IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/T/336/12**

In the matter between

LEBOEA MOTLALANE **PLAINTIFF**

AND

SEOTSA TABA MOTLALANE
(born Seotsa Motsamai) **DEFENDANT**

JUDGMENT

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

DATE OF HEARING: **18 JUNE 2018**

DATE OF JUDGMENT: **19 AUGUST 2019**

ANNOTATIONS

Legislation

1. Laws of Lerotholi
2. Attesting Witnesses Act 1876

Cases

1. Rasekoai vs Rasekoai C of A (CIV) 30/2010
2. 'Makhahliso Motanteli vs Tseko Tekane C of A (CIV) 17/2009
3. Frasers Lesotho vs Hata-Butle Pty Ltd 1999/2000 LLR 65

[1] Plaintiff issued summons against Defendant claiming, I summarise:-

(a) a Declaration that he (Plaintiff) is the heir to the estate of late Chaka and 'Manthabiseng Taba Motlalane.

(b) an order directing Defendant to deliver up to Plaintiff all property of deceased in his possession being

- *2 x arable fields*
- *2 x residential houses including utensils therein situate*
- *Cattle, sheep, donkeys and their bewys*
- *Late Chaka's passport, macolscorp, bank card and Teba Bank Book and Card*
- *Costs of suit*

At the outset I must emphasise that pleadings in this case, as happens in many cases lately, are very poorly drafted. So serious is this problem that sometimes a party's real case is missed and misrepresented in the pleadings. This is one such case.

[2] This dispute is over inheritance rights to the estate of the late Chaka and 'Manthabiseng Motlalane. Plaintiff's case is that Chaka and 'Manthabiseng had a child who predeceased them. Defendant pleads that he is Chaka and 'Manthabiseng's son. Chaka died in 2001 while 'Manthabiseng died seven (7) years later, in 2008. None of the estates were reported with the office of the Master of High Court upon the demise of each of the spouses. The applicable law under the circumstances is therefore the customary law of inheritance in terms of which the long standing legal principle is that the heir is the first born male child of the deceased. What has come to be known popularly as **Section 11(1) of the Laws of Lerotholi** applies**.** Where the family meets to appoint an heir they cannot ignore the provisions of **Section 11(1) of the Laws of Lerotholi** and create their own, **Rasekoai vs Rasekoai C of A (CIV) 30/2010.**

[3] **THE FAMILY TREE**

Before getting into the issue at hand it is prudent to outline the family tree so as to clarify the relationship between the deceased and the respective litigants. As far as is discernible from the papers the family tree is traced from two (2) brothers Motseki and Habofanoe Motlalane. Motseki had been married to one 'Mapuleng who survived him and their two (2) children Puleng and Chaka Motlalane. Incidentally, the family uses two surnames Motlalane and Taba interchangeably. Following the death of 'Mapuleng Motseki married 'Mapaballo. That union was blessed with two (2) children 'Mantoko and Ponto. Although having not been joined as a party nor called in as a witness Ponto features a lot in this litigation as shall be seen a little later. Ponto and Chaka (the deceased) are therefore brothers. Chaka is from the first house while Ponto is from the second house. They are the sons of Motseki. At the time of this action Plaintiff testified that Ponto and his mother 'Mapaballo are still alive, and emigrated to South Africa as citizens of that country. He testified that Defendant came to live with 'Manthabiseng as a herdboy.

[4] In his lifetime Chaka had married one 'Manthabiseng born Motsamai. Plaintiff pleaded in his summons and testified in court that he is heir to the estate of Chaka and 'Manathabiseng through Ponto who donated his rights to estate of deceased to him (Plaintiff). Plaintiff testified tha the decision of Ponto to donate his rights to him were confirmed by a family council decision dated 2nd January 2009. Plaintiff says as a direct descendant of Habofanoe Motlalane, who was Motseki's brother he is the rightful person to inherit 'Manthabiseng's estate. Habofanoe had two wives, one of whom bore him Plaintiff. So, to Plaintiff the late Motlalane was senior uncle, being Habofanoe's elder brother.

[5] When Chaka retired from the mines at Klerksdorp his place was taken up by Plaintiff as his son in accordance with the tradition between mines and their employees. In 2001 when Chaka died, his surviving spouse 'Manthabiseng became heir by default as no formal arrangements were made to introduce heir. No complaint was raised then about the position of Defendant in the Motlalane family and his relationship with 'Manthabiseng continued. That was until 2008 when she ('Manthabiseng) died. Plaintiff for the first time found Defendant unsuited to inherit her estate. Instead he saw himself as the rightful heir. He is before this court seeking an order to declare him as such. He also claims that Defendant be ordered to release to him the property in Defendant's possession being 2 arable fields, 2 houses and utensils, a residential site, cattle, sheep and their bewys as well as Chaka's passport, *macolscop,* bank card and TEBA bank book. Plaintiff founds his claims on an allegation that Ponto, being Chaka's brother, was appointed heir to the estate in question. The said Ponto passed on the inheritance rights to him (Plaintiff) and the family agreed with him.

[6] Plaintiff testified that after 'Manthabiseng's death a family meeting was held on 04/08/2008 to decide on who was heir to the estate. At that time Defendant was living at his own place. 2 of his siblings were living with 'Manthabiseng. The family resolved that the estate should devolve upon Ponto Motlalane. Having been so appointed, Ponto in turn passed on his heirship to Plaintiff. Plaintiff handed in Exhibits "A", "B", "C", "D" and "E" in support of his testimony. The exhibits are family letters which essentially speak the same thing; that the Motlalane family agree with Ponto Motlalane in passing his rights to the deceased's estate to his younger brother Leboea Motlalane. The rights having been conferred on

him (Ponto) as the deceased's heir in line with the family hierarchy. The estate comprises cattle, sheep, donkeys and their bewys. It also includes 2 arable fields household property, a residential site, 2 houses as well as Chaka's passport, *macolscorp*, TEBA Savings book, bank cards, 'Manthabiseng's passport, animals and fields. Signatories to these letters are Ponto, Paseka, Mokete, Teboho and Mofokeng Motlalane. The curious thing about these documents is that when Defendant requested further particulars to Plaintiff's Summons about their existence, Plaintiff's answer was that they did not exist. See Defendant's Request for Further Particulars dated 24 June 2012 and Plaintiff's Particulars thereto dated 09th August 2012. Where did these documents ("A", "B", "C" and "D"). See Record page 8 – 10.

[7] A question arises out of this arrangement; whether Ponto is competent to inherit Chaka's estate. Both in terms of the Motlalane lineage and on the fact that he participated in the discussions. According to Defendant Ponto is not son to the deceased and does not fall within the framework of **Section 11(1) of the Laws of Lerotholi** to be heir of the deceased. I accept that argument. Defendant testified that he is the son of Chaka and 'Manthabiseng. He has always been treated as such by all Motlalane family during the lifetime of his parents. That is the law. Defendant goes on to say that Ponto could not therefore pass to Plaintiff what he did not have. Defendant also relies on **Section 3 of the Attesting Witnesses Act 1876.** Defendant paraphrases and submits that the provision means that any person attesting any testamentary instrument to whom the instrument bequeaths property or purport to make an appointment for his benefit, such testamentary instrument to whom the instrument bequeaths property or purport to make an appointment for his benefit, such testamentary instrument shall be null and void. Plaintiff conceded under cross

examination that it was irregular for Ponto to have been signatory to the family letter appointing him heir. That Ponto could not appoint himself. Another authority relied on by Defendant is the case of '**Makhahliso Motanteli v Tseko Tekane C of A (CIV) 17/2009.** In that case an applicant who sought to inherit in terms of the will could not because he appeared to have attested to same. The 2 authorities cited by Defendant reflect the correct passion of the law. However, they are not applicable to his case. We do not have a will in this matter. No bequest whatsoever. Exhibits "A", "B", "C", "D" and "E" do not constitute testamentary writings. They are letters by the alleged Motlalane "family" wherein they express their approval or agreement with Ponto in allegedly passing his rights to Plaintiff. I say alleged Motlalane family because senior members of Motlalane were not there e.g. 'Mapaballo and 'Matanki. Though still alive they were not part of decision purportedly making Ponto heir to estate of Chaka and 'Manthabiseng. The letters do not meet the requirements for a Will. In fact it may as well have been prudent and proper for Ponto to have been part thereof because the decision is his. The family is just in agreement with him. I do observe that the letters are dated 02/01/2009 and 30/05/2009 for exhibit "E" which dates are different from 04/08/2008 being the date that Plaintiff alleges the meeting was held.

[8] Of the two arguments above raised by Defendant, I am in agreement with the one that Ponto is not the deceased's son. Neither is Plaintiff for that matter. As regards Defendant, Plaintiff testified that Defendant is not the deceased's child either. He testified that Defendant was a herd boy who was raised in the Motlalane family by his (Defendant) aunt 'Manthabiseng and her husband Chaka. Plaintiff's evidence was also that Defendant had been using his names as Seotsa Motsamai. That this was changed to Seotsa Taba Motlalane when Chaka fell ill and had to have Defendant take his

place at Vaal Reefs mines in South Africa where he used to work before falling ill. According to Plaintiff it was at that time that Chaka had to apply for a passport for Defendant. Plaintiff could not remember when all this happened. It is significant that at the time Chaka is alleged to have done these things neither Plaintiff nor Ponto ever objected to Chaka doing so on the basis that Defendant was not his child (or a Motlalane child) and that the proper heir to Chaka to take up his place at Vaal Reefs was Plaintiff or Ponto. No issue was ever raised in that regard. It is only now after Chaka's and 'Manthabiseng's deaths that Plaintiff raise the issue of legitimacy of Defendant and entitlement to Chaka's *"macoloskopo"* which constitutes prayer (b) (iii) of Plaintiff's summons. Equally, the issue of heirship to Chaka and 'Manthabiseng should have been raised then given the circumstances of the alleged status of Defendant in the Motlalane family. It was not. Yet Plaintiff now makes it his central contention in terms of prayer (a) of his summons. This issue of Defendant's identification and his passports were specifically challenged that his first passport referred to him by surname of Motsamai. Defendant flatly denied this assertion of Plaintiff. Plaintiff further alleged and asserted that Defendant was holding his first passport in order to suppress and hide that fact from the Court. Again Defendant vehemently denied this assertion offering to bring his old passport to Court the next day. Both sides agreed that he should do so. So next day Defendant brought his old passport. It was handed in by him with leave of all parties and the Court as Exhibit "G". In examination by both Counsel and the Court it was found to be Lesotho Passport RA 043474 dated 8th September 1999 and expiring on 7th September 2009. This evidence put paid to Plaintiff's assertive evidence and disproved Plaintiff's case completely that Defendant was ever a "Motsamai" child. It proved beyond doubt that Defendant was always a "Taba/Motlalane" child until members decided to gang against him and call him a "Motsamai" child and

not a "Taba/Motlalane". It also lends evidence to Defendant's evidence that he has always been a son of Chaka and 'Manthabiseng from birth using Taba surname including when he first went to school at St. Lucia Primary School. This evidence disproves Plaintiff's case that Defendant first used "Taba" surname when he first went to take up his father's position at Vaal Reefs in Klerksdorp in South Africa in 2000.

[9] Plaintiff called his cousin Janfeke Motlalane to support him as PW2. Janfeke said he was Plaintiff's cousin. The core of his testimony was that Plaintiff was the rightful heir of Chaka Motlalane. He said he was present when the Motlalane family met to appoint heir to the estate; that the estate was passed on to Ponto. I must point out that I find it hard to accept and place reliance on this evidence because it has already been established through Exhibits "A", "B", "C", "D" and "E" that Janfeke is not one of the signatories of the family letter appointing an heir to the estate. He tried to wriggle out of this glaring evidence by saying that as they were many people in attendance at the meeting he did not sight. But what is clear from Exhibit "A", "B", "C", and "D" is that there were 5 people at the meeting at most. There were not that "many people" as he alleges. He went on to say what PW1 had said that since Ponto was no longer a Lesotho citizen resident he (Ponto) and the family agreed that Ponto would donate the property of Chaka and 'Manthabiseng to Plaintiff. He also testified that he knew Defendant as Seotsa Motsamai. However, PW2 did not know when Defendant had started living with Chaka and 'Manthabiseng. He did not know Defendant to be the son of Chaka and 'Manthabiseng. He testified that Defendant referred to 'Manthabiseng as his aunt. He did not know when Defendant was born. Apart from PW2 there were no other witnesses for Plaintiff's case. What is telling against Plaintiff's case is that though 'Mapaballo (Ponto's mother) and 'Matanki (PW2's mother) are both still

alive they were not called by Plaintiff to prove that Defendant was indeed not son of Chaka and ‘Manthabiseng. Neither were they part of the family counsel of 2/01/2009 that made Plaintiff heir to the estate of ‘Manthabiseng and Chaka.

[10] In his plea, Defendant identifies himself as Seotsa Taba. In giving evidence he testified that he was the son of Chaka and ‘Manthabiseng Taba. He says that the deceased raised him as such as their only child and in fact he has always known himself son of Chaka and ‘Manthabiseng. He has used the surname of “Taba” without objection from any quarter including from Plaintiff himself during all of the lifetime of Chaka and ‘Manthabiseng. Defendant also says that the deceased died leaving him as their son and heir. During oral evidence Defendant said he was born in 1980 and married with three (3) children. Same as him all his children use the “Taba” surname. In this regard Defendant had handed in two passport copies as proof of how he had always identified himself. The first copy was of a passport he had been issued with in 1999 which expired in 2009. The second copy was of his valid passport issued in 2010 which was due to expire in 2020. Defendant successfully refuted Plaintiff’s version that he only assumed the Taba surname when he sought to replace Chaka at Vaal Reefs Mine in 2000. Born in 1980, Defendant was 19 years old in 1999 when he was issued with the first passport he tendered in as evidence. And that was way before Chaka left work on account of ill-health. I am fully satisfied that Defendant is son of Chaka and ‘Manthabiseng and that he has always known himself as Seotsa Taba and used that surname without murmur from Plaintiff including when he first went to school.

[11] Also during oral evidence Defendant knew himself to be born in the Motlalane family as Seotsa Taba in the family of Chaka and ‘Manthabiseng

Motlalane. Defendant's plea in the summons is that he is son of Chaka and 'Manthabiseng by adoption. But Defendant's evidence was clear that he was their son by birth. I am aware of and appreciate the principle in **Frazer's Lesotho Limited vs Hata Butle (Pty) LTD 1999-2000 LLR 65.** I am satisfied that the factual situation in the **Hata-Butle** case is distinguishable from the present in that in the present case this particular fact was tested in trial through cross-examination. During that cross-examination the Defendant made it clear that his case was that he is born the son of Chaka and 'Manthabiseng and no other person. He made it clear in his evidence that he has not known any father other than Chaka to be his father. It is clear from all evidence tendered before this court that Defendant is a "Taba" and son of late Chaka and 'Manthabiseng and that this position has been so since infanthood as their child without murmur from any quarter. It was only after the death of both Chaka and 'Manthabiseng that Plaintiff and his supporters that Defendant was on 2 January 2009 alleged to be a "Motsamai" and not a son of Taba by Chaka and 'Manthabiseng. As I indicated earlier in this judgment I am satisfied that on a balance of probabilities Defendant is indeed a son of Chaka and 'Manthabiseng. I say this inter alia because during trial Plaintiff, and his witness were vague about when some important events took place or he simply did not know, for example when or where Defendant was born. The evidence of Defendant that Plaintiff in fact did not reside Ha Molibetsane but in fact resided in Maseru was not challenged by Plaitniff. Plaintiff failed to give me a convincing and satisfactory answer why the authenticity of Defendant as son of late Chaka and 'Manthabiseng was first contested by him after both deceased had died. I specially asked whether Defendant had ever been denied to participate fully in burial rights as a son of "Motlalane" before the so called family meeting of 2nd January 2009. The answer was that Defendant had never been denied such right as a son of

the late Chaka and ‘Manthabiseng including at the burial of ‘Manthabiseng in December 2008. This piece of evidence was not contested by Plaintiff or his witness. In fact Defendant’s testimony was that he (Defendant worked harmoniously throughout arrangements for the burial of ‘Manthabiseng with Teboho the older brother of Plaintiff. Contrast the quality of witness and testimony of PW1 and PW2 with solid straightforward manner and truthful manner, I might add with which Defendant gave his evidence. I am satisfied that Plaintiff has failed on a balance of probabilities to satisfy me that he is the legitimate heir of Chaka and ‘Manthabiseng on the basis that Defendant was not the son of Chaka and ‘Manthabiseng but a herd boy raised by deceased in their household who arrived as a Motsamai but who later assumed the surname of Taba in order to facilitate him to take up the place of Chaka when Chaka retired from working at the mines. That simply was disproved by Defendant and shown to be a lie.

[12] The onus of proving that he is the legitimate heir to the estate of late Chaka and ‘Manthabiseng rests on a balance of probabilities throughout at Plaintiff. In my view Plaintiff has failed to discharge that onus completely. As I said earlier both the quality of his testimony and his demeanour in the witness box was unsatisfactory and fell for short of his responsibility to discharge that onus on a balance of probabilities. The demeanour of Defendant on the other hand and how he answered questions as both full and supported by documentary evidence (e.g. old passport) which demonstrated that he had always been a Taba/Motlalane.

[13] I am satisfied that Plaintiff has failed to prove his case on a balance of probabilities that he indeed is entitled to be declared by this court to be the rightful heir to the estate of the late Chaka and ‘Manthabiseng. On the

contrary the clear evidence arising from the trial of facts in that Defendant is son and heir to the estate of late Chaka and dismiss Plaintiff's prayers (a), (b) and (c) of his summons.

Final Order

1. I dismiss Plaintiff's prayers (a), (b) and (c)
2. I order costs to Defendant on party and party scale

   For purposes of clarity of effect and meaning of this orders immediately above:-
3. I order and direct that Plaintiff must vacate and hand back to Defendant the homestead and houses together with keys for those houses of late Chaka and 'Manthabiseng which he appropriated to himself by force together with all the other moveable assets (including scotch-cart, plough, planter, cultivator, and 2 iron yokes) of late Chaka and 'Manthabiseng which he took away by force from lawful custody of Defendant.

J. T. M. MOILOA
JUDGE

FOR PLAINTIFF: **ADV. S. K. MAKARA**

FOR DEFENDANT: **ADV. MALEFANE**