

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/137/16

In the matter between:

KOTSOANE MOELETSI

APPLICANT

AND

NTHOFELA MOELETSI

1st RESPONDENT

**LESOTHO HIGHLANDS DEVELOPMENT
AUTHORITY**

2nd RESPONDENT

JUDGMENT

CORAM:

HON. J. T. M. MOILOA

DATE OF HEARING:

15/08/2016

DATE OF JUDGMENT:

19 August 2019

ANNOTATIONS

Legislation

1. Laws of Lerotholi
2. High Court Rules, 1980

[1] On 03/04/2015 this application was brought before my brother Peete J. on an urgent basis. He issued a rule nisi calling upon the Respondents to show cause why the following prayers shall not be made final orders;

1. The normal modes and service of process prescribed by the rules of this honourable court be and are hereby dispensed with on account of urgency hereof.
2. That a *rule nisi* be and is hereby issued returnable on the 23rd May 2016 calling upon the Respondents to show cause (if any) why the following prayers shall not be made the final orders of this honourable court.
 - (a) That the 2nd Respondent be and is hereby restrained and interdicted from further giving and/or handing over to Nthofela Moeletsi (1st Respondent) the monetary grants and/or cheques given in respect of the Sephokong field that is affected by the Lesotho Highlands Development Authority water project pending finalization of the present matter.
 - (b) That the Applicant be declared the lawful and rightful customary heir of the late Mamahlomola Moeletsi.
 - (c) Costs of suit.
 - (d) Further and/or alternative relief.
3. That prayer 1 and 2(a) operate with immediate effect as an interim court order.

[2] Applicant and 1st Respondent are brothers and sons of the late ‘Mamahlomola Moeletsi who died on 24 December 2011. The siblings were six boys and one sister. Their sister is the last born in the family. The first of the children was one Mahlomola Moeletsi. He and all his sons predeceased ‘Mamahlomola. There was yet another sibling who predeceased ‘Mamahlomola. All of these first two older sons of ‘Mamahlomola died without leaving any descendants. Applicant is the third born son and this leaves him as the first living son of ‘Mamahlomola. It is not in dispute as is evident from 1st Respondent’s own pleadings, that Applicant is the deceased’s heir. This in line with the long standing Sesotho law and custom as codified under **Section 11(1) of part 1 of the**

Laws of Lerotholi. The section provides that the heir shall be the first male child born of the first married wife.

- [3] Although not disputing his brother's position as heir to their mother's estate, 1st Respondent challenges Applicant's heirship rights to the field situate at Sephokong which is affected by the Lesotho Highlands Development Authority (LHDA) who is cited here as 2nd Respondent. During her lifetime 'Mamahlomola was receiving compensation in the form of monetary grants from 2nd Respondent. In later years of her life due to health problems 'Mamahlomola's grants from 2nd Respondent were being received on her behalf by First Respondent. This arrangement continued until 'Mamahlomola's death. The relevant authority facilitating that arrangement was Annexures "A" and "B" to Answering Affidavit of First Respondent. It is against this background that Applicant seeks to be the one who receives those grants from 2nd Respondent through an order declaring him the lawful and customary heir of the late 'Mamahlomola Moeletsi. Moreover, Applicant seeks as consequential relief to the order above, that 2nd Respondent be ordered to pay to Applicant all monetary grants and/or cheques in respect of the Sephokong field affected by the LHDA water project. At the time this application was launched those monetary grants were being received by 1st Respondent. Applicant seeks an order interdicting 2nd Respondent from further giving such grants to 1st Respondent. 'Mamahlomola had instructed LHDA to give her grants to 1st Respondent on her behalf due to old age and ill health. 1st Respondent contends that Annexures "A" and "B" to his Answer constitute a bequest to him by their late mother of the field at Sephokong. Is First Respondent correct that Annexures "A" and "B" and a bequethal of Sephokong field to himself by his mother? I will deal in depth with this question later on in this judgment.

[4] **Non-compliance with Rules of Court**

In his answering affidavit 1st Respondent raises a point of law; that Applicant failed to comply with the provisions of **Rule 58(1) of the High Court Rules 1980**. This he explains by saying that Applicant has attached to his founding affidavit documents written in Sesotho without accompanying them with a translation certified to be correct by a sworn translator. On that basis 1st Respondent prays that the application be dismissed. Applicant concedes to this irregularity and offers an explanation that the translated documents were inadvertently left out. However, he did not seek this court's leave to furnish those translated documents, in particular "B" and "C" to the founding affidavit. Document "B" is a letter of Moeletsi family designating Applicant as heir to the estate of 'Mamahlomola. Document "C" is another letter by Principal Chief of Butha-Buthe also confirming the decision of Moeletsi family appointing Applicant as heir to late 'Mamahlomola. I do not take kindly to counsel who do a sloppy job and pay little or no attention to the material they bring to court. However, I would not have done justice to this family dispute if I were to simply dismiss it on the basis of a superficial technicality alone which is not material to the dispute. It has to be borne in mind that the rules of court are an important component of procedural definition of disputes between the parties before court. They are therefore important to assist the court and the parties in orderly bringing the dispute between the parties before court. However, they are not to be used as tools to constrain the court from adjudicating on the real dispute between parties. Moreover, I have no doubt that this Court, litigants and counsel in *casu* understand Sesotho and none of us had difficulty appreciating contents of "B" and "C"

to the founding affidavit. The point of law raised does not render this application to be dismissed.

[5] **Merits**

Both Applicant and 1st Respondent have attached documents they rely on in support of their respective positions. To his Founding Affidavit Applicant has attached “A”, “B”, “C” and “D”. Collectively, the documents are letters introducing Applicant as heir to the estate of his mother ‘Mamahlomola Moeletsi. The letter process was initiated by the Moeletsi family through the area chief of Ha Lesaoana, Liphakoeng Butha-Buthe. This introduction is acknowledged by the Principal Chief of Butha-Buthe who refers the matter further to the District Administrator (DA) Butha-Buthe. The DA on that basis writes to LHDA (2nd Respondent) a confirmation letter to the effect that Applicant is the rightful owner of ‘Mamahlomola’s estate. This is a standard procedure in matters of this nature where a customary heir has been appointed by the Family.

[6] According to 1st Respondent, 2nd Respondent could not act on the basis of A, B, C and D outlined above because they do not align themselves with ‘Mamahlomola’s written instructions. The written instructions First Respondent is referring to are Annexures “A” and “B” to his Answer. Contents of “A” attached to 1st Respondent’s answering affidavit are that “I bequeath (sic) the said field to my son by the name of Nthofela Moeletsi. My names ‘Mamahlomola Moeletsi should be substituted with his names Nthofela Moeletsi. I further put a condition that he must survive (sic) me from the compensation he is going to receive for as long as I live.” The letter is stamped by the chief of ha Malesaoana, Leribe. (My emphasis)

[7] **Evaluation of evidence relating to merits**

I pause here to focus a little on the boundaries issue in this case. In the founding affidavit Applicant identifies both himself and 1st Respondent as residents of Ha Lesaoana, Malibamatšo in the district of Leribe. In the answering affidavit 1st Respondent also identifies himself as a male Mosotho adult of ha Lesaoana, Malibamatšo in the district of Leribe (Paragraph 1). Then at paragraph 4 he clarifies that he is from Butha-Buthe and not Leribe. Having so clarified that he is from Butha-Buthe, 1st Respondent surprisingly attaches “A” to his Answering Affidavit allegedly authored by his late mother through a chief in Leribe. Annexure “A” itself bears the Chief’s addresses Ha ‘Malesaoana. And the chief’s stamp on “A” is that of the chief of Ha ‘Malesaoana Leribe contrary to the fact that the author was a resident of Ha Lesaoana. The chief of Ha ‘Malesaoana had no jurisdiction over disputes of this matter. It is the chief of Ha Lesaoana Butha-Buthe and the Principal Chief of Butha-Buthe who has jurisdiction over disputants in this matter; and who therefore had competency to confirm the letter of the family designating heir to the estate of the late ‘Mamahlomola. This is the document that he refers to as ‘Mamahlomola’s written instructions. In fact the rest of 1st Respondent’s annexures B, C, D and E (materially similar to Applicant’s annexures) are a process undertaken in Leribe, not Butha-Buthe. What influenced 1st Respondent to undergo the customary heirship process in the district that has no jurisdiction over him, his late mother and the relevant Moeletsi family? In my assessment in all probability Annexures “A” and “B” of 1st Respondent are fraudulent and cannot be relied upon. I have decided to rely on the affidavit of chieftainess ‘Mamotloang Lesaoana, in the district of Butha-Buthe. The affidavit is attached in support of Applicant to his replying affidavit. The chieftainess avers in her capacity as such, that the Moeletsi

family presented before her Kotsoane Moeletsi (Applicant) as beneficiary of the late ‘Mamahlomola Moeletsi in respect of the compensation she was receiving from LHDA (2nd Respondent) during her lifetime and NOT Nthofela Moeletsi (1st Respondent). The Chieftainess concludes her supporting affidavit by stating that the chief of Ha ‘Malesaoana together with the Principal Chief of Leribe do not have jurisdiction over Ha Lesaoana.

- [8] At paragraph 3 of this judgment I undertook to discuss whether annexure “A” to the answering affidavit of 1st Respondent constitutes a bequethal. 1st Respondent refers to the document as ‘Mamahlomola’s written instructions in terms of which she bequeathed to him the field at Sephokong. Applicant challenges these written instructions on the basis that their mother ‘Mamahlomola was illiterate and “A” which is alleged to have been written by her is not authentic. I have already indicated in the preceding paragraph that “A” bears the Ha ‘Malesaoana address while ‘Mamahlomola was a resident of Ha Lesaoana, Butha-Buthe. My answer to whether “A” is a bequest to 1st Respondent is in the negative. In my considered view “A” is not a testamentary writing. It does not constitute written instructions. Written instructions are an expression by the testator of how they want their assets or estate to be distributed after their death. As a matter of good practice Basotho society have such important documents as written instructions witnessed by members of the family as well as signed and stamped by their area chief. In *casu* this was not done. “A” is a plain simple letter ostensibly signed by ‘Mamahlomola Moeletsi before the foreign chief of Ha ‘Malesaoana, Leribe. No family members as witnesses. Not forgetting that Applicant already disputes the validity of “A” on the basis of ‘Mamahlomola being illeterate; even if ‘Mamahlomola was literate, it was irregular for her to approach an area chief who had no

jurisdiction over her. I am not accepting that ‘Mamahlomola expressed her wishes before a chief outside her area. The document does not constitute a testamentary writing in any way. All it does is to transfer or hand over to Nthofela Moeletsi the responsibility of collecting the grant on behalf of ‘Mamahlomola (*hore a mphelise ka eona ho hlakoloe lebitso la ‘Mamahlomola Moeletsi ho ngoloe Nthofela Moeletsi. A ntšapote ka eona le eena a itšapote ka eona*). (My name to be substituted for his for him to see to my general maintenance as well as his own.) That is the purpose of the substitution, to operate in the present while ‘Mamahlomola is unable to do so herself. This can be read from “B” as well which concludes by the author stating an inability due to circumstances beyond her control. Annexures “A” and “B” are not a bequest by ‘Mamahlomola to Nthofela. The 2 are materially similar in content. “A” is addressed to LHDA. “B” is addressed to the chief of Ha Lesaoana. Both letters are purported to have been written by ‘Mamahlomola Moeletsi. Both letters are date stamped 02/04/2008 by the chief of Ha Malesaoana, Leribe. The area chief who does not have jurisdiction over the Moeletsi family from Ha Lesaoana, Butha-Buthe. I am not persuaded in finding the document(s) to be transferring ‘Mamahlomola’s field at Sephokong after her death to Nthofela. For the avoidance of doubt, 1st Respondent is misguided in regarding “A” to his Answering Affidavit as a bequethal to himself by ‘Mamahlomola. It does not. By 1st Respondent’s own pleadings Applicant is their parent’s customary heir. Nothing contained in 1st Respondent’s papers disproves that fact.

- [9] In addition to the incompetencies of the chief of Ha ‘Malesaoana Leribe and the Principal Chief of Leribe discussed above I observed more irreconcilable facts relied upon by 1st Respondent in Annexure “D” which I discuss below. That is the letter from the Principal Chief of Leribe to

LHDA, presenting 1st Respondent as beneficiary to the estate of ‘Mamahlomola Moeletsi, because he was already receiving same during her lifetime. What puzzles me is the concluding sentence; that the chief of Ha Lesaoana omitted to affix his stamp on the family letter, but the rights are his (1st Respondent). “D” is preceded by “C” being the family letter presenting 1st Respondent as heir. “C” correctly bears the address of Ha Lesaoana Butha-Buthe. From there, if things were done in proper order, 1st Respondent should have presented “C” to the Principal Chief of his district, Butha-Buthe not that of Leribe who has no jurisdiction or knowledge of the affairs of this family as they are not resident within his jurisdiction. I find these letters materially flawed and reject them insofar as they purport to present 1st Respondent as heir to ‘Mamahlomola. 1st Respondent’s situation is made worse by one Mahlasinyane Mohapi who appears in “C” as witness number 5. Mahlasinyane Mohapi has deposed to an affidavit wherein he avers that he knows nothing about “C” to 1st Respondent’s Answering Affidavit; that he has not signed any letter presenting Nthofela Moeletsi (1st Respondent) as beneficiary of ‘Mamahlomola Moeletsi in relation to the Sephokong field. Apart from Mahlasinyane Mohapi the rest of the signatories to “C” are said to be the direct sons of 1st Respondent inclusive of his daughter in law ‘Marorisang Moeletsi who was married into the family in 2015. It does not make sense as to how then she witnessed a family letter authored in 2014.

- [10] I am not persuaded to accept “C”, “D” and “E” either relied upon by 1st Respondent as against Applicant’s claim that he’s the rightful heir to the Sephokong field. That has not been disproved by 1st Respondent. These annexures were made on the basis of “A”. In my view, on the basis of “B” as well.

[11] In the light of the conclusion I have arrived at regarding the authenticity and content of annexures “A” and “B”, as well as the resultant “C”, “D” and “E” the application succeeds and the rule nisi dated 03/04/2015 is hereby confirmed with costs of Applicant.

J. T. M. MOILOA
JUDGE

FOR APPLICANT: ADV. K. D. MASHAILE

FOR RESPONDENTS: ADV. N. F. MASOABI