IN THE HIGH COURT OF LESOTHO

CIV/APN/603/2012

In the matter between:

KGOTHALANG SYLVIA MACHAKELA	**APPLICANT**
And	
MORAPEDI NELSON MACHAKELA	**1st RESPONDENT**
THABANG EDGAR MACHAKELA	**2nd RESPONDENT**
KHAUHELO CLERENCE MACHAKELA	**3rd RESPONDENT**
EXECUTOR (ESTATE OF THE LATE SELLO MACHAKELA)	**4th RESPONDENT**
NEDBANK (LESOTHO)	**5th RESPONDENT**
MASTER OF THE HIGH COURT	**6th RESPONDENT**
ATTORNEY GENERAL	**7th RESPONDENT**

CORAM : **Nomngcongo J.**

DATE OF HEARING: **6th September 2013**

DATE OF JUDGMENT: **16th September 2018**

JUDGMENT

The applicant has approached court for an order in the terms :

(a) That account number 022000237586 held at Nedbank Lesotho be freezed pending finalisation of these proceedings and any other account held by the 1st respondent in Lesotho wherein the proceeds of the estate of late Sello Machakela were deposited into from the pension fund that the late deceased was a member.

(b) That the 1st respondent be interdicted from dealing with or disposing off the assets of the late Sello Machakela pending appointment of the executor by the Master of the High Court.

(c) That the 1st respondent be and is hereby interdicted and restrained from holding out himself as a sole heir alternatively an executor of the estate of the late Sello Machakela.

(d) That the appointment of the 1st respondent as a sole heir alternatively an executor of the estate of the late Sello Machakela be and it is hereby declared unlawful.

(e) That it is hereby declared that the applicant, 1st respondent, 2nd respondent and 3rd respondent are equal beneficiaries in the estate of the late Sello Machakela.

(f) That the 6th respondent be and is hereby ordered to appoint any suitable person other than any of the heirs or heiresses as an executor and/or executrix of the estate of the late Sello Machakela.

3. That 1st respondent should pay costs of suit.

4. That applicant be granted such further and/or alternative relief.

5. That prayers 1, 2 and 2(a), (b) and (c) operate with immediate effect as interim relief.

[1] The applicant is the second child and daughter of the late Sello Machakela and her late wife Evelyn Machakela. The first respondent is their eldest son. The 2nd and 3rd respondents are their brothers. The late Sello was shot and killed at his home in Khubetsoana. Subsequent to his death the family sat down to prepare for the funeral. Before that it appointed the 1st respondent according to the applicant herself as the customary heir. A letter was written to that effect by members of the Machakela family who signed it. The applicant was also a signatory to it as well as the second and third respondents. The first respondent was not. The family also resolved that a bank account be opened to receive monies in preparation for the burial. Such account was duly opened in the name of the first respondent as account number 022000237586 with Nedbank Lesotho.

[2] The applicant says it had also been resolved that when the burial money had been received the said account would be closed. I pause to observe that this would have been a very strange resolution because it would preclude access to the funds thus defeating the

purposes for which it had been opened. I do not believe there was any such resolution. Such a resolution was allegedly contained in the letter that appointed the first respondent as customary heir. Such a letter was not even annexed to the applicant's founding affidavit.

[3] Be that as it may the Government of Lesotho through Parliament of which Sello had been a member released a sum of M84,000 in preparation for the burial and deposited it in the above account. The applicant says after this the 1st respondent did not close the account. I have indicated that this was an untenable proposition. Subsequent to this Parliament released a further substantial sum of M1,065,168.00. The applicant complains that first respondent did not inform her about receipt of this money. She complains bitterly that the third respondent is the one administrator of the estate and he single handedly controls an amount in excess of one Million Maluti which she alleges that he unlawfully received from the Lesotho Government. She claims she is not fighting over inheritances and she seeks only a fair distribution amongst the heirs and heiresses of which she claims to be one. She says that third respondent's acts amount to a continuing illegality when he has no right whatsoever to hold himself out as the executor and heir at the

same time, a position she says creates a clear conflict of interest, She says she and her siblings as co-heirs to the estate suffer irreparable harm and prejudice at the hands of the third respondent by his continuing. Strangely she also says that they do not reasonably apprehend the irreparable harm that she alleges. She alleges the conduct of the respondent trambles on her rights and the lawful administration of her late father's estate.

[4] It will immediately be apparent that her disclaimer that she is not, fighting over inheritances rings quite hollow in the face of this onslaught against the third respondent.

[5] In answer to these charges the third respondent answers simply that the issue of succession or inheritance in Lesotho is a matter to be regulated either under the received law or under customary law. He pointed out that under the received law the applicable statutory instruments are the Administration of Estates Proclamation N0-19 of 1935 and the Intestate Succession Proclamation N0.2 of 1953.

[6] These two pieces of Legislation provide that they shall not apply to the estates of Africans. Section 3(b) of the Administration of Estates Act provides

"This proclamation shall not apply,

(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 been married, under European Law".**

[7] The respondents goes on to say that the estates of Basotho who have maintained their customary way of life will be regulated by customary law. Therefore, whenever the question arises whether a succession or inheritance is regulated by customary law or by the received law, it firstly has to be established whether the deceased may have abandoned tribal custom and adopted a European mode of life and this will determine which law to apply.

[8] Lastly it is contended that the applicant made no attempt to address the question of the mode of life of the deceased, Sello Machakela. The applicant replies that it was not necessary to do so as the averments in her founding affidavit make it abundantly clear that he had adopted a European way of life. This argument overlooked the provision of section 3 (b) of the Act in that it states in no uncertain terms that the proclamation does not apply to Africans. It will only do so if the applicant can establish that he had adopted a European mode of life to the satisfaction of the Master. There is a presumption therefore that as an African the Act does not apply to him. This presumption can only be rebutted by proof to the contrary. The applicant an onus which he has to discharge. Simply to put forward certain factors which point to a certain way of life is not sufficient because there may well be others which point in the opposite direction and which may weigh more heavily than those put forward by the applicant. It is therefore a necessary averment to state and prove the mode of life of the deceased.

[9] In this case the deceased died intestate. The family did not bother to report the death of the deceased in terms of the Administration of Estates Proclamation. Instead they sat down to appoint the heir and they appointed the first respondent in true Basotho male Primogeniture Custom. The applicant in her own version was a signatory to the letter confirming that he was appointed customary heir to the estate. W.C.M Maqutu has this to say of such a situation in his work Contemporary Family Law of Lesotho at p.170.

"Another feature of Basotho society is that in cases of intestacy, the deceased estate is not reported to the Master of the High Court so that he can determine whether or not it should be administered according to the Common Law, every Estate which has not been reported to the Master is automatically administered according to Basotho Customary or indigenous law".

[10] Indeed it should be so, after all the deceased was a Mosotho and not some kind of assimilated European Speaking of which, I found it necessary to make a comment on the so

called mode of life test that is found in the Administration of Estates Proclamation and similar Legislation and the decisions of our Courts that have sought to interpret their provisions. These provisions and their interpretation by our courts are an embarrassing relic of the colonial mindset with its racist understones. They are patronizing and condescending. The criteria for determining whether one has abandoned a Sesotho way of life have led to such ridiculous inquiries as whether one wears European clothes or not or whether he sleeps on a bed and eating at a table with whole family See MOKOROSI V MOKOROSI 1967 – 1970 LLR 1- Cases such as these make a caricature of a contemporary African who nonetheless still observes and maintains his African way of life many respects. I have yet to see a Mosotho who has completely abandoned Sesotho custom and does not at some point or other practice it. The applicant herself, by being party to the appointment of the first respondent by custom has acknowledged this and she cannot be heard to say that deceased had abandoned the Sesotho way of life.

[11] The application is dismissed with costs and the rule nisi issues by Peete J. is discharged.

T. NOMNGCONGO
JUDGE

For Applicant: **Mr Nthontho**

For Respondent: **Mr Loubser**