CIV/APN/329/14

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MATEBELLO JEAN MATETE	**1ST APPLICANT**
THAKANE CHIMOMBE (N.O)	**2ND APPLICANT**
MOTLATSI RAMAROU (N.O)	**3RD APPLICANT**
And	
MATETE PAUL MATETE	**1ST RESPONDENT**
M.M OPERATIONS SERVICES (PTY) LTD	**2ND RESPONDENT**
MOPELI PAUL MOKHETHI	**3RD RESPONDENT**
REGISTRAR OF COMPANIES	**4TH RESPONDENT**
MASTER OF THE HIGH COURT	**5TH RESPONDENT**
ATTORNEY GENERAL	**6TH RESPONDENT**

JUDGMENT

Coram	:	His Honour Judge Keketso Moahloli (a.i)
Heard	:	9 March & 11 September 2018
Delivered	:	28 September 2018

SUMMARY

Testate succession- Validity of joint will - Cohabitants / life or domestic partners are in terms of section 5 of Law of Inheritance Act 1873 persons competent to make a will, provided they "have abandoned tribal custom and adopted a European mode if life" as per proviso to section 3(b) of Administration of Estates Proclamation 1935 – Such competent persons have full, unrestricted freedom of testation and may disinherit or omit to mention any child, parent or descendant without assigning any reason..., any law, usage or custom notwithstanding; and no such will as aforesaid may be set aside by reason of such disinheritance or omission – Competent cohabitants may appoint each other as heirs in their respective wills or in a joint will

ANNOTATIONS

Cases:

'Mota v 'Mota & Others, C of A (CIV)/12/15
'Mota v 'Mota & Others, CIV/APN/390/14
Rakhetla & Another v Aldeia (born Rakhetla) & Others, LAC (2009-2010) 196
Rasekoai & Another v Rasekoai & Others, LAC (2011-2012) 88
Ratia v Ratia & Another, CIV/APN/329/14
Thinyane v Masooa [2015] LSCA

Statutes:

Administration of Estates Proclamation 19 of 1935
Intestate Succession Proclamation 2 of 1953
Law of Inheritance Act 26 of 1873
Laws of Lerotholi 1903 (as amended in 1938)
Legal Capacity of Married Persons Act 9 of 2006.

Books consulted:

Heaton, J. 2010. South African Family Law. 3ed, LexisNexis
Maqutu, WCM. 2005. Contemporary Family Law (The Lesotho Position). 2ed, NUL Publishing House
Poulter, S. 1976. Family Law and Litigation in Basotho Society. Oxford University Press
Poulter, S.1999. Legal Dualism in Lesotho. Morija Sesuto Book Depot

Moahloli AJ

INTRODUCTION

[1] This is an application for an order in the following terms:

> **“** 1. That ordinary modes of service be dispensed with due to urgency of the matter;
>
> 2. That the First Applicant be declared as the Universal Heir of the late Sello Gilbert Matete;
>
> 3. That the transfer of the 500 shares held by the late Sello Gilbert Matete in M.M Operations Services (Pty) Ltd Reg. No.1993/97 to the First Respondent be declared unlawful and null and void;
>
> 4. That the First applicant be declared the rightful heir of the 500 shares held by the late Sello Gilbert Matete in the Second Respondent;
>
> 5. That the Fourth Respondent be ordered to register the First Applicant as the holder of 500 shares held by the late Sello Gilbert Matete in the Second Respondent and to remove the name of the First Respondent as the Director and shareholder of the Second Respondent from the company file in the Registry of Companies;
>
> 6. That the Third Respondent be ordered to cease paying, or cause to be paid, dividends in respect of the 500 shares held by the Late Sello Gilbert Matete in the Second Respondent and to pay, or caused to be paid, such dividends instead to the First Respondent;
>
> 7. That the Self Appointment of the First Respondent to the Directorship of the Second Respondent be declared unlawful and a nullity;
>
> 8. That the Third Respondent cease to work with the First Respondent as the director and shareholder of the Second Respondent in the affairs and operations of the Company;
>
> 9. That the Respondents pay the costs of suit;
>
> 10. That the Applicants be granted further and or alternative relief. **”**

[2] The first respondent opposes the relief sought for reasons to be canvased later. The applicants were represented by Adv. Khesuoe and the first respondent by Adv. Masiphule. The second to the firth respondents are not opposing the application.

BACKGROUND

[3] The 1st Respondent ("Paul") is the first born son of the deceased (Sello Gilbert Matete) from his first marriage to 'Malebina Matete (born Monokoane), which ended in divorce on 29 April 1991.

[4] After the divorce, the deceased got married to the 1st Applicant ("'Matebello") by Christian rights in community of property on 6 July 2012. Before this marriage the deceased and 'Matebello, who were apparently living together, executed a joint will which they registered with the Master of the High Court on 24 May 2005. In the will 'Matebello is not referred to by her maiden names Neo Jane Malefane, but as Neo 'Matebello Matete, and the two testators refer to themselves as "married in community of property…residing at Sekamaneng in the district of Berea". Clause 5 of the will stipulates:

> "***THE SURVIVING TESTATOR/TESTATRIX***
>
> *We nominate, constitute and appoint the SURVIVOR OF US as the sole and universal heir of all the family assets and effects, whether movable or immovable and whenever situate, subject to the following conditions:*
>
> - *The SURVIVOR shall be entitled to remain in full possession of all the assets in the estate until his/her death. He/she shall have unrestricted use, control and administer all assets, shall be entitled to use any income for his/her maintenance and support, and may generally deal with the assets in any way that he/she may think fit, subject only to the reservation that every reasonable endeavour be made by him/her to preserve the corpus of the estate for the ultimate benefit of our children:*
>
> - *'Mants'eli Rosina Matete born 20th May,1995;*

- *Mahao Matete born 28th February,1999"*

And clause 6 provides:

> *"In the event of our simultaneous o near simultaneous death the following properties shall devolve upon the said grandchildren in equal shares."*

[5] It is also not disputed that in June 1993 the deceased and one Mopeli Mokhethi registered a security services company called M.M Operations Services (Pty) Ltd., in which they each held 500 shares. The deceased's said shares have since been transferred to Paul after the death of his father. This is because on 3 May 2014, shortly after the passing of the deceased, a meeting of the Matete family purported to nominate Paul as the heir to the deceased's estate. He was subsequently presented to the Master as lawful heir to the said estate.

[6] The applicants are now challenging the appointment of Paul as sole heir. They argue that it is unlawful because it goes against the prescripts of the joint will executed by 'Matebello and the deceased. They also maintain that as 'Matebello was the lawful wife of the deceased, she is the sole heir to the deceased estate.

[7] Paul vehemently opposes the application on two grounds. Firstly he argues that the so-called will is invalid because at the time it was purportedly executed, 'Matebello was not married to the deceased in terms of the law. Secondly, even if the will is deemed valid, in terms of section 14(1) of the *Laws of Lerotholi* a father is not permitted to, by will, deprive his heir of a greater share of the father's estate. Paul further argues he was lawfully appointed heir by a meeting of the Matete family held on 3 May 2014 and this was endorsed by their Chief. And that was done in conformity with section 11(1) of the *Laws of Lerotholi*, which stipulates that the heir shall be the first male child of the first married wife.

ANALYSIS OF ARGUMENT

The Joint Will

[8] Contrary to popular belief, it is not true that in our law only married persons are allowed to make a joint will. A joint will is in essence a testamentary document by which two or more persons express their intentions in a single document, irrespective of whether they are married or not. It can be used by couples who live together without entering into a legally recognised marriage [i.e. in a type of relationship known by various terms, such as domestic partnership, life partnership, cohabitation, living together]. Since such a relationship does not confer the consequences a legally recognised marriage on the cohabitants, such partners can acquire some degree of protection by making use of ordinary legal rules and remedies such as contracts and wills.

[9] In terms of section 5 of out of the *Law Inheritance Act 26 of 1873*:

> " Every person competent to make a will shall have full power by any will executed after the taking effect of this Part to disinherit or omit to mention any child, parent, relative or descendant without assigning any reason for such disinheritance or omission, any law, usage or custom now or heretofore in force in Basutoland notwithstanding: and no such will as aforesaid shall be liable to be set aside as invalid, either wholly or in part, by reason of such disinheritance or omission as aforesaid". **[my emphasis]**

[10] And the expression *"competent to make will"* has been interpreted to mean, in the case of an African[1], persons who *"have abandoned tribal custom and adopted a European mode of life"* [per proviso to section 3(b) of the *Administration of Estates Proclamation 19 of 1935*][2]. This expression has very offensive overtones and ought to have been jettisoned long ago by our lawmakers. In more acceptable parlance it means a person whose lifestyle is predominantly modern rather than predominantly customary. It must be noted that the third

[1] "African" is defined as 'any person belonging to any of the aboriginal races or tribes of Africa south of the Equator' [by section 2 of the Administration of Estates Proclamation 1935

[2] See inter alia Rasekoai v Rasekoai at para [22]; Rakhetla v Aldeia

requirement in the aforesaid proviso only applies where the testators are married (in which case then they must have married under European law).

[11] It is important to bear in mind that *in casu* it not the Respondents' case that the deceased had not abandoned tribal custom. Their opposition/defence is premised solely on the grounds paraphrased in paragraph [7] above. They would to have had to advance very persuasive evidence to substantiate such argument, because the testators themselves, in clause 1 of their joint will, declare that they lead a modern mode of living and their estate must be administered under the Administration of Estates Proclamation or any other comparable legislation.

[12] The Court of Appeal case of *Thinyane v Masooa [2015] LSCA* made it abundantly clear that a widow who has abandoned the customary for a European lifestyle is in terms of the two statutes referred to above competent to make a will [at paras 22-23]. Also that a testator's assertion that she has done so is very pertinent when deciding the matter [at paras 20-22].

[13] Regarding Paul's argument he cannot be deprived of more than half of the estate, our answer is that this is the case only where the estate falls to devolve in terms of customary law. This is not the case *in casu* as his father and 'Matebello made it clear in unequivocal terms how they wished their estate to devolve. And they were permitted to do this by section 5 of the Law of Inheritance Act set out above. This provision "makes it plain that if a person executes a valid will and was competent to do so his wishes must be carried out regardless of any restrictions in Sesotho law" [*Poulter, Legal Dualism in Lesotho 113*].

[14] Another factor which favours 'Matebello's claim to the estate is the fact that there is evidence before this court to the effect that 'Matebello got married to the deceased in community of property in 2012 and the evidence was not disputed. Consequently the deceased and 'Matebello owned the joint state in equal and

undivided shares. And in terms of the *Legal Capacity of Married Persons Act* 'Matebello, the surviving spouse, has full legal capacity with regard to the administration of the estate, amongst other things.

[15] In addition, the High Court judgments of *Ratia v Ratia* and *Mota v Mota* have emphasised that the heir cannot inherit from the joint estate while the widow is still alive. The latter judgement was subsequently confirmed by the Court of Appeal[3]on this point

DISPOSITION

[16] For the above reasons, it follows that prayers 2 to 9 in the Notice of Motion must be granted.

ORDER

The application is granted, with costs

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KEKETSO MOAHLOLI
ACTING JUDGE

Appearances:

Adv. MV Khesuoe for 1st Applicant
Adv. BMR Masiphole for 1st Respondent

[3] C of A (CIV)/12/15 (Unreported) at paras [9] and [14].