

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/255/17

In the matter between:

‘MALEEBA MABOTE	1st APPLICANT
KHAHLISO MABOTE	2nd APPLICANT
KATLEHO MABOTE	3rd APPLICANT
ESTATE OF LATE SAMUEL MOLISE MABOTE	4th APPLICANT

AND

SELLO MABOTE	1st RESPONDENT
MASTER OF THE HIGH COURT	2nd RESPONDENT

JUDGMENT

CORAM: HON. J. T. M. MOILOA J.

DATE OF HEARING: 20, 21 and 24 July 2017

DATE OF JUDGMENT 11 August 2017

ANNOTATIONS

Cases

1. Frasers Lesotho ltd. vs Hata-Butle (Pty) Ltd LAC 1995/99
2. Mafret Tuoane and 8 others vs National Executive Committee & 14 Others
3. Ramothello vs Ramothello (CIV/T/727/86)

Legislation

1. High Court Rules 8 (22)(b))
2. Administration of Estates Proclamation 19/1935
3. Children’s Protection and Welfare Act 7/2011

[1] Parties herein first appeared before me on 13/07/2017. On the day I issued a rule nisi calling upon Respondents to show cause why prayers 1,2,3,5 and 6 may not be granted to Applicants. The prayers were that:

(a) 1(a) and (b) the matter be regarded as urgent and the rules and modes of service be dispensed with

(b) 1(c) Respondent be interdicted from disposing of the estate of the late Samuel Mabote and/or stop collecting rent from the (deceased's) rented flats at Ha Thamae, Maseru.

(c) Prayer 2 was that Applicants be declared rightful owners of the deceased estate

(d) Prayer 3 sought intervention of the Master of the High Court in protecting the rights of the deceased's minor child being third Applicant.

(e) Prayer 5 was costs of suit.

(f) Prayer 6 was for further and/or alternative relief.

The rule was returnable on 20 July 2017. The hearing ran through 20, 21 and 24 July, 2017. It was during arguments and submissions by both counsel that some of the issues were clarified, which were otherwise not clear on the day of first appearance, hence the difference in findings as will be seen from the orders I am making.

[2] First Applicant was married under customary law to the late Samuel Mabote (the deceased). He passed away in December 2011 leaving behind the first Applicant and a daughter named Khahliso Mabote who is second Applicant. The deceased is also survived by a minor child Katileho Mabote, third Applicant in the proceedings. It is common cause

that third Applicant was born out of wedlock during the deceased and first Applicant's separation. Third Applicant's mother predeceased the deceased. It is also common cause that first Respondent is the deceased's brother; which makes him uncle to second and third Applicants.

[3] Respondent's Answer raised 3 points of law in *limine*, names urgency, *pedent lite* and *locus standi*.

[4] **URGENCY**

The matter is before court against first Respondent on an urgent basis. Counsel for Applicants has signed a certificate of urgency certifying that the matter is urgent because "the Respondent is busy disposing off the 4th Applicant (the estate of the deceased) by selling them out without the consent of the 1st, 2nd and 3rd Applicants who are the rightful owners of the estate by virtue of them being wife and children of the deceased." First Respondent contends that urgency in this matter is misconceived and unfounded in the circumstances of this case. First Respondent contends that the issue of heirship (before this court now) arose in early January 2012 after the deceased's passing. I have struggled to find in the founding affidavit the circumstances which Applicant finds to render the application urgent and the reasons why she claims that she cannot be afforded substantial relief in due course if the ordinary periods were followed (**High Court Rule 8 (22)(b)**) safe to state that Adv. Nqhae for Applicants submitted that Applicant made worrying discoveries on 10 July 2017. The urgent application was filed the next day; 11 July 2017. According to Applicant the house had been broken into on the 10th. On the same day they got a message that first Respondent was selling some

of the property, collecting rentals and that one of the vehicles were sold by first Respondent. But this cannot be correct for since January 2012 the property of deceased's estate has been in the hands of first Respondent without challenge from Applicants. The rents have been collected from the flats by first Respondent without challenge by Applicants. In the circumstances of this case I cannot sustain urgency in 2017. On this ground alone I dismiss this application on the grounds that it is an abuse of court process. It is not fair that lay clients are made to litigate when in law it is obvious that their claims are unsustainable.

- [5] Interestingly, Applicant wants this court to direct the Master of the High Court to “intervene in protecting the rights of the 3rd Applicant.” I cannot see how to do that. That is an office created by statute for proper administration of deceased estates. **Section 13 of the Administration of Estates Proclamation 19/1935** stipulates 14 days within which estates are to be reported to the Master. **Section 38 of the Children's Protection and Welfare Act 7/2011** prescribes two months for the reporting where there are interests of minor children to be protected as in casu. Applicant ought to have adhered to at least one of those instruments. The Master of the High Court would have then taken charge of the estate in time and facilitated proper administration of same. That way the issue of urgency could have been remedied from the on-set. Not for the court to make an order for intervention five years later.
- [6] In support of their prayers first Applicant has deposed to a Founding Affidavit. Facts stated under paragraph 4 refer to “MM1” being proof of a customary law marriage between 1st Applicant and the deceased. One child was born out of the marriage, 2nd Applicant. The marriage is not in dispute. In fact averments under the said paragraph are common cause

namely, the deceased's passing in December 2011, that at the time of his passing he had been separated from first Applicant although not divorced. And that during the separation the deceased fathered a child, 3rd Applicant.

- [7] First Applicant goes on to aver that first Respondent expelled her during the burial of the deceased and that her daughter (second Applicant) faced the same fate in 2012; by being expelled from her home. It is not clear from the Founding Affidavit where second Applicant had been living and with whom during the time of her parents' separation. It is as such unclear what is meant by her being expelled "from her home."
- [8] "MM2" is an inventory of what is alleged to be the property of the deceased. It reflects movable property in the form of motor vehicles, household property, electrical appliances, "office equipment", cellphones, a gun, documents and other items. The immovable property is listed to include a residential house at Ha Pita, a mall, a farm, a house at Upper Thamae and a building construction. Again it is not clear when this inventory was taken and whether all the property was still present at the time the application was moved; except an addition that a sprinter was sold by Sello Mabote in 2014. However, first Applicant does state that they were informed by some of the relatives that first Respondent was disposing of the property selling it. None of the relatives is named nor is there a supporting affidavit towards such allegations against first Respondent. Neither does she aver that she verily believes such information to be true and correct.

[9] ***On Pedente Lite***

Reference has been made to CIV/APN/20/12 which is said to have been moved by Applicant some time in 2012 after the passing of the deceased. According to Respondent this court is urged to dismiss the present application on the basis that CIV/APN/20/12 is yet to be decided by this court. He alleges that CIV/APN/20/12 among other prayers sought in that application included a declarator as to heirship of the deceased estate. Applicant challenges this point in their replying affidavit by stating that judgment had been handed down in that application. Moreover, that the parties were different. Apart from applicant other parties in the 2012 application were ‘Mamosito Mabote, Sello Mabote and Lesotho Funeral Services. Ms. Nqhae contends that the cause of action was different from the present, in that the 2012 application concerned burial of the deceased. Miss Nqhae submitted that the court found Applicant to have had prior right to bury the deceased, Samuel Mabote. Mr. Mokobori on the other hand submitted that what the court did then (in 2012) was to decide the matter in the interim namely, the prayer relating to burial. That the prayers were not finalised, particularly prayer (f) which was about heirship. The court on its own called for the file in CIV/APN/20/12. On perusal of the court file in CIV/APN/20/2012 it becomes clear that prayer (f) is indeed still pending before court. Accordingly I find that the alleged prayer (f) is still hanging in CIV/APN/20/12 and is yet to be decided upon. On this ground also I dismiss this application before me.

[10] ***Locus Standi***

It is common cause that 3rd Applicant, Katleho Mabote, is a minor. Respondent avers in his answering affidavit that by virtue of her being a minor she has no *locus standi in judicio*. He submits that 3rd Applicant should have been duly assisted by someone rightfully authorised. To this Applicant replies, that the Master of the High Court is cited herein because it is a body responsible for the protection of minor children in inheritance matters and administration of deceased estates. This is the same body whom the court is asked to direct to intervene. Now Applicant avers in her Replying Affidavit that the office is cited in a representative capacity. But this fact was not alleged in the founding affidavit. It appears in the Reply which is contrary to rules in pleadings which discourage introducing new facts in the Replying Affidavit. I accordingly uphold Respondent's point and find that 3rd Applicant has no *locus standi in judicio*. I do not suggest that she is not entitled to maintenance out of her late father's estate. I hold that for litigation purposes she has no standing without the assistance of her guardian. The locus is lacking insofar as the child is a litigant without due assistance of a guardian.

- [11] In written heads of argument for First Respondent, Mr. Mokobori sought to add a fourth point in *limine* namely that Applicant had failed to join one Mrs. 'Mamosito Mabote who is grandmother of Applicant and owner of a two roomed house at Ha Thamae in the Maseru Urban Area as well as a house at Ha Pita Lithoteng also in the Maseru Urban Area. Now, the legal principle is that a party is bound by his pleadings. He will stand or fall on his pleadings. A party is not permitted to litigate "by ambush" is Justice Gauntlett aptly described it in **Frasers Lesotho Ltd. vs Hata-Butle (Pty) Ltd LAC 1995/99**.

[12] I have come across a somewhat similar situation in the case of **Mafret Tuoane and 8 Others v National Executive Committee and 14 Others CIV/APN/61/2012** in which I gave a decision in April 2012. In that case respondents raised several points in *limine* all of which were not raised in their answering affidavits. They were for the first time raised in their heads of argument. As such the pleadings before me had not factually dealt with such points in *limine*. I was not particularly pleased with Respondents for such conduct. I am still not pleased with 1st Respondent in *casu*. Taking a litigant by surprise, ambushing them and not opening room for them to attack or respond to another's points is not to be condoned. In the words of Gauntlett JA in **Frasers Lesotho Ltd v Hata-Butle (PTY) LTD LAC (1995-1999) 698 at 702** "It is in particular wrong to direct the attention of the other party to one issue and then attempt to canvass another." 1st Respondent stated his points in *limine* in clear terms to be "A. Urgency." "B. *Pedente life*" and "C. *Locus Standi*". Having discussed the three he gets into the merits of the case. The interdict issue and non-joinder appear in his heads of argument thereby denying Applicant time and opportunity to pay attention to them. I hold in favour of Applicant on the dismissal of these two points. Not because they do not have merit but because they were not pleaded.

[13] **Has Applicant Established a Clear Right to Interdict She Seeks?**

In law an Applicant who seeks the court's interdict must demonstrate on the facts of his case the following elements:-

- (a) A clear right to the relief they seek;
- (b) Irreparable harm likely to be suffered by applicant if relief sought is not
- (c) No satisfactory remedy available to applicant in due cause if interdict sought is not granted immediately

(d) Balance of convenience favours the granting of the interdict sought.

Advocate Nqhae challenges this by saying that but her application was for a temporary relief to which I had to ask if she meant applicant was not obliged to establish the said elements. At the end of the day it was agreed that the elements had to be satisfied. Be that as it may, the reading of first Respondent's answering affidavit speaks of three points in limine; urgency, *pedente lite* and *locus standi*. Indeed its perusal does not indicate the non-joinder plea and satisfaction of interdict requirements.

[14] **Merits**

The substance of 1st, 2nd and 3rd Applicants case is that they be declared rightful owners of 4th Applicant. The basis for 1st Applicant's claim is her customary law marriage to the deceased. The marriage is not materially challenged. Safe to say that 1st Respondent starts off his answer by stating that he is not privy to the marriage in question and can therefore not respond issuably. However, in the next paragraph he does acknowledge the existence of the marriage between first Applicant and the deceased and "MM1" has been annexed to support this fact. That 2nd and 3rd Applicants are the children by deceased has never been in issue.

[15] **Surviving Spouse's (Widow) Rights Under Customary Law**

First Applicant's claim to be declared an owner or beneficiary to the deceased estate is based on her being the lawful spouse of the deceased. The claims of 2nd and 3rd Applicants are based on them being biological children of the deceased of cause with qualification to the 3rd Applicant as already discussed; her illegitimacy.

- [16] According to Applicant the customary law principle of “*malapa ha a jane*” is applicable and favourable to her case. She submits that the property which the parties (Applicant and deceased) acquired together under custom cannot be allocated to the house of the younger wife in a polygamous family or be allocated to the younger brother of the deceased while the widow is still alive as well as the deceased’s children. Nothing in the Founding Affidavit indicates Applicant’s marriage to the deceased being his second marriage. In fact it becomes clearer in 1st Respondent’s heads that this was the deceased’s second marriage. That he had been married to one ‘Mabatho Mabote whose marriage to the deceased was still subsistent at the time he married first Applicant, hence the polygamy issue. The issue of “*malapa ha a jane*” is non-suited on the grounds that it was never pleaded in Founding Affidavit as the bases of Applicant’s claim to the deceased estate.
- [17] Applicant relies on the decision in **Ramothello v Ramothello CIV/T/727/86**. It was a case between parties who had concluded a customary law marriage and subsequently entered into a civil marriage. The civil marriage had been declared null and void *ab initio* on the ground that at the time they purported to enter into the civil marriage the defendant was still married to his first wife and the said marriage was still in subsistence. The court found in that case that the property of the plaintiff’s house was being used for the purposes of the first house. The legal position was stated, that defendant being a polygamist could not take the property of the plaintiff’s house and use it for the first house. I am deliberately detailing out circumstances surrounding the **Ramothello** case relied on by first Applicant to demonstrate that the case is different from hers. True, Applicant has quoted the correct position of the law

regarding property in polygamous marriages. However, the attempt to apply the principle to the merits of her case is unfortunately not helpful. Her case is against the brother of the deceased. The deceased and first Respondent are siblings not parties in a marriage other than that of deceased and first Applicant. I do not condone that first Respondent being the brother of the deceased should deprive the surviving spouse and children of the benefits of the estate. The point I am making is that the basis and/or argument advanced by first Applicant in support of her claim is misplaced under the circumstances and I reject it. It is not pleaded by Applicant and it cannot be relied upon at the hearing through the back-door as it were.

[18] I am not satisfied that Applicant has fulfilled the requirements for the grant of an interdict against First Respondent. Applicant has failed to establish a clear right to the estate in question, that is to say the whole of the estate of the late Samuel Mabote. Applicant has not established to my satisfaction that the property she is laying claim to belonged to her and the deceased. She and the deceased were living in rented flats and in terms of the “*malapa ha a jane*” principle her rights are limited to the property proved to have been acquired by her and the deceased towards their household. I am not convinced that such acquisition extends to the “MM2” list. I am not able to rely on annexure MM2 list as it is not clear who authored it and for what purpose. It is unsigned and its origin remains a mystery to me.

[19] The application is therefore dismissed. There is no order as to costs, this being a family dispute.

J. T. M. MOILOA
JUDGE

For Applicants: Adv. T. G. Nqhae

For Respondents: Adv. Mokobori