

IN THE HIGH COURT OF LESOTHO

CIV/APN/23/2016

In the matter between:-

KHABISO MOFOLO NO

1ST APPLICANT

KGAHLISO MTHIMKULU

2ND APPLICANT

And

MPHU KENEILOE RAMATLAPENG

1ST RESPONDENT

ESTATE LATE PEPENENE MOFOLO

2ND RESPONDENT

SHOPRITE (PTY) LTD

3RD RESPONDENT

MASTER OF THE HIGH COURT

4TH RESPONDENT

ATTORNEY GENERAL

5TH RESPONDENT

JUDGMENT

CORAM : **Honourable Mr Justice T Monaphathi**

Date of hearing : **29th November 2016**

Date of judgment :

Summary

Annotations

Statutes

Administration of Estates Proclamation 29 of 1935.

Land (Amendment) Order 6 of 1992.

Cases

Maoeng and Others v Maoeng and Others C of A (CIV) No. 09/2019

Mokatsanyane v Thekiso C of A 23 of 2004

Moiloa v Thekiso (CIV/APN/19/2007)

Mokorosi v Mokorosi 1967-1970 LLR

Mokhutle NO v MJM (PTY) LTD and Others LAC (200-2004)

Motsamai v Motsamai (CIV/APN/166/2008)

Rasekoai v Rasekoai C of A (CIV) 30/2010

Thokoa v Hoohlo 1978 LLR

Books

WCM Maqutu *Contemporary Family Law in Lesotho*

Monaphathi J.:

[1] On the 19th February 2016, applicants- granddaughters of the late **Mofolo**

Thomas Mofolo and **Mampe Mofolo** instituted this application. They sought an order:

1. Interdicting 1st respondent from transferring the sites **number 19223-064** and **19223-063** belonging to the late **Thomas Mofolo** into her own names.
2. Interdicting the 1st respondent from selling rights to the site **number 19223-063**.
3. Interdicting the 1st respondent from collecting rentals from Mofolo centre site **No 19223-064**.
4. Directing the 1st respondent to pay monies collected as rental from Mofolo Centre, site **number 19223-064**.
5. Setting aside the appointment of the Late **Peppenene Mofolo** as the sole heir to the estate of late **Thomas Mofolo** by the family.
6. Directing that the estate of the late **Thomas Mofolo** be distributed equally among the beneficiaries.

7. Those prayers 1, 2 and 3 are to operate with immediate effect.

[2] The court per Moiloa J had on the 8th February 2016 granted leave to applicants to sue 1st Respondent by way of Edictal citation. Applicants had alleged that 1st respondent had left the country and her whereabouts were unknown to applicants.

[3] On the 21st March 2016 the office of **Messrs S Phafane** entered a notice of intention to oppose on behalf of the 1st and 2nd respondent. Although the 3rd, 4th and 5th respondent were served they never filed any opposition. Papers were filed by both parties but before the application could be heard applicants sought leave to amend their notice of motion by deleting prayer 4 and substituting it with a prayer couched thus:

“Directing 1st respondent to account for monies collected as rentals from Mofolo Center and pay applicants their share.”

Prayer 5 was amended to read

“Reviewing and setting aside the appointment of the Late Pepenene Mofolo as the sole heir to the late Thomas Mofolo.”

Prayer 6 was amended and substituted to read

“6 (a)directing that the estate of the late Mofolo Thomas Mofolo be distributed equally among the beneficiaries in terms of intestate succession law.”

Alternatively

“(b) Ordering that the estate be shared in terms of customary law”

Factual matrix

[4] I shall now proceed to deal with the application as amended. In a letter dated 17th October 1991 a family council appointed one **Pepenene Mofolo** as the heir to the estate of the late **Thomas** and **Mampe Mofolo**. The letter is authored in Sesotho but Counsel failed to provide court with fair translation. It reads

P.O. Box 49,
Teyateyaneng
Lesotho
17th October 1991

Mohlomphehi,

Re thabaho o tsebisa hore batho ba saenang lengolo lena ke litho tsa lelapa la MOFOLO ‘me bahlahisa kapele ho uena mojalefa la bafu MOFOLO THOMAS MOFOLO le MAMPE MOFOLO ea bitsoang PEPENENE MOFOLO ke mojalefa.

Ke tla leboha ha u amohela tsebisano ena.

Khotso.

THOMAS MOFOLO

THABANG MOFOLO

RAMOFOLO MOFOLO

RANTANTI MOFOLO

MAPHEKO MOFOLO

[5] **Pepenene** passed on leaving behind his wife, **Mphu Keneiloe Ramatlapeng- 1st** Respondent. Applicant allege in their founding affidavits that **Mphu** has sought to transfer certain sites belonging to the estate of Late **Mofolo** into her own names. The purported transfer was published in a newspaper article attached as annexure “KM2”. However, this newspaper and date of publication is undisclosed. Also, they allege she has purported to sell interests in one site and is collecting rentals from **Mofolo Centre**. They pray that the court restrain and interdict 1st respondent from carrying out the above acts and to direct that the estate be distributed equally among beneficiaries including monies collected from rentals. Applicants have also filed objection with the Land Administration Authority objecting to transfer of site **No.19223-063 and 19223-064** of the late **Thomas Mofolo**. The letter of objection was served on the authority on the 22nd July 2015.

[6] Applicants and their brother **Khere Mofolo** are children of late **Motho-oa-Moroo Mofolo**- the second son of the late **Thomas** and **Mampe Mofolo**. According to applicants late Thomas had abandoned customary mode of life in favour of the European mode of life. In support of the mode of life test, applicants state that their late grandparents were married by civil right and held accounts and had insurance covers. Therefore, applicants allege “his estate ought to be administered in terms of laws of administration of estate pertaining to intestate succession”. This is in line with their amended prayer 6 (a) in the notice of motion. They posit further that even if “Thomas had not abandoned the customary way of life and that his estate ought to have been administered and disposed of in terms of custom, the appointment of Pepenene would still be irregular and unlawful because it sought to appoint him as sole heir to the estate, contrary to the customary principle that an heir shares with his siblings. There is no sole heirship even in customary law [sic]”.

[7] First respondent's opposing affidavits discounted the allegation that the late Thomas and Mampe Mofolo were married by civil rites. She also raised an exception to applicants' locus standi to bring the application as they did because according to the 1st Respondent applicants had no legally enforceable claim to the estate of the late Thomas Mofolo. She also raised a point in limine that **Shoprite (PTY) LTD** had been misjoined because she had at some point before Berea Urban Council disclosed that she had no intention to sell Mofolo estate to **Shoprite**. Lastly, that applicants had failed to disclose material facts, that is

- a) That Thomas and Mampe were married by customary marriage.
- b) That after the demise of their mother Poelo Mofolo, their father married Nthatisi Makhaba Mofolo.
- c) That the late Motho-oa- Moroa and Poelo never challenged the appointment of the Pepenene Mofolo during their life time.

[8] First respondent nonetheless responded to the merits. She denied that **Khere**, **Khahliso** and **Khabiso** are the beneficiaries to the estate of late Mofolo **Thomas Mofolo** by virtue of being the children of the late **Motho-oa-moroo**- second son of late **Thomas Mofolo**. She indicated that upon the demise of her husband- **Pepenene Mofolo**, the landed property became her inheritance. Further, that she assumed all the rights and privileges of her late husband *ex lege*. She states in answering affidavit that she acquired rights and interests on sites Numbers **19223-063** and **19223-064** by the operation of the law. She alleges further that she continued to service all debts due to the estate of late Mofolo and continues to maintain certain property **No. 19223-063** her own money. She states that her late husband was not entitled to share the estate of the deceased and even if had to he could not possibly share it with applicants who lacked locus standi to institute such a claim.

The Law

[9] The issue arising out of this application is two-fold. It is whether 1st respondent is entitled to inherit all properties forming estate of late **Thomas and Mampe Mofolo** to the exclusion of all other children of Thomas and **Mampe Mofolo**. And whether this is so under customary law or under intestate succession. Parties are at loggerheads as to which law ought to be applied to the administration of this estate. Applicants are of the view that their grandparents had died intestate and therefore their estate would devolve among their children and their grandchildren.

[10] On the other hand 1st respondent maintains that she is the customary heir and is entitled to “everything” that formed part of estate of the late Thomas and Mampe Mofolo. She says this entitlement is based or founded on the letter authored by the family council addressed to the **Chief of Ha Mokhothu** and the **Office of the Environment Officer** quoted above. The letter introduced **Pepenene** as the “Mojalefa” of the late **Thomas and Mampe Mofolo**. According to 1st Respondent this “bojalefa” was transferred to her upon the demise of Pepenene- her husband.

The mode of life test

[11] The mode of life test often becomes a central issue whenever deceased estates are concerned. It is often brought up either to challenge bequests as done through wills and other testamentary dispositions. A plethora of High Court decisions have addressed this. In *Mokorosi v Mokorosi* the Court held that since the deceased wore European clothes, ate and slept and lived in the European way. Belonged to a protestant church. Had not circumcised any of his sons and daughters through initiation school. No bohali had been paid for his marriage and that of his children. He consulted a firm of lawyers that drew up his will and held bank account and had business was since was evidence that he had abandoned

customary way of life in favour of European mode of life. On the other hand **Thokoa**, a medical doctor who had graduated from university, lived a modern life in a modern house and using modern technology accepted that he had not abandoned customary mode of life in favour of European way of life. He considered himself a modernised Mosotho.¹

[12] Today, most lifestyle choices that ticked the European mode life box are becoming common lifestyle choice to all Basotho.² The anterior question is whether the late Thomas and Mampe had abandoned a customary way of life and adopted a European mode of living. If abandonment is not proven the case stands to be decided in terms of customary law. So, the issue must be decided before addressing any of the reliefs sought in the notice of motion as amended.

[13] Applicants' case is that the Late **Thomas** had abandoned customary way of life in favour of European way of life. They allege that he done away with customs and its practices. He possessed a bank account and had insurance policy with old mutual. He was married by civil rites and took his children to European school and **Pepenene** was even sent away to study in the United States of America. Respondents disputes that **Thomas** had abandoned customary way of life and that he was married by civil rites. First respondent's response to allegations that holding bank accounts and insurance policies is European is rather interesting. She says "*I aver that father and mother in law never abandoned the customary way of life as indicated in my previous paragraphs. They were improved Basotho couple who had means and wanted what was best for their children. It is hard to imagine why they were not expected to open bank accounts, insurance policies, own motor vehicles and have big house with running water and electricity for their convenience.*" Maqutu remarks "*it is hard to imagine why a Mosotho cannot be expected to wear European clothes, sleep on a bed, do his*

¹ *Thokoa v Hoohlo* 1978 LLR.

² *Mokorosi v Mokorosi* 1967-1970 LLR.

ploughing with a tractor, cover greater distances with a car, have a ten-roomed mansion with electricity and modern convenience, if such a Mosotho has means.”³

[14] At this point the issue of existence of a civil marriage became a dispute of fact. However, evidence of the conclusion of civil marriage between **Thomas** and **‘Mampe Mofolo** was provided, albeit belatedly in the reply. I say belated because at the stage of reply respondent can no longer be able to discount any assertions or allegations made. One **‘Mapheko Mofolo** vividly recalls that the couple got married at St. Mary’s Mission in Roma around 1945 or 1946.

[15] Intestate succession is governed by the *Administration of Estates Proclamation*²⁹ of 1935. In terms of section 3 (b) it shall not apply to “*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 the estates of Africans who have 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.*” Where this is so, the estate of the deceased would be distributed equally among the children of the deceased.⁴

[16] Customary law shall apply to estates of Basotho who have not abandoned customary way of life for European mode of life. Under customary law, the designation of an heir is by law and not by preference. That is, where the deceased dies without leaving any written instructions regarding his estate the family council would convene and appoint the first born male child as the “mojalefa”. However, this does not

³ WCM Maqutu *Contemporary Family Law in Lesotho* 178.

⁴ *Motsamai v Motsamai* (CIV/APN/166/2008).

presuppose that the heir inherits everything to the exclusion of his brothers. He is to share with his brothers the estate of late parents. But the entitled to a greater share of the estate. Paragraph 13 (1) of the laws of Lerotholi states that “*the heir in Basutoland shall inherit all unallocated property of the estate and he is obliged by custom to use the estate with his father’s widow or widows and to share with his junior brothers according to their rank.*”

[17] In terms of section 8 (2) (a) of the *Land Amendment Order* 6 of 1992 the widow is given the same rights in relation to land as her deceased husband. Anyhow, the status of 1st Respondent as a widow is not relevant because it is not challenged. However, if I were to conclude that she is the customary heir I would subject her to the provisions paragraph 13 (1) of the laws of Lerotholi. Really, the business of the family council is not appoint anyone as heir. Under customary law being an heir is by virtue of law. Nor, can the family council disinherit anyone. Consider paragraph 14 (1) of the laws of Lerotholi which says “*if the man dies leaving written instructions regarding the allotment on his death, his wishes must be carried out, provided the heir according to Basuto custom has not been deprived of the greater part of the estate.*”⁵ In other words the family council cannot do that which the deceased cannot under customary law do. Similarly, the family council cannot absolve the heir from the customary obligation to share together with his brothers the estate of their late parents and however theratio.

[18] First respondent raised three points in limine, namely; applicants’ lack of locus standi. First respondent alleges that they have no legally enforceable right and claim to the estate of late Thomas and Mampe. Further that, as a widow she has same rights as **Pepe nene** who was appointed sole heir to the estate. Applicants’ have locus standi to bring this application in as much as their father- the late **Motho- oa- moroa** was the son of late **Thomas**

⁵ *Rasekoai v Rasekoai* C of A (CIV) 30/2010.

and **Mampe**. The Court in **Maoeng v Maoeng** noted that “*the laws of Lerotholi’s bias against females have been ameliorated by Land (Amendment) Order 6 of 1992*”. The second point is misjoinder. Applicants seem to have been labouring under an apprehension that there was a purported and intended sale between 1st Respondent and **Shorprite**. This issue was even taken before **Berea Council**. **Shorprite** did not oppose this application and did not incur in costs and therefore no prejudice caused. The point of non-disclosure is broken into three points. The first being that applicants deliberately withheld the fact that Thomas and Mampe were married by customary marriage. I have dealt with this point elsewhere in this judgment. I therefore dismiss it. The second, namely, that **Mothoa-oa-Moroa** married one Nthatisi has no bearing on this application and so does the third objection.

Conclusion

[18] The factors referred to above could be consistent with adoption by the Late Thomas Mofolo of a European mode of life but for the fact existence of civil marriage was not in my opinion satisfactorily proved. A dispute of fact arose as to the conclusion of a civil marriage by the deceased. This ought to have been anticipated by applicants. Conclusion of a civil marriage weighs heavily on the decision whether the deceased had indeed abandoned. It’s explicitly required by the act that intestate succession would only apply to “*estates of Africans who..., if married, have married under European law.*” These factors were not sufficiently proven by applicants. The Court in **Mokatsanyane v Thekiso**⁶ held that respondent who claimed that the testator had abandoned customary way of life in favour European way of life bore the onus to prove such abandonment.

[19] I make the following orders;

1. Prayer 1 is granted.
2. Prayer 2 is granted.
3. Prayer 3 is granted.
4. Prayer 4 as amended is granted.
5. Prayer 5 as amended is refused.
6. Prayers 6 (a) as amended is refused.
7. Prayer 6 (b) as amended is granted.