

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/554/07

In the matter between

PALESA LEHANA

1st PLAINTIFF

**MAMORENA MAKHETHA
(born Lerato Lehana)**

2nd PLAINTIFF

LIRONTŠO LEHANA

3rd PLAINTIFF

AND

**CELINA MOOKHO LETLAKA
(Also known as ‘Malehana Lehana)**

1st DEFENDANT

COMMISSIONER OF LANDS

2nd DEFENDANT

MASTER OF THE HIGH COURT

3rd DEFENDANT

JUDGMENT

CORAM:

HON. J. T.M. MOILOA

DATE OF HEARING:

27 SEPTEMBER 2017

DATE OF JUDGMENT:

26 MAY 2020

ANNOTATIONS

Legislation:

- 1 Administration of Estates Proclamation 19 of 1935
- 2 Children's Protection and Welfare Act 2011

Cases

- 1 R v Khumalo 1947 (4) SA 157 (NPD)

[1] This is an inheritance contest between siblings (Plaintiffs) and their late father's second wife (1st Defendant). The deceased's marriage to 1st Defendant is disputed by Plaintiffs. Plaintiffs were born out of a civil law marriage between their late parents Ntaote Lehana and 'Mantema 'Mapalesa Lehana. In her lifetime 'Mantema worked at Mafeteng Town Office while Ntaote worked as a Salesman at a furniture shop in Mafeteng. 'Mantema died in 1979 predeceasing Ntaote, who later died in 1996. At the time of 'Mantema's death in 1979 1st Plaintiff was only 4 years old while 2nd Plaintiff was 3 years old and 3rd Plaintiff was 1 year old. Cohabitation between Ntaote and 1st Defendant commenced sometime in 1982. 1st Defendant had initially been an employee of Ntaote. The two later became lovers and 1st Defendant fell pregnant which influenced their decision to get married. Two children were born between Ntaote and 1st Defendant. The children are 'Mapheta Lehana, a girl born in 1984 and Lehana Lehana, a boy born in 1986. 1st Defendant and Ntaote lived together as husband and wife until Ntaote died in 1996. The Lehana family recognised 1st Defendant as Ntaote's widow. Plaintiffs do not. As a result they are before court seeking the following orders:

1. Declaring Plaintiffs to be heirs to the estate of the late Ntaote and his wife 'Mantema Lehana;
2. Declaring that the late Ntaote Lehana was never lawfully married to the first Defendant;
3. Evicting the first Defendant from the Plaintiffs' parents' residential house at Hospital Area, Mafeteng Urban Area;
4. Directing the first Defendant to hand over to Plaintiffs their parents' residential home situate at Ha Raliemere Mafeteng alternatively, to pay Plaintiffs M60,000.00 being the value of the said site;
5. Interdicting the first Defendant from receiving rentals from the business premises of the Plaintiffs' parents at Bus Stop Area Mafeteng;
6. Declaring that the Plaintiffs are entitled to collect all rentals from the business premises of their parents situate at Bus Stop Area.
7. Alternatively, to 5 and 6 above:
Declaring that the Plaintiffs and the first Defendant share rentals from the Plaintiffs' parents' business at Bus Stop Area, Mafeteng and the single room situate at site number A26 Hospital Area Mafeteng, which is rented out;
 1. Directing the first Defendant to pay costs hereof;
 2. Granting Plaintiff further or alternative relief.

[2] The matter was tried on evidence. However, before dealing with the evidence led during trial it is worth noting at this point that in his written submissions, Adv. K. Mohau (KC) for Plaintiffs argues that the dispute herein can be resolved on the basis of agreements signed by 1st Defendant (to be dealt with later in the judgment) without dealing with the question whether there was a marriage between 1st Defendant and the late Ntaote Lehana. My own view is that the question whether Ntaote was lawfully married to 1st Defendant is in fact central in the determination of this claim to a deceased estate. It is one of the prayers in Plaintiff's summons and it

has to be interrogated and determined. Adv. Mohau KC also argues that the court should not be bothered by the issue whether the late Ntaote and ‘Mantema had abandoned the customary way of life. I do not agree with Adv. Mohau KC in this regard either. It is imperative to establish the choice of law of the deceased in deciding on the fate of their estate. **Section 3 of the Administration of Estates Proclamation 19 of 1935** provides that it shall not apply 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 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 married under European law.” **Section 3(b)** must be read with **Section 34 of the Proclamation** which provides that deceased estates shall be reported to the Master within 14 days which reporting will lead to the Master appointing an executor to take charge of and administer the estate. Neither upon the passing of Mantema in 1979 nor in 1996 when Ntaote died was the reporting done with the Master to be seized with the estate(s) and determine the mode of life of the deceased and/or appoint an executor. The fact that Ntaote and Mantema had married under civil rites is important but is not on its own a decisive factor that they had abandoned the customary way of life. Defendants led the evidence of DW2 (Paulosi Mokeke) to try and establish that Ntatote and ‘Mantema had not abandoned customary law mode of life. DW2 described himself as a “a traditional medicine doctor”. But Mokeke’s evidence in fact established that he was an adherent of the Christian Faith. At first, he practiced his traditional medicine at the same time as being a practising Catholic. He told the Court that he was called by God to be a medicine man and to heal people. Later God called him to St. Patrick’s Apostolic Church where he became a leader in 2004. His own clients came from Catholics, LEC, Anglicans and many

other Christian denominations. He said he healed his clients through a mixture of prayer and traditional herbs. To my mind this is indicative that DW2 and his clients practiced a hybrid of tradition and modernity. DW2 identified himself as a traditional healer who had known the late Ntaote as his client. DW2 said he served both the late Lehana and his first wife. The late Lehana also came for services at his practice with 1st Defendant. DW2 does not demonstrate that Ntaote and ‘Mantema had adopted a customary way of life. As I said earlier it is a hybrid of modern way of life and traditional beliefs. The evidence of DW2 and the contention of 1st Defendant that the estate of Ntaote and ‘Mantema must necessarily be dealt in accordance with customary law is not conclusive. The Court has to look at other factors e.g. type of marriage of ‘Mantema and Ntaote, work they did to support their lives, where they lived, how they led their lives in their lifetime. As we have seen, ‘Mantema was a civil servant and a practicing Catholic. Ntaote was a manager at a furniture shop in Mafeteng. Both lived in an urban area of Hospital Area Mafeteng. They educated their children (the Plaintiffs) in church schools. None of their children was sent to circumcision schools in traditional fashion. Both ‘Mantema and Ntaote (and indeed Defendant) lived in modern premises. They owned a café and conducted a business there. I conclude under these circumstances that they *had* abandoned traditional way of life and adopted a mixture of both custom and modern life.

- [3] Adv. Mohau KC also makes a submission that the **Children’s Protection and Welfare Act 2011** is available to Plaintiffs. I disagree. **Section (3)** of that Act defines a child as a person under the age of eighteen years. From the pleadings and indeed in evidence before court, there are no “children” in *casu*. The Act cited above shall therefore not be of assistance to this court in this case.

- [4] Plaintiffs' case is that they as Ntaote's children are heirs to his estate and pray this court to declare them as such. 1st Defendant's plea is that she and her son (Lehana) are successors to the estate of her late husband. The identifiable portion of the estate comprises the following immovable property:

The estate

- 4.1 A business site situate at Bus Stop area in Mafeteng; held under lease number 06472 – 050. It came out during 1st Defendant's evidence that she effected transfer of this property to herself in 2012, already aware that Plaintiffs were challenging her rights therein. 1st Defendant is in charge of the premises and is collecting rentals from same.
- 4.2 A residential site situate at Hospital Area, numbered A26. The property is still held in the names of the late Ntaote Lehana. 1st Defendant lives there.
- 4.3 A developed unnumbered residential site at Ha Raliemere, Mafeteng District; valued at approximately M60,000.00. 1st Defendant sold the property in 1999 at M20,000.00 and benefitted to its purchase price to the exclusion of the Plaintiff. This benefit which she took must be taken into account as a portion of the estate which she solely benefited herself from; the value must be deducted from her share.
- 4.4 A residential site at Matholeng, Mafeteng registered under number 06463 – 049. It is not in dispute that the late Ntaote acquired it for 1st Defendant. There is an incomplete structure built there. This was

an indication that Plot 26A Hospital Area should be left to the children of 'Mantema.

THE EVIDENCE

- [5] 2nd Plaintiff was the only witness who gave evidence in support of Plaintiffs' case. She identified herself as 'Mamonaheng Makhetha born Lerato Lehana. She is the second born of the deceased Ntaote and 'Mantema and was born in 1976. PW1 said she had previously been married, in 1994. Her marriage however failed in 2000.

THE BUSINESS SITE AT MAFETENG BUS STOP (RENTALS)

- 5.1 PW1 testified that the last time she checked which was in the year 2007 this business collected rent at M3,500.00 per month. 1st Defendant took over the administration of the estate after the death of Ntaote Lehana and collected the said rentals. PW1 reiterated in oral evidence contents of paragraph 17 of the Declaration. She said 1st Defendant undertook to share the rentals from the business site equally with the Plaintiffs. PW1 said she and her sisters were given M1,500.00 each. The M1,500.00 was said to be one of the amounts that were left behind but PW1 said she and her siblings did not know how. She said that they were promised that going forwards they would be given M500.00 each by 1st Defendant. PW1 said they were given the said M500.00 only once thereafter and she was told that it was for the last time because she was a married woman. Nothing was explained about the fate of her sisters Palesa and Lirontšo.
- 5.2 PW1 testified that in 2003 they together with 1st Defendant were at Principal Chief's office at Likhoele. It was agreed that 1st Defendant

must give them means of livelihood. When they got home they agreed that 1st Defendant should give them rent once after every two months in order to enable her to use some of the money to advance progress in building her own house at Matholeng; so that she could leave their home at Hospital Area. This 1st Defendant did three times only, PW1 said.

- 5.3 PW1 also referred to the year 2005. She said in that year a family meeting was held and it was again agreed that 1st Defendant should continue to share the rentals with them; the rentals from the bus stop area premises. This time it was to be divided into two equal shares and PW1 and her siblings were to share the other half in equal shares. 1st Defendant signed the new agreement and honoured it until 1st June 2007. This stoppage PW1 said came by way of a letter from Adv. Zwelakhe Mda (1st Defendant's counsel in the matter). She said they were stopped from going to their home to receive rentals from their father's store. There is a document marked "Exhibit E" in relation to this turn of events. The document is an agreement to the effect that rentals collected from the Bus Stop Area would be shared between 1st Defendant and Plaintiffs. 1st Defendant confirms having been part of the meeting as the late Ntaote's widow. 1st Defendant also confirms that she was not compelled to sign the document. However, 1st Defendant says she never gave Plaintiffs any money as indicated in the agreement. She says Plaintiffs were not entitled to such rentals as she was providing for them as her children, in this regard 1st Defendant insists that she is heir to the late Ntaote's estate as opposed to his children; Plaintiffs. In law 1st Defendant is not sole heir to the estate of Ntaote. Secondly she

cannot resile from an agreement voluntarily entered into in regard to division of the estate and benefits arising from it.

THE RESIDENTIAL SITE SITUATE AT HOSPITAL AREA

- [6] PW1 described this site as a house built as rental rooms. It is not a big house she said. It has one entry point or door with four external doors. It has a small room which can be used as a toilet room. PW1 continued to say that 1st Defendant lives in this house together with someone who is renting a room there. PW1 had last visited there in June 2007 and the one room was rented out at M250.00 per month at the time.

PW1 said she, Lirontšo and Ntaote started living at Hospital Area in 1987, having moved from Ha Raliemere. At that time 1st Defendant remained at Ha Raliemere and came to join them at Hospital Area towards end of 1988; together with her two children ‘Mapheta and Lehana Lehana. PW1 said under cross-examination that the four roomed house at Hospital Area was built in 1987 after her father retired from his employment at Frazers. It was completed in 1988. Since the passing of Ntaote, PW1 said 1st Defendant has built a seven roomed incomplete house at Hospital Area. The structure was erected by 1st Defendant in 2004.

[7] THE SITE AT HA RALIEMERE

PW1 testified that the business site had been used by both her parents during their lifetime. After the passing of ‘Mantema in 1979, Ntaote continued with the business. PW1 said she first came to know 1st Defendant as her nanny and the late Ntaote’s employee at the shop at Ha Raliemere. The shop stopped operating towards end of 1987. PW1 testified that 1st Defendant sold the business site at Ha Raliemere in 1999

and sold it at M20,000.00. PW1 said 1st Defendant told them this. This was not challenged under cross-examination.

- [8] This is the property which PW1 considers hers and her sisters' home and want 1st Defendant evicted from. The last immovable property is the residential site at Matholeng. It is not disputed that the late Ntaote bought it for 1st Defendant. Having identified the property as not in contest, I move to the question whether 1st Defendant is heir on the basis of a valid marriage to the late Ntaote.

WAS FIRST DEFENDANT LEGALLY MARRIED TO NTAOTE?

- [9] PW1's testimony on this issue has been that her late father Ntaote Lehana was not married to 1st Defendant. Their late father never told them she was his wife. PW1 said she first came to know 1st Defendant as her nanny and her father's employee. At no time was there a marriage ceremony or welcome ceremony made in respect of 1st Defendant. During her examination in chief a document which was labelled "Exhibit B" was shown to PW1. She testified that it was dated 10/06/1984. PW1 said the document was handwritten and signed by 1st Defendant. PW1 testified further that contents of the document purported to be a marriage agreement. She said the agreement was between Molete Ntaote and 'Maseeta Letlaka and that the two had not appended their signatures on their purported agreement. PW1 said Molete Ntaote was late. During his lifetime he was a schools Inspector and therefore literate. The first witness to this document was Ntaote Lehana, PW1's father who was also literate and PW1 knew his handwriting. She went on to say that where it was written "Ntaote Lehana" it was in fact 1st Defendant's handwriting and not that of Ntaote. PW1 said she did not know the two witnesses on the document being "Mofu 'Mofu and Kisimane Tau". The last witness 'Maleballo Leballo"

was 1st Defendant's elder sister. PW1 said it was not usual for a person about whom *bohali* is negotiated to be the one reducing the agreement to writing as 1st Defendant did.

- [10] Moreover PW1 said there were two rubber stamps on the document. The names of chiefs were reflected but only one chief appears to have appended his signature. PW1's view was that that document did not embody a *Bohali* agreement. This piece of evidence of PW1 was intended to prove that her late father and 1st Defendant were never legally married. That no ceremony ever took place in relation to her marriage to the late Ntaote. Their father never told them she was his new wife and lastly, the purported marriage agreement was defective and indeed, not a document proving marriage.
- [11] Under cross-examination PW1 stated that 1st Defendant herself regarded herself married to the late Ntaote Lehana in accordance with customary law. Moreover, PW1 conceded that 1st Defendant has always been recognised as her father's wife so much that after his death, 1st Defendant was presented to authorities (DA) by the Lehana family as the deceased's wife. 1st Defendant also wore mourning cloth for the late Lehana Ntaote. Burial arrangements were made by her in co-operation with other members of the family. PW1 confirmed that 1st Defendant was referred to as their *mangoane* (junior wife). When put to her that indeed 1st Defendant was their father's wife, PW1 said that their father never told them as such.
- [12] There being no handwriting expert called in relation to "Exhibit B" this court is not so equipped to make an expert analysis. See **R v Khumalo 1947 (4) SA 157 (NPD) @ 161**. I find that on the balance of probabilities, 1st Defendant was the second lawful wife of the late Ntaote Lehana. This comes from PW1's own evidence that their father bought a site at

Matholeng specifically for 1st Defendant. Ntaote's own conduct is such that he took in 1st Defendant as his wife. In 1982/1984 when this took place Ntaote being a widower, was competent to marry. Nothing precluded him from taking in 1st Defendant as his second wife. If at all he never mentioned it to his children despite the good relationship they had as stated by PW1, that oversight does not render their union unlawful. The two regarded themselves as such. So did the family. This Court is not about to declare differently.

WHO IS HEIR?

- [13] As a legal consequence of a valid marriage, 1st Defendant stands as one of the heirs of the late Ntaote. At the time of 'Mantema's passing (1979) her estate vested in Ntaote and the Plaintiffs. Later in 1982, Ntaote married 1st Defendant pooling that property into the joint estate he held with 1st Defendant. The estate in issue is landed property and governed under the **Land Act, 1979**. The rights of Plaintiffs are not affected by the amendment which was introduced in 1992. The Plaintiffs rights vested in them before 1992 and before Defendant married the late Ntaote anyway.

EVICITION OF 1ST DEFENDANT

- [14] PW1 referred to a document (PL1) dated 04 February 2006; exhibit "C". PW1 said the document was written by 1st Defendant in her (PW1's) presence. PW1 said through "PL1" 1st Defendant agreed that she would leave and handover their (Plaintiffs) parents' home. 1st Defendant did not move. PW1 also referred to an incident in winter 2003 before Principal Chief Lerotholi Seeiso. PW1 said 1st Defendant had said she would leave their home and hand over the property to them, but she never did. In January 2006 PW1 said, they were before O/C Mafeteng LMPS where 1st Defendant again agreed to leave their home (Plot 26A Hospital Area). Yet

again she did not. “PL1” was drawn up by 1st Defendant two weeks after the meeting at the LMPS, Mafeteng. PW1 testified further that although in terms of this document 1st Defendant requested a year to vacate and return the house, she in fact did not do so. After a year she was given a six months’ extension. The due date per the extension was end of June 2007; Exhibit “D”. At the time PW1 was giving evidence, she said 1st Defendant had still not left their (Plaintiffs’) parents’ home.

- [15] The above testimony was interrogated under cross-examination particularly Exhibit “C”. The defence version was that 1st Defendant wrote Exhibit “C” not voluntarily but under undue influence, and as such it was not binding on her. PW1 reiterated that the document was made voluntarily and binding on 1st Defendant.

At the end of the day, the document does exist. It also comes from 1st Defendant’s mouth through her Counsel that 1st Defendant wrote and signed the document. I am not persuaded that Exhibit “C” was made under duress at all. In fact, it was a repetition of what Defendant had agreed to do before the Principal Chief of Likhoele already in 2003. She must comply and vacate Plot 26A and share rentals of Bus Stop site as had been decided by Lehana family.

DEFENCE CASE

- [16] In summary defence case is that 1st Defendant as lawful widow of the late Ntaote Lehana is the sole heir to the estate of the late Ntaote. But in my opinion, such a contention is over simplification of the position. She together with Ntaote’s children are heirs. On the issue of what transpired at the first family meeting and before the Principal Chief’s office as well as before Officer Commanding she says she was coerced by Police and she

is entitled to renege from such agreement she made with Plaintiff. It is significant that she does not say she was coerced by family at the first family meeting where it was agreed at request that she is to vacate site A26 Hospital Area and hand it over to the Plaintiffs but that she be given 6 months in which to complete her own house at Matholeng. I reject as untrue that she was coerced by anyone. Her attitude before court is that as a widow of Ntaote she is the sole heir and as such she is entitled to the entire estate of Ntaote Lehana. She does not allege that the Principal Chief coerced her to vacate. Indeed the evidence is that when Plaintiffs and 1st Defendant were before the Principal Chief and later before the police it was because the Plaintiffs were complaining that 1st Defendant was more than a year (well beyond the agreed 6 months) in Plot A26 Hospital Area and seemed relaxed. As to why she unilaterally stopped sharing rentals from the business site at Mafeteng Bus Stop, 1st Defendant's stance before court was once again that as a widow of Ntaote and sole heir of Ntaote's estate she was entitled to unilaterally change her mind and stop sharing the rentals contrary to Lehana Family decision. I hold a different view and hold that Plaintiffs and 1st Defendant as heirs to Lehana should share the estate equally among them. In doing so I am of the view that it must be borne in mind that the estate of Ntaote Lehana and 'Mantema must reflect an equitable share of that estate with Plaintiffs in particular as children of 'Mantema and Ntaote Lehana. As to why she secretly registered the Mafeteng Bus Stop Business site in her own name well knowing the decision of Lehana Family and that Plaintiffs were disputing her decision to appropriate to herself solely rental benefits from this site, 1st Defendant's attitude was again that as widow of Ntaote Lehana she was sole heir and entitled to do so. I think the action of 1st Respondent was less than honest in registering this business in her own name without knowledge of

Plaintiffs and in the face of Plaintiffs complaint that she is not implementing the sharing agreement.

CONCLUSION

[16] As things stand, 1st Defendant has indeed benefitted a greater deal out of the estate than Plaintiffs; who are the deceased's children. They have a legitimate right to the same property. 1st Defendant has under her name, the business premises at bus-stop area. She is collecting rentals therefrom. 1st Defendant is in occupation of the residential site at Hospital Area. 1st Defendant sold the site at Ha Raliemere to her sole benefit. 1st Defendant holds under her name the Matholeng site. On the other hand, Plaintiffs only have equal shares to the site at Jorising as came from the evidence of PW1. In my view, this is not an equitable distribution.

1st Defendant together with Plaintiffs are rightful heirs to the estate of the late Ntaote Lehana as spouse and children of Ntaote respectively. Accordingly, on the distribution of Lehana's estate all his heirs must share that estate equitably. On the balance of probabilities Ntaote intended for the Hospital Area site to remain home to Plaintiffs. This is evident in his conduct of acquiring a different site altogether for 1st Defendant at Matholeng. It is also evidenced by the conduct and understanding of 1st Defendant before the Principal Chiefs of Likhoele in 2004 and Officer Commanding Mafeteng Police in 2006. This is buttressed by 1st Defendant's own conduct in 2005 when she implemented the sharing of rentals from Bus stop business properties.

In the circumstances of this case and in the interests of a fair and equitable distribution of Ntaote Lehana's estate the following orders are made:

1. That 1st Defendant hand over residential plot A26 Hospital Area Mafeteng to Plaintiffs consistently with the family decision and clear intend of Lehana in his lifetime.
2. That Plot 06463-049 Matholeng Mafeteng Urban Area is awarded to remain property of 1st Defendant consistently with the original intend of late Ntaote Lehana.
3. That the unnumbered Tjorosing residential site is awarded to the Plaintiffs.
4. That the unnumbered Raliemere business site which 1st Defendant unilaterally appropriated to herself alone and benefitted from proceeds thereof is awarded the value thereof in exchange of the Tjorosing site.
5. That plot No. 064 72 – 050 Bus Stop Area Mafeteng Urban Area is to be de-registered and be registered jointly in the names of Plaintiffs.
6. That the rentals being collected from Plot 06472 – 050 Lehana business site situate at Bus Stop Area, Mafeteng Urban Area shall continue to be shared by Plaintiffs and 1st Defendant for the duration of 1st Defendant's lifetime, consistently with the Ntaote family decision which all accepted as a compromise for the sake of Ntaote family peace.
7. There shall be no order for costs on the ground that the dispute is one involving family members.

J. T. M. MOILOA
JUDGE

FOR THE PLAINTIFFS: ADV. K. MOHAU KC

FOR THE DEFENDANT: ADV. Z. MDA KC