NOVEMBER 2017

ANNOTATIONS:

Cases

1. Setlogelo vs Setlogelo 1922 AD
2. Thibeli and Others vs National Executive Committee Lesotho Congress of Democracy CIV/APN/54/11

[1] This is an interlocutory application pending the hearing and finalisation of CIV/T/265/09: Prayers in the notice of motion are among others that:

- (a) *The Respondents be interdicted from disposing and/or alienating properties which are the subject matter of the proceedings in CIV/T/265/09.*
- (b) *The Respondents be interdicted from holding themselves as the owners and doing as they please with properties which are the subject matter in CIV/T/265/09.*
- (c) *The Respondents be directed to return the properties they have already taken pending finalisation of CIV/T/265/09.*
- (d) *The Respondents be interdicted from collecting rentals of the properties and/or enjoying the proceeds generated from the said properties pending finalisation of CIV/T/265/09 as well as other prayers.*

[2] Applicants prayers in CIV/T/265/09 are framed in the following terms:

- “(a) *An order declaring Fani Makoko and Pheello Lehasa’s purported civil bigamous marriage contracted on the 30th November 1981 to be null and void ab ignition on grounds of Fani’s prior existing marriage to ‘Manthako Makoko;*
- (b) *An Order declaring the Will by Fani Makoko dated or registered by Master of High Court on the 13th October 2003 bequeathed in favour of First Defendant to be null and void ab initio;*
- (c) *An Order directive that the property inherited by Taumane pursuant to an invalid Will be returned to the estate of Fani and Pheello so that proper assessment which will enable an equal share before Plaintiff and Third Defendant can be made;*
- (d) *An Order declaring that Fani Makoko died interstate;*
- (e) *An Order declaring Plaintiff as the lawful heir to the estate of Pheello Lehasa pursuant to a decision by Lehasa’s family;*
- (f) *An Order ejecting Mokhele Makoko from a site he currently occupies at Borokhoneng;*
- (g) *An Order declaring Property accumulated together during the subsistence of the voidable marriage between Fani Makoko and Pheello Lehasa to be divided equally between Plaintiff and Third Defendant;*
- (h) *Costs of suit against First and Second Defendants in the event of opposition;*
- (i) *Granting Plaintiff such further and/or alternative relief.”*

- [3] In his heads of argument Advocate Teele KC for Applicant seeks to confirm prayer 1(a) of the Notice of Motion which has already been granted in the interim by my brother Nomngcongong J. in 2014.

Applicant bases his claim on being a customary heir of his late grandmother Pheello Lehasa (Masechaba Makoko). This is pleaded in the main trial as well.

The history is rather interesting. It appears the late Fani Makoko who lived in Kroonstad, South Africa for many years returned to Lesotho in 1964. He was leaving behind his then wife 'Manthako Makoko. They were married under custom. In South Africa a customary marriage between Africans was not regarded as marriage but a mere "union". It could be registered at Bantu Affairs Commissioner's Court and this marriage of 'Manthako and Fani was also registered there in Kroonstad. They were blessed with two children Taumane and Nthako Makoko. Taumane is First Respondent in these proceedings. The marriage between Fani and 'Manthako was terminated before the Central Bantustan Divorce Court in Kronstad in February, 1973.

- [4] Upon his arrival in Lesotho in 1964 Fani got married to Pheello Lehasa by customary law. This he did during the subsistence of his customary law marriage to 'Manthako thereby rendering himself a polygamist. He then got divorced from 'Manthako in 1973. A few years later, in 1981, he converted his customary law marriage with Pheello Lehasa into a civil one. They both had the capacity to enter into a valid civil rites contract of marriage. And they did. Fani and Pheello never had children together. But by operation of law, Taumane Makoko and Nthako Makoko became

the children of Fani and Pheello upon Fani and Pheello being married in 1964.

- [5] Pheello herself had been previously married to one Smuts Lekhau. They had been divorced at the time Pheello got married to Fani. Out of the marriage to Lekhau, Pheello had three girls whom she took with her back to her maiden home at the time of her divorce of Lekhau. They used her maiden surname Lehasa, both for herself and for her daughters. One of Pheello and Smuts Lekhau's daughters was Keketso. Keketso never married but bore a son, Thabo the present Applicant. Applicant then is illegitimate son of Keketso. He is not a Makoko. She used her mother's maiden surname Lehasa for her child Thabo as well. Indeed he refers to himself as Thabo Lehasa. Things being in order, Thabo should have been a Lekhau; being an illegitimate child of Keketso who was born out of a valid marriage between Pheello and Smuts Lekhau.
- [6] Taumane (First Respondent) later followed his father to Lesotho. He found him living with new wife Pheello (Masechaba Lehasa), her daughter Keketso and her grandson Thabo. He joined the four and lived with them only to fall in love with Keketso. They finally got married and he got the name 'Mamokhele Makoko. Mokhele was born out of that marriage. He is Second Respondent in these proceedings and half brother to Applicant. The marriage between Taumane and Keketso (Mamokhele) subsisted between 1972 and 1984 when they got divorced.
- [7] Given this history and background of parties in this litigation I am of the view that Applicant's line of succession stems from the Lekhau family tree where his mother was begotten. The decision and choice by his grandmother Pheello to use her maiden surname Lehasa on her daughter

Keketso, who in turn extended the chain by using the same surname on her illegitimate child does not change their lineage. Applicant's lineage is not that of Makoko in anyway. His mother too married into the Makoko family by First Respondent but Applicant was never adopted into the Makoko family. There simply is no evidence that Applicant was ever adopted into Makoko family. There is no argument whatsoever persuading me to find that Applicant is eligible to bring an inheritance claim against a Makoko estate. Be that as it may, Applicant does seek a final interdict from this court against Respondents from disposing and/or alienating properties which are the subject matter or proceedings in CIV/T/225/09. Such properties are part of Makoko estate since the marriage of Fani to Pheello in 1964.

- [8] The celebrated case of **Setlogelo vs Setlogelo 1922 AD** laid down the requirements for an interdict. The decision in **Thibeli and Others v National Executive Committee, Lesotho Congress for Democracy CIV/APN/54/11** is but one of the many within our jurisdiction which followed/applied same. In that case my sister Majara J. as she then was presiding. The requirements are the following;

- (a) *A prima facie right*
- (b) *An injury actually committed or reasonably apprehended*
- (c) *A balance of convenience in favour of the granting of the relief and*
- (d) *Absence of any other satisfactory remedy.*

- [9] ***Prima facie right***

Applicant pins his claim on the fact that he was appointed by the Lehasa family as customary heir of his late grandmother Pheello Lehasa. This on the understanding, that she died a Lehasa. As already established, she

reverted to her maiden Lehasa family after her first marriage to Lekhau was terminated. Now, it is Applicant's contention that her second marriage to Fani Makoko was never a valid marriage because Fani had an existing marriage with 'Manthako. That the unlawfulness of the marriage between Fani and Pheello should persist to and beyond the date when they purported to enter a civil marriage in 1981.

10] I disagree with this submission. Fani Makoko was married under custom with 'Manthako. That marriage was dissolved by a competent court of law in 1973, being the Bantustan Divorce Court. In 1981 when he purported to marry Pheello, Fani was free of his first marriage. In any case he had the competence to conclude a second contract of marriage since the first did not exist anymore. Even if we were to take the argument back to the 1960's when Fani and Pheello entered into a customary marriage in Maseru, he then rendered himself a polygamist since he took in Pheello while he was still married customarily to 'Mathako. By 1981 when they took the civil marriage route the impediment to their intentions if at all it was an impediment, had already been removed by reason of a divorce decree in 1973 dissolving the marriage of Fani and 'Manthako. Fani had the competence to marry Pheello. Pheello became 'Masechaba Makoko following her marriage to Fani Makoko.

[11] Moreover, even if it were to be established on trial that the Will drafted by Fani was defective, I still do not see how Applicant features in the distribution of that estate. If the Will is set aside, Fani will have died intestate and his estate devolved upon Pheello and Fani's children; namely Taumane and Nthako. If the Will is upheld to an extent of Fani's half share of the estate (hers and Pheello's estate) then of course Pheello

is entitled to her own half share by operation of law. As it turns out she also died intestate in 2007. Upon her passing her estate goes back into the Makoko lineage. Hers and Fani's heirs stand to benefit from the estate. Not the Lehasa's. The Lehasa's were misguided in law when they purported to appoint Applicant as heir to estate of Pheello. Pheello died a Makoko not a Lehasa. The property she inherited from her father became hers. When she married Fani she pooled that property of hers into the marriage in community of property with Fani with whom she had no biological children apart from the children of Fani from his first marriage. It is the Respondents who are the lawful beneficiaries of this estate.

[12] **Conclusion**

For the foregoing reasons I am not satisfied that Applicant has established a *prima facie* right in these proceedings that entitle him to an interdict against the Respondents. As the Applicant had not established a clear right based on the facts before me, the other requirements for an interdict fall away and I accordingly dismiss his application.

J. T. M. MOILOA
JUDGE

FOR APPLICANT:

ADV. E. M. TEELE KC

FOR APPLICANT:

ADV. R. SETLOJOANE