

IN THE HIGH COURT OF LESOTHO

In the matter between

'MABATŠOENENG GRACE HLAELE N.O.
(The Guardian of Regina Retšelisitsoe Thabane)

1ST APPLICANT

KUILI NDEBELE N.O.
(Curator bonis to the Estate of Late Lipolelo Thabane)

2ND APPLICANT

And

'MAESAIAH THABANE

1ST RESPONDENT

THOMAS MOTSOAHAE THABANE

2ND RESPONDENT

THE MASTER OF THE HIGH COURT

3RD RESPONDENT

THE ATTORNEY GENERAL

4TH RESPONDENT

TOKA THABANE

5TH RESPONDENT

POTLAKO THABANE

6TH RESPONDENT

PULANE BOROTHO née THABANE

7TH RESPONDENT

THE LAND ADMINISTRATION AUTHORITY

8TH RESPONDENT

THE MINISTER OF SOCIAL WELFARE

9TH RESPONDENT

RULING ON PRELIMINARY OBJECTIONS AND INTERIM RELIEF

Coram: His Honour Justice Keketso L. Moahloli

Date heard: 6 July 2020

Date delivered: 13 July 2020

SUMMARY

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Moahloli J

INTRODUCTION

[1] This is an application brought on an urgent basis, for an order in the following terms:

“1. Dispensing with the forms and service and time limits provided for in the Rules, and hearing the matter as one of urgency at such time and in such manner and in accordance with such procedure as this Honourable Court may deem fit.

2. A *rule nisi* is issued calling upon the Respondents to appear and show cause on a date as determined by this Honourable Court why an order in the following terms should not be made:

2.1 The 1st and 2nd RESPONDENTS to any person are hereby interdicted from transferring and or transacting over any sale of land rights and interest in respect of immovable properties registered in their respective names with THE LAND AND ADMINISTRATION AUTHORITY (7TH RESPONDENT) pending finalization of this matter.

2.2 The 7th RESPONDENT is hereby directed to furnish and or dispatch the entire record of the land registered in the respective names of 'MAESIAH THABANE and THOMAS MOTSOAHAE THABANE and such list shall include but not limited to the following registered plots:

1. PLOT NO. 14312 – 1270
2. PLOT NO. 14313 – 1271
3. PLOT NO. 14312 – 1272
4. PLOT NO. 14312 – 1273
5. PLOT NO. 14312 – 1274
6. PLOT NO. 14312 – 1275
7. PLOT NO. 14312 – 1278
8. PLOT NO. 14312 – 1279
9. PLOT NO. 12303 – 1006
10. PLOT NO. 14311 - 1002
11. PLOT NO. 14312 – 1281
12. PLOT NO. 12284 - 379
13. PLOT NO. 12284 – 740

2.3 The MASTER OF THE HIGH COURT (3RD RESPONDENT) be directed to dispatch the record of all testamentary documents registered by the 2ND RESPONDENT pending finalization of this matter.

2.4 That 9TH RESPONDENT be directed forthwith to cause for an assessment of REGINA RETŠELISITSOE THABANE by the authorized agents and or qualified

social worker (s) under the MINISTRY OF SOCIAL WELFARE and cause for the presentation of the said report within 14 (fourteen) days of the grant of this order.

2.5 That 1ST APPLICANT be granted interim custody of the minor child REGINA RETŠELISITSOE THABANE pending finalization of this matter.

3. That it be declared that pursuant to the provisions of SECTION 56 (3) read with SECTION 24 of THE ADMINISTRATION OF ESTATES PROCLAMATION NO. 19 OF 1935 the 2ND RESPONDENT shall forfeit for the benefit of the adopted children by the names of REGINA RETŠELISITSOE THABANE and KEKELETSO JOSEPH THABANE a quarter of the LATE LIPOLELO ALICE THABANE ESTATE.

4. That it is declared that all properties (movable and or immovable) registered in the names of 'MAESAIAH THABANE and THOMAS MOTSOAHAE THABANE and which were acquired and or allocated prior to their marriage do not form part of their point estate but that of THOMAS MOTSOAHAE THABANE and the late LIPOLELO ALICE THABANE and falls to evolve as such.

5. Pursuant to the grant of PRAYER 4 above, the names of the 1ST RESPONDENT reflected in the documents of title referred to in PRAYER 2.2 above be expunged from the records of the 8th RESPONDENT and the status quo be restored to the extend that the property in issue forms part of the joint estate of THOMAS MOTSOAHAE THABANE and THE LATE LIPOLELO ALICE THABANE.

6. That any or all testamentary documents registered by 1ST and 2ND RESPONDENTS with 3RD RESPONDENT or any authorized state official bequeathing rights and interest in immovable properties listed in PRAYER 2.2 above and which form part of the joint estate of THE LATE LIPOLELO ALICE THABANE and THOMAS MOTSOAHAE THABANE are null and void and should forthwith be expunged from the records of the 3RD RESPONDENT and or rejected as such.

7. Pursuant to the grant of PRAYER 2.4 above, an appropriate order as to custody in favour of the guardian (1ST APPLICANT) and or any alternative remedy or remedies be made by this Honourable Court in respect of what is in the best interest of REGINA RETŠELISITSOE THABANE.

8. The RESPONDENTS are directed to pay the costs in the event of opposition.

9. Further or alternative relief as the court may deem fit.

10. PRAYER 1 and 2 (2.1 – 2.5) must operate with immediate effect as an interim relief and shall remain in force until it may be discharged or set aside by this Court on the return date or thereafter”

[2] The application was moved on 6 July 2020. After hearing lengthy submissions by the legal representatives of the two applicants and the 1st, 2nd, 5th and 6th respondents, I reserved my ruling on the points *in limine* raised and interim reliefs sought to 13 July 2020.

POINTS IN LIMINE

[3] Respondents raised two preliminary objections, which they asserted were dispositive of this application.

(I) Firstly, they argued that the 1st Applicant (Mrs. Hlaele) has no *locus standi in judicio* to institute these proceedings as the Master of the High Court (3rd Respondent, “the Master”) acted unlawfully in granting her guardianship of the child Regina whereas, in terms of section 56 (1) (b) and (3) read together with Section 204 (2) of the Children’s Protection and Welfare Act No.7 of 2011 (“the CPWA”), the 2nd Respondent (Ntate Tom Thabane), as the adoptive parent of the two children, was their rightful guardian. The aforesaid provisions state:

“Effect of adoption on parental rights

56. (1) Where an adoption order is made –

- (a) the rights, duties, obligations and liabilities, including those under customary law of parents of a child or of any other person connected with the child, of any nature whatsoever, shall cease; and
- (b) an adoptive parent of a child shall assume the parental rights, duties, obligations and liabilities of the child with respect to care, guardianship and education as if the child were born to the adoptive parent.

(2) Where an adoption order is obtained jointly by a husband and wife, they shall assume parental responsibilities jointly and a child shall relate to them as parents as if born naturally to them as husband and wife.

(3) Where an adoption order is made by an individual, he shall assume parental responsibilities and a child shall relate to him as a parent as if born naturally to him.

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Right of surviving parent to guardianship

204. (1) On the death of the father of a child, the mother, if surviving, shall, subject of the provisions of this Act, be the guardian of the child.

(2) On the death of the mother of a child, the father, if surviving, shall, subject of the provisions of this Act, be the guardian of the child.”

(II) Secondly, they contended that this Court did not have jurisdiction to grant Prayers 2.4 and 2.5 as they concern matters within the exclusive purview of the Children’s Court in terms of *sections 23, 24, 25 and 37* of the CPWA. [viz. “Protection of Child in Need of Love and Protection – Part II”]. They argued that these provisions, as well as *section 133 (1)* of the CPWA

effectively oust the jurisdiction of the High Court. The aforesaid *section 133 (1)* provides that:

“Jurisdiction of Children’s Court

133. (1) Every Subordinate Court shall be a Children’s Court within its area of jurisdiction and shall have jurisdiction to hear and determine cases of children in need of care, protection and rehabilitation and charges as appear in Schedules I and II.”

[5] Applicants, for their part, contended that these *in limine* objections were unsustainable because:

(i) The Master, in paragraph 6 of her Report interim of Rule 8(19) has provided a legitimate reason for appointing Mrs. Hlaele as guardian. She states:

“The law requires that whatever is being done for the minor child must be in the best interest of such a child. After learning about Regina’s stay with a lady who has been charged with the death of her adoptive mother, and having seen some of her conversations with Mrs Mabatšoeneng Hlaele with whom they are half-sisters, I decided to appoint a Guardian for Regina as her adoptive father cannot at present even take a good care of himself due to ill health and old age. The conversation indicated that the environment under which Regina lives is not good for her psychologically. The only way to safe (sic) Regina from that bondage was to appoint a Guardian for her and Mrs. Mabatšoeneng Hlaele was appointed as such in terms of section 203 1 (d) of the CPWA. She however reported having been denied access to the child. ”

(ii) It is not true that section 133 (1) ousts the jurisdiction of the High Court in every matter concerning custody and guardianship of children. For instance, the High Court routinely deals with custody in divorce proceedings, without deferring it to the Children's Court.

(iii) The High Court, as upper guardian of children, still retains residual jurisdiction over children. *In casu* Applicants are not seeking to challenge Ntate Thabane's right to parenting, but are merely seeking to safeguard the adoptive children's personal rights to the intestate estate of their deceased adoptive mother Lipolelo.

Locus standi

[6] *In casu* it is common cause, on the 1st Respondent's (Mrs. 'Maesaiah Thabane's) own version, that Ntate Thabane, the surviving parent/father of the child Regina, is incapacitated, due to advanced dementia, Alzheimer and life-threatening ill health¹. In my view the Master of the High Court was consequently justified to appoint Mrs. Hlaele as her guardian, at least in respect of the estate, on the strength of the following provisions of the CPWA:

“Appointment of guardian

203 (5) A guardian may be appointed in respect of a person or estate of a child or both.

(6) Where a guardian is appointed only in respect of an estate of a child, he need not have actual custody of the child but shall, with the authority of the Master of the High Court, have –

¹ See *inter alia* paragraphs 7.3, 7.4 and 7.5 of 'Maesaiah Thabane's Bail Petition – Annexure 10 to this Application.

- (a) the power and responsibility to administer the estate of the child and in particular to receive and recover and invest the property of the child in his own name for the benefit of the child;
- (b) The duty to take all reasonable steps to safeguard the estate of the child from loss or damage;
- (c) The duty to produce and avail accounts in respect of the child's estate to the parent or custodian of the child or to such other person as a Children's Court, as the case may be, on every anniversary of the date of his appointment; and
- (d) to produce any account or inventory in respect of the child's estate when required to do so by a Children's Court.

[7] This Court unreservedly endorses the Masters' decision. The High Court, as the upper guardian of minors, has the inherent power to determine who should have the guardianship and/or the custody of the child if this is in the best interests of the child². In our common law the Roman Dutch law, the authority of the high court as upper guardian is greater than that of the parents or guardian; hence the court's power to deprive one or both parents of their parental authority. In all these respects the interests of the minor are always paramount. In my judgement the special circumstances of this case justify the appointment of a guardian to look after the interests of the minor child Regina.

Jurisdiction

² Rowan v Feifer 1953 (2) SA 705 (E); September v Karriem 1959 (3) SA 687 (C); Ex parte Van Dam 1973 (2) SA 182 (W)

[8] In my view the main purpose of this application is to safeguard the rights of the adopted children Regina and Kekeletso to their lawful share of the joint estate of their adoptive parents, Ntate Tom Thabane and the deceased Mrs. Lipolelo Thabane.

[9] The obligations of the surviving parent, duties of the Master and powers of the High Court in this regard are set out in the CPWA as follows:

“PART V – ADMINISTRATION OF PROPERTY OF CHILDREN BY OFFICE OF THE MASTER OF THE HIGH COURT

Reporting of estate to the office of the Master of the High Court

38. Where a parent is survived by minor children, the surviving parent, guardian, closest relative, or any member of the community shall report the estate to the office of the Master of the High Court within two months of the death of the parent.

Seeking permission of the office of the Master of the High Court for alienation, disposal of or sale of children’s property

39. (1) A surviving parent, guardian, closest relative or any member of the community shall seek permission of the office of the Master of the High Court when alienating, disposing of or selling children’s property.

(2) A surviving parent, guardian, closest relative or any member of the community who fails to comply with the provisions of this section, commits an offence and is liable on conviction to a fine not exceeding five thousand maloti or to imprisonment for a period not exceeding five months.

Duties of the Master of the High Court

40. The Master of the High Court shall –

- (a) in administering a child’s share of parental property, ensure that the best interests of the child are met;
- (b) where assets of an estate are being alienated, disposed of or sold, ensure that permission has been granted and a child is not left destitute or homeless;
- (c) have power to administer or confiscate property belonging to children and to delegate such powers to any person or institution;
- (d) where he discovers that the property belong to children has been negligently used by the successful heir or any person, request the concerned person to pay for that property, failing which he shall make an application to court for such a person to pay for such property;

Devolution of property on adoption

62. (1) Where an adoptive parent dies intestate, his property shall devolve on an adopted child in all respects as if the adopted child is the natural child of the adoptive parent.

(2) Estates of adoptive parents shall be subject to administration of property by the Master of the High Court

(3) If it appears to the High Court on a claim made that a disposition of property devolving on an intestacy has been exercised unfairly against an adopted child, the High Court may make such an order as it thinks equitable to the adopted child in relation to property devolving on the intestacy in accordance with the law.”

[10] Without getting into the merits of this case, as the respondents have not yet had the opportunity of filing opposing papers, it would seem that the surviving parent and guardian did not report the estate as required by section 38, and might have started alienating some of the property belonging to the adoptive children without leave of the Master and/or this Court. In such cases section 40 empowers the Master to intervene in the interests of the child. Similarly section 62 expressly empowers the High Court to step in and “make such an order as it thinks equitable to the adopted child in relation to property devolving on the intestacy in accordance with the law”. For this reason alone the respondents’ assertion that this court has no jurisdiction to intervene to safeguard the interests of the adoptive children cannot be sustained.

[11] Furthermore as I have already intimated above, even though when one parent has died the other becomes the sole guardian, in all cases, however, the High Court as the upper guardian of all minors will interfere with the *de jure* position in exceptional

circumstances where this is in the best interests of the child concerned³. In my view this is a befitting case for the court to exercise its inherent jurisdiction as upper guardian.

[12] Lastly, it is not true that section 133(1) of the CPAW ousts the jurisdiction of this Court to consider the interim reliefs sought. A proper reading of this provision shows that it gives the Children’s Court jurisdiction only over “cases of children in need of care, protection and rehabilitation and charges as appear in Schedules I and II.” The present case is primarily about the administration of a deceased intestate estate in the best interests of a minor child and a person who for some reason is incapable of administering his own estate and is in need of the protection and assistance of a *curator bonis*.

Interim reliefs sought

[13] The interim court orders Applicants seek in Prayer 10 of their notice of motion are mostly prohibitory (prayer 21) and mandatory interdicts (prayers 2.2, 2.3 & 2.4). This court has inherent jurisdiction to grant interdicts. The main purpose of prayer 2.1 seems to me to be to restrain possible infringement of the adoptive children’s rights in respect of the joint estate of their deceased mother. The rest of the interim reliefs’ could arguably be construed as being supportive of this and incidental thereto.

³ e.g. F v B 1988 (3) SA 948 (D); B v P 1991 (4) SA 113 (T)

[14] In our law the prerequisites for the granting of an interim interdict are:

- (a) a *prima facie* right on the part of the applicant;
- (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted;
- (c) a balance of convenience in favour of the granting of the interim relief; and
- (d) the absence of any other satisfactory remedy available to the applicant

[15] The court has a discretion, and is not obliged, to grant such an interdict, even if all the requisites are shown; which discretion the court must exercise judicially upon consideration of all pertinent issues together and not separately.

Prima facie right

[16] In the present case, I am satisfied that the Applicant have identified an applicable right that exists in law, and not a mere interest. They have shown that the adoptive children have a right to a share of the joint estate of their deceased mother and their surviving father, either in terms of the common law rules of intestate succession or the celebrated Sesotho law principle of "*malapa ha a jane*". They have also shown that their wards have the right and urgent need to protect whatever property is due to devolve to them against unlawful dissipation. I must emphasize that at this stage of the proceedings, because the relief, the standard of proving a right which has allegedly been infringed is less stringent than if they were claimed a final interdict.

Apprehension of irreparable harm and absence of satisfactory remedy

[17] Respondents content that the interim relief should not be granted because even if applicants are successful in due course damages would be a viable alternative remedy. In my judgement this court is entitled to grant an interim interdict *in casu* because the apprehended injury is a continuing violation of the applicant's wards rights, even though it may be possible technically to compensate them by an award of damages⁴. This is closely related to the principle that no one should ever have to abandon his rights and accept damages instead⁵. Secondly, since some of the final reliefs are vindicatory in nature, this court does not regard damages as adequate compensation. The reason is that an owner who has been deprived of his property should not be forced to accept damages instead of the return of the property.

Balance of convenience

[18] In my judgement in the present case since the relief is only of a temporary nature and does not relate to property owned by 1st and 2nd respondents it cannot be said that the Respondents would be unfairly prejudiced by the granting of the interdict. In other words, the prejudice that is likely to be suffered by the applicants' wards if the interdict

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is not granted far outweighs the prejudice that might be suffered by the respondents if it is.

[19] In view of the above, I am satisfied that the applicants have satisfied the requirements for the grant of the interim interdicts.

Prayer 2.2 and 2.3

[20] I must mention that ordinarily I would have been very reluctant to grant prayers 2.2. and 2.3 as there is some justification in Respondents' argument that they somewhat invade their privacy. However since *in casu* the surviving parent failed to report the estate to the Master as required by *section 38 of the CPWA* and also failed to make and submit to the Master an inventory of all property which at the time of the death of belonged to the estate of the predeceasing and surviving spouses (as required by *section 20 (1) of the Administrates of Estates Proclamation*), I am of the opinion that 2nd Respondent is under a duty to assist the children and the Master and the Court to identify which properties belong to the deceased estate. He is, so to speak, the author of his own misfortune. Hence, I will grant these prayers.

ORDER

1. Prayer 1 is hereby granted
2. A *rule nisi* issues in terms of prayer 2, returnable on 14 August 2020, save that no order is made as to prayer 2.4.
3. Prayers 2.1, 2.2, 2.3 and 2.5 are to operate with immediate effect as interim relief and shall remain in force until the return day.

K.L. MOAHLOLI
JUDGE

Appearances:

Adv. CJ Lephuthing for 1st Applicant

Mr M Rasekoai for 2nd Applicant

Adv S Phafane KC for 1st, 5th and 6th Respondents

Mr Q Letsika for 2nd Respondent