IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/434/2020**

In the matter between:

RETŠELISITSOE LESHAPA **APPLICANT**

AND

LISEBO LESHAPA	**1ST RESPONDENT**
RE: ESTATE LATE 'MAMOKHELE LESHAPA	**2ND RESPONDENT**
PHEELO RAMPHEANE	**3RD RESPONDENT**
MASTER OF THE HIGH COURT	**4TH RESPONDENT**
ATTORNEY GENERAL	**5TH RESPONDENT**

Neutral Citation: Retšelisitsoe Leshapa v Lisebo Leshapa & 4 Others (CIV/APN/434/20) [2021] LSHC 70 (17 JUNE 2021)

JUDGMENT

CORAM: **MOKHESI J**

DATE OF HEARING: **26 MAY 2021**

DATE OF JUDGMENT: **17 JUNE 2021**

SUMMARY

SUCCESSION: *The applicant is seeking to annul the Will of his late grandmother in terms of which she bequeathed certain immovable property to his sister (1st respondent)- the 1st respondent failing to discharge the onus resting on her to prove that the deceased had abandoned her customary mode of life in favour of the European one, when she allegedly executed the Will- held, the application should succeed.*

ANNOTATIONS:

Legislation:

Law of Inheritance Act No. 26 of 1873

Administration of Estates Proclamation 19 of 1935

High Court Act 1978 (as amended by Act No.34 of 1984)

Cases:

Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd (237/2004/2005) [2005] ZASCA 50; [2006] 1 ALL SA 103 (SCA) (30 May 2005)

Mokatsanyane and Another v Thekiso and others (23/2004) [2005] LSA 6 (2 April 2005)

Hart v Pinetown Drive-Inn Cinema (Pty) Ltd 1972 (1) SA 464 (D)

Swissborough Diamonds Mines v Government of the R.S.A 1999 (2) SA 279

Geldenhuys and Neethling v Beuthin 1918 AD 426

[1] This is an application in terms of which the applicant is challenging the validity of the Will of the late 'Mamokhele Leshapa. The applicant and 1st respondent are siblings. They are fighting over a Will which was purportedly executed by their late grandmother. In terms of the said Will, the deceased bequeathed a developed residential site at Ha Lesia held under lease No. 11292 – 279. It is common cause that the applicant was raised and lived with the deceased. Following the deceased's passing away, it emerged that the 1st respondent was bequeathed the immovable property mentioned above in terms of the will, which on the face of it had been executed by the deceased on the 23 January 2020. Meanwhile the family council, unaware of the existence of the said Will, had appointed the applicant as the heir to the deceased's estate.

[2] In his founding affidavit the applicant makes the following case for attacking the said will:

> *"* *-10-*
>
> *At all times I have known the deceased, lived a customary way of life.*
>
> 1. *She was married to the late Lekolukotoana Leshapha by customary/Sesotho law.*
>
> 2. *Following his passing in 1995 she underwent the traditional ritual of "ho roala thatpo," this ritual was also performed when her son Mokhele Leshapa passed away in 2015.*
>
> 3. *Her son (only child) did not attend formal education at all; he was a head boy (sic) and grew up tending to the family animals.*

4. *The late 'Mamokhele Leshapa always involved the family council when making decisions pertaining to property and she was subject of the chief.*

5. *She believed in "Balimo", every year on the 6th month; she held a feast for the family to honour their ancestors and give thanks.*

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The period he Will is said to have been executed, the testator was at Likalaneng under may care and she remained there and did not travel the entire month of December. In the event that it is shown that the Will is not forgery, the testator lacked the capacity to execute a Will. She could not have understood what she was signing and the effects thereof."

[3] To these averments the 1st respondent raised a constitutional point in *limine* that, Section 5 of the **Law of Inheritance Act No. 26 of 1873** and Section 3 (B) of the **Administration of Estates Proclamation 19 of 1935** are discriminatory against Basotho who have not abandoned their customary way lives as it affected, adversely, their freedom to testate based on cultural believes. During arguments, the applicant's counsel, Adv. Tšabeha, abandoned this so-called point in *limine*. On the merits, the 1st respondent's case is averred tersely and laconically, thus:

"5.2 DISPUTE OF FACT

The Will is further challenged on the basis that deceased never signed it. This calls for a factual enquiry on whether or not the deceased signed the Will. The Honourable Court shall realize that the deceased has placed her thumb where he ought to have placed her signature because she could not write her names. It is for the record denied that the deceased did not a sign as alleged. She did sign and the witnesses can also attest to that.

Based on the above grounds it is submitted that this application ought to fail without any further ado. The honourable (sic) shall further realise that in seeking the declaration of the Will as null and void, Applicant has not any prayer that he be declared the customary heir of the deceased. The court cannot just grand a declaratory order without a consequential relief thereafter."

[4] **Issues for determination**

(1) Validity of the Will.

It is trite, in this jurisdiction that even though there is a presumption in favour of validity of the Will, in situations where the said Will is challenged on the ground that the testator did not abandon his or her customary mode of life, the assertor of the Will is saddled with the onus of proving that the deceased had abandoned the customary mode of life at the time he/she executed the Will. This was made plain in **Mokatsanyane and Another v Thekiso and others (23/2004) [2005] LSA 6 (2 April 2005).** I am referring to this electronic version of the judgment because the excerpt upon which reliance will be made in this judgment does not appear in the hardcopy version which is reported in LAC (2005 – 2006). In the hard copy version, there appears to be a *lacuna* where the court discusses the question of *onus,* as only conclusion appears in paragraph 15 of the judgment. In the electronic version at para. 12 the court says:

".... It follows in these circumstances, in my opinion, that the onus burdens the Appellants to prove the validity of the Will in question. Indeed the general rule is that he who asserts must prove. See ***Van Wyk v Lewis 1924 AD 438 at 444.***

In reaching this conclusion, I am not unmindful of the majority decision in ***Kunz v Swart and Others 1924 AD 618*** *to the effect that there is a*

presumption in favour of the validity of a will, thus placing the onus of proof on the person challenging it. With respect I think that the minority decision of De Villiers JA to the contrary is not only more cogent but is also more preferable to the situation in Lesotho. In this regard the learned Judge of Appeal quoted from a passage in Voet (Pand. 5.3.4) to the effect that "without any doubt" the onus probandi is upon the person who maintains that a will has been made. In this country, as I shall endeavour to demonstrate shortly, testamentary disposition is restricted to persons who have abandoned a customary mode of life and have adopted a European way of living. It makes common sense and logic in my opinion that such persons should bear the burden on the persons challenging wills on this score would no doubt amount to proving the negative. By contrast, the position in South Africa is that wills may be validly made by any persons except minors under the age of 16 and persons who are at the time mentally incapable of appreciating the nature and effect of their acts."

[5] In the present matter, it is no doubt that in the Will itself, the testator says when she executed the Will, she had abandoned her customary mode of life in favour of the European one. However, the mere presence of this statement in the Will is not enough to tilt the scales in favour of the Will assertor. There has got to be proof by way of evidence that indeed the testator had abandoned her customary mode of life "as there is no magic power in a will, and where it is challenged, as here proof must be forthcoming …" **Mokatsanyane ibid at para. 18).** In the present matter the applicant specifically attacks the Will on the ground that the deceased had not abandoned her customary way of life when she allegedly executed it; that she underwent a ritual of mourning her deceased husband and son called "*Ho roala thapo",* respectively in 1995 and 2015; that she always involved family council when making decisions about property matters; that she believed in the spirits of the dead "*Balimo"*, and that she would

hold a feast in June of every year to honour the ancestors. To these allegations the 1st respondent said nothing. She did not even make a flirting attempt to proffer contradicting evidence. All that she could contend herself with doing was to confine herself to saying that the deceased signed the will, as if that was enough in and of itself. This attitude she displayed even to the most poignant assertion by the applicant that on the day the Will depicts as being the day it was executed, the deceased was still under his care at Thaba-Tseka and did not travel during that period.

[6] I think the respondent made a monumental mistake of not appreciating the purpose or role that is played by the affidavits in motion proceedings. Affidavits, in motion proceedings serve the purpose of pleadings and contain evidence upon which a deponent relies. They also serve on important role of defining the issues between the parties. In **Hart v Pinetown Drive-Inn Cinema (Pty) Ltd 1972 (1) SA 464 (D) at 469 C – E** it was said:

> *"Where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at the trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound."*

[7] Because of this stated purpose of affidavits in motion proceedings, the respondent in his/her answering affidavit must set out the evidence upon

which he/she relies on in order to discharge the onus that is resting on him (**Swissborough Diamonds Mines v Government of the R.S.A 1999 (2) SA 279** at 323 J – 324A**).** The 1st respondent has left the allegations of the applicant uncontroverted; this is despite the onus resting on her to prove that the deceased had abandoned the customary mode of life in favour of the European one when she supposedly executed the said Will. Even if this court were to be inclined to refer the issue of abandonment of the customary mode of life and capacity of the deceased to testate, and on the authenticity of the signature present on the Will, the problem is that there is no dispute of fact which has been raised by the 1st respondent. She seemed to have laboured under the false impression that the Will in and of itself and the presence of the words that the testator had abandoned customary mode of life, would do the trick for her. In the face of the applicant's pointed attacks, the 1st respondent ought to have factually counteracted those averments, but in this case, that was not done, therefore leaving the applicant's averments uncontroverted. The fact that the 1st respondent has failed to raise an issue regarding the deceased's mode of life, based on **Mokatsanyane,** this was fatal because she was bound to discharge the *onus* resting on her in relation to this issue.

[8] **<u>Declarator without consequential relief</u>**

The 1st respondent has attacked the applicant on the basis further that he is seeking a declarator without any consequential relief. The High Court Act 1978 (as amended by Act No.34 of 1984) provides that:

> *"2(1) The High Court of Lesotho shall continue to exist and shall, as heretofore, be a superior court of record, and shall have,*

(a) Unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law in force in Lesotho;

(b) .....

(c) In its discretion and at the instance of any interested person, power to inquire into and determine any existing future or contingent right or obligation notwithstanding that such person cannot claim any relief consequently upon the determination; and

(d) ....”

[9] Because the High Court at common law did not have jurisdiction to grant declaratory relief, the above section confers such jurisdiction (**Geldenhuys and Neethling v Beuthin 1918 AD 426).** The approach to declaratory relief is a two-step approach which firstly has to establish whether the applicant has any interest in existing, future or contingent right; and secondly, when the court is satisfied about the existence of any of these factors, it must determine whether or not it is prepared to grant a declaratory relief. Existence of a dispute is not a requirement for the grant of a declaratory relief as long as the parties exist upon whom such a declarator would be binding. All the applicant must do is to satisfy the court that he is interested in existing, contingent or future right or obligation:

“[17] It seems to me that once the applicant has satisfied the court that he/she is interested in an “existing future or contingent right obligation the court is obliged by the subsection to exercise its discretion. This does not, however, mean that the court is bound to grand a declarator but that it must consider and decide whether it should refuse or grant order, following an examination of all relevant factors .....” **(Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd (237/2004/2005) [2005] ZASCA 50; [2006] 1 ALL SA 103 (SCA) (30 May 2005)).**

[10] The applicant is clearly interested in the determination of the issue of succession regard being had to the fact that he has been nominated the heir by the Leshapa family council. I am satisfied that a declarator will be binding between the parties in this matter.

In the result the following order is made:

a) It is declared that the Will of `Mamokhele Leshapa dated 23rd January 2020 is *null and void*.
b) It is declared that `Mamokhele Leshapa died intestate.
c) The applicant is awarded costs of suit.

MOKHESI J.

For the Applicant:	**Adv. N.G Thabane instructed by K. NTHONTHO ATTORNEYS.**
For the 1st Respondent:	**Adv. Ts`abeha instructed by K.D MABULU ATTORNEYS**
For 2nd to 5th Respondents:	**NO APPEARANCE**