

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/133/18

In the matter between:

NTSELE RADEBE

APPLICANT

AND

MAMELLO TŠOSANE SHONGWE

1st RESPONDENT

MAPONE MAKHOABENYANE

2nd RESPONDENT

TUMELO MAKHOABENYANE (duly assisted)

3rd RESPONDENT

KAROHANO TŠOSANE LEKHANYA

4th RESPONDENT

KUTLO TŠOSANE

5th RESPONDENT

SEKOELE MAKHOABENYANE

6th RESPONDENT

SETOFOLO MAKHOABENYANE

7th RESPONDENT

MAMPHUTLANE MAKHOABENYANE

8th RESPONDENT

MAMPONE MAKHOABENYANE

9th RESPONDENT

POLELLO SEPHORA MAKHERA N.O.

10th RESPONDENT

MASTER OF THE HIGH COURT

11th RESPONDENT

ATTORNEY GENERAL

12th RESPONDENT

JUDGMENT

CORAM:

HON. J.T.M. MOILOA J

DATE OF HEARING:

01/08/2018

DATE OF JUDGMENT:

13/11/2018

ANNOTATIONS

Cases

1. Frasers Lesotho Ltd. vs Hata Butle (Pty) Ltd 1999-2001 LLR, 9
2. Khali vs the Executor, Estate of the late Edwards Moeketsi Khali CIV/APN/291/2005

- [1] The present application was moved on an urgent basis on 03rd March 2018. Parties took time to be ready. It eventually got heard on 1st August 2018 when the matter was ripe for hearing. It is a short matter; family dispute between relatives of the deceased over the deceased estate. Applicant is a paternal relative of the deceased while the Respondents are from both the maternal and paternal sides of deceased except of course 10th, 11th and 12th Respondents. The deceased died on 31/03/2018. It is common cause that at the time of her death the deceased had executed a valid Will and had had it registered with the Master of the High Court on 16th February 2016. It is annexure “NRI” to the pleadings. In terms of the Will of deceased, 1st to 9th Respondents are beneficiaries under the said Will of the deceased.
- [2] Applicant himself is not a beneficiary under the WILL. It is his son Tšepo who is a major beneficiary. He is in this matter in a representative capacity on behalf of his minor son under the Will. Tšepo has been bequeathed the deceased’s house being the immovable property of deceased Plot No. 13294 – 005 situate at Lithabaneng Ha Keiso in Maseru Urban Area. Tšepo is a minor of 10 years old still attending primary school. At the date of hearing of this matter he was reported to be at school attending classes.
- [3] Paragraph 14 of the Founding Affidavit sets out the cause of the dispute. Applicant avers that 10th Respondent read the WILL to all present after the death of ‘Mamahele Radebe. It is following the reading of that WILL that

First Respondent then asked the 10th Respondent whether she had also brought the amendments to the Will. 10th Respondent responded that she had left the Codicil at her office and asked to be granted an adjournment to fetch them. She came back with what she said were amendments to the deceased's WILL. The amendments were allegedly made by the deceased on 29/03/2018, 2 days before she passed away. Tenth Respondent proceeded to read them out. Applicant avers further that in terms of these amendments the deceased's house which in terms of the original WILL was bequeathed to his son was now purportedly bequeathed to First Respondent. Applicant requested 10th Respondent to give him copies. She promised she would make them available. However, 10th Respondent never furnished Applicant with a copy of the alleged Codicil. Neither did Applicant and the assembled relatives get to see the contents of the alleged codicil from which 10th Respondent was reading. To crown it all the alleged codicil from which 10th Respondent read amendments to the Will were never annexed to the pleadings before court. As I am dealing with this judgment there still is no (alleged) amendment to "NR1" filed of record nor annexed anywhere.

- [4] Only 1st and 10th Respondents have filed Answering Affidavits, contents of which are materially similar particularly in relation to contents of paragraph 14 of the Founding Affidavit. None of these contesting Respondents have challenged the averments made by Applicant at paragraph 14, the averments which founded the basis for the dispute in all respects. It therefore is an undisputed fact that 10th Respondent read out "NR1" together with its alleged amendments copies of which were never made available to Applicant. No one, except the Tenth Respondent not even this court, has been availed such codicil to see and read contents thereof or even to verify that such an alleged codicil exists in fact. During

arguments in court I pressed counsel for First Respondent to show me on the pleadings before court where the existence of a valid codicil is established. Tenth Respondent then confessed to the court that in fact the deceased had not signed any codicil until her death.

- [5] A codicil is no more than a testamentary document similar to a WILL. In principle a codicil serves to amend a previously executed WILL. Now, on my enquiry to that 10th Respondent to point me to wherein the pleading it was pleaded that a valid codicil had been made and where is the codicil in the pleadings 10th Respondent had made a submission that the deceased had called her Attorney to amend her first WILL. Also that having given instructions and before it was signed she died. She submitted that in law those instructions to her constituted a codicil but she was unable to support her submission with any authority. I observe in passing that none of these alleged facts have been pleaded by Tenth Respondent at all. It was her argument from the bar unsupported by any pleaded fact on her part.
- [6] To all this Advocate Shale for Applicant reacted by submitting that it is common cause that the deceased drew up a will on 16/02/2016 and had it registered with the office of 11th Respondent on 22/02/2016. He went further to submit that 10th Respondent is arguing for the first time from the bar that the deceased called her Attorney to amend her WILL. It is not pleaded. Moreover, even the alleged unsigned “codicil” has not been annexed to the papers to enlighten the court. I cannot, and this I have come across in several matters before me, overemphasise enough to counsel to desist from the bad practice of pleading from the bar instead of properly pleading their cause in pleadings so that the opposite side is made aware of what her case is and is enabled therefore to issuably plead to it with relevant facts. Conducting trials by guerrilla tactics of ambushing the other side is

not permissible. See for example **Gauntlet JA** remarks in **Frasers Lesotho Ltd. v Hata Butle (Pty) LTD 1999-2001 LLR, 9.**

- [7] Back to the issue at hand. “It is trite law that a WILL takes effect on the death of the testator, he may therefore, at any time before his death revoke such WILL. Also trite is the fact that the last lawfully executed WILL or codicil supersedes all other previously executed WILLS or codicils”. See **Khali vs The Executor, Estate of the late Edward Moeketsi Khali CIV/APN/291/2005.** It is not in issue that our law allows any testator to make amendments to his WILL and that the latest amendment will prevail over the previous ones. However, in *casu* it is Applicant who has satisfactorily established a bequest in favour of his minor child under “NRI”. First and Tenth Respondents on the other hand have failed to disprove “NRI” by the alleged amendment thereto. No alleged codicil has been made part of the pleadings. As matters factually stand nothing supersedes the prevalence of the original WILL of the deceased, “NRI”. I find accordingly that no lawful and valid codicil was made.

This court conclusively makes the following orders:

- (1) *The Will of the Late ‘Mamahele Hyacinth Radebe executed by her in her life time on 16th February 2016 and registered with the Master’s office on the 22nd February 2016 under registration No. 20/2016 is hereby declared to be the only valid Last Will and Testament of the Late ‘Mamahele Hyacinth Radebe;*
- (2) *It is hereby declared that the estate of the Late ‘Mamahele Hyacinth Radebe shall be executed and devolve in accordance with the Last Will and Testament of the Late ‘Mamahele Hyacinth Radebe dated 16th February 2016 and registered under No. 20/2016 in the Master’s office on 22nd February 2016.*

(3) There will be no order to costs on the basis that the dispute was a family dispute arising from misguided view of First Respondent Mamello Tšosane Shongwe.

J. T. M. MOILOA
JUDGE

FOR APPLICANT: ADV. SHALE
FOR RESPONDENTS: ADV. MAKHERA