IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/T/360/2012**

In the matter between

MOTSAMAI MORIE **APPLICANT**

AND

LESOTHO NATIONAL GENERAL INSURANCE COMPANY LIMITED **RESPONDENT**

JUDGEMENT

Neutral Citation: Motsamai Morie v Lesotho National General Insurance Company Limited CIV/T/360/2012 [2021] LSHC 103

CORAM: BANYANE J

HEARD: 18/11/2020

DELIVERED: 23/08/2021

Summary

Application for substitution - the person to be substituted neither an executor of the deceased's estate nor his heir but relies on his appointment as a guardian of the deceased's minor child - whether he lacks capacity to continue with the litigation.

ANNOTATIONS

Cases cited

1. Motanteli v Tekane LAC (2009-2010)391
2. Molibeli v Mokhethi CIV/APN/226/07
3. Makhetha v Estate Late Elizabeth 'Mabolase Sekonyela C of A (CIV) 44 of 2017 [2018] LSCA 16
4. Solane v Commissioner of Police CIV/T/16/06
5. Commander Lesotho Defence Force v Raselemane C of A (CIV) 27/2021 [2021 LSCA 13
6. Willenburg v Willenburg & Another 1908 25 SC 775
7. Hoffa NO v S.A Mutual Fire General Insurance Co Ltd 1965 (2) SA 944
8. Minister of Justice and Correctional Services and Others v Estate Late Robert James Stranshan-ford & Others [2016] SASCA 197

Books

1. RG Mckerron; The Law of Delict (3rd impression) 1983

Legislation and Subsidiary Legislation

1. The Children Protection and Welfare Act No.7 of 2011
2. The Administration of Estates Proclamation No.16 of 1935
3. The High Court Rules of 1980

BANYANE J

Introduction

[1] In this opposed substitution application, Mr. Mokhethi Morie (hereinafter referred to as the deceased) instituted a claim for damages in the amount of M243, 850.00 broken down as follows;

a) Medical and hospital expenses	M 60.00
b) Estimated future medical and hospital expenses	M 500.00
c) Estimated future loss of earnings	M140 790.00
d) General damages for pain and suffering	M100 000.00

[2] This claim arises out injuries allegedly sustained from a certain collision which occurred on the 20th May 2010, involving a motor vehicle (insured by the defendant) registered AM 957.

[3] The defendant opposes the claim and accordingly filed a notice of intention to defend on the 12th July 2012. On the 29th August 2012, it requested certain particulars. These were supplied on the 11th June 2013. On the 22nd July 2013, the defendant filed its plea.

[4] In January 2014, the deceased met his death. He was substituted by his mother 'Masebolelo Morie. This was on 20th October 2014. Regrettably, she too passed on in November 2017.

[5] The present application for substitution is filed by the applicant, Motsamai Morie, who describes the deceased as his brother. The basis for substitution is that he has been appointed as a guardian of the deceased's minor child and customary heir, Rorisang Morie. He annexed to his affidavit; a family letter signed by three members in this regard.

[6] This application is opposed by the respondent/defendant, mainly on the ground that the applicant lacks capacity to be substituted in these proceedings.

The parties' submissions

[7] The applicant's counsel miss Moerane advanced a two-pronged argument. The first relates to transmissibility of the action to the deceased's heir. The second relates to the applicant's capacity to proceed with this matter.

7.1 With regards to the first point, she referred the Court to the case of **Minister of Justice and Correctional Services and Others v Estate Late Robert James Stranshan-ford & Others [2016] SASCA 197:[2017] 1 ALL SA 354(SCA)** to submit that a claim for pain and suffering and loss of amenities of life is transmissible to the deceased's estate where the proceedings have reached the stage of *litis contestatio*.

7.2 She contends on the strength of this authority that the claim is transmissible since the pleadings had already been closed at the time of the deceased's demise.

[8] In relation to the applicant's capacity to be substituted in these proceedings, she asserts that the deceased's estate was administered by customary law until 2017, when the deceased' mother 'Masebolelelo Morie met her death (notably an issue not raised in the founding affidavit). She thus relied on Rule 14(7) of the High Court Rules 1980 to argue that an heir of the deceased's estate is entitled to be substituted for the deceased in these proceedings. She contends on this basis that Rorisang being the only son of the deceased Mokhethi Morie is the rightful heir to his father's estate in terms of section 11 of the Laws of Lerotholi.

8.1 She referred the Court to **Motanteli v Tekane LAC (2009-2010)391** to submit that the deceased's only son is the rightful customary law heir per section 11.

8.2 She additionally asserts that by reason of his minority status, the deceased's son is proscribed from instituting any legal proceedings hence, the applicant is qualified to take on the proceedings on his behalf following the appointment as guardian.

8.3 She relies on section 203(1) and 48 of the Children's Protection and Welfare Act 2011 to submit that the applicant's appointment is legally valid.

8.4 She urged the Court to follow **Molibeli v Mokhethi CIV/APN/226/07** on whose basis she submitted that the applicant is entitled to act on behalf of the minor child to prosecute this action.

[9] In support of the objection to the applicant's *locus standi* to be substituted in these proceedings, Miss Taka contended on behalf of the respondent that the applicant has failed to allege in his founding affidavit whether the deceased's estate is to be/has been administered under Customary Law or the Administration of Estates Proclamation of 1935; that he is neither an executor, curator or trustee contemplated under Rule 14(5) of the High Court Rules, nor is he an heir to the deceased estate contemplated under Rule 14(7). It is on this basis that she asserts that the applicant lacks capacity to substitute the deceased plaintiff in this matter.

9.1 It is her further contention that the provisions of the Children Protection and Welfare Act of 2011 on which the applicant relies for the validity of his guardianship(in particular section 48) confers no powers to any person to litigate on behalf of minor children and that the provisions of section 81 of the Administration of Estates Proclamation No.19 of 1935

(dealing with appointment of curator ad litem and bonis) ought to have been followed.

9.2 She adds that the applicant has also failed to follow the procedure stipulated under section 47(1) of the Children's Protection and Welfare Act, which prescribes that a person who takes a child into his care or guardianship shall together with the person under whose care the child was at the time of the taking of the child, notify the chief, local authority or the Department of Social Welfare, within one week of the taking of the child.

9.3 She concludes by submitting that the applicant's resort to Laws of Lerotholi is insupportable for the reason that where the common law or legislation sufficiently deal with or cover a given subject(in this case; administration of Minors' estates and their guardianship), the Laws of Lerotholi are inapplicable .

Analysis

[10] As shown above, the defendant's objection to the applicant's standing is premised mainly on the ground that he does not fall under either of the two categories contemplated under Rule 14 of the High Court Rules to whom actions may be transmissible following death of a party. Other grounds for the objection are that; a) the applicant failed to establish that he properly acquired guardianship over the minor child; and b) that the appointment confers no authority to litigate in terms of Rule 14 because the damages claimed were suffered by the deceased personally.

Issues

[11] The arguments advanced and the oblique suggestion in the respondent's opposing affidavit that the claim was personal to the deceased, necessitate a determination of mainly two issues. They are whether;

a) The action survives the deceased's death and transmissible to either his estate or his heir
b) Depending on the answer to (a) above, whether the applicant has capacity to be substituted in these proceedings.

Transmissibility of actions

[12] I should start from the premise that some causes of action are extinguished by death of a party to litigation and are not transmissible to the estate of such a deceased party. This is reflected in Rule 14(1) of the High Court Rules 1980, which deals with extinction and transmissibility of actions. It provides that;

> "no proceedings shall terminate merely by reason of the death, marriage or other change of status of any party thereto unless the cause of such proceedings is thereby extinguished".

[13] The subsequent provisions of this rule set out the procedure to be followed when a party dies during the course of litigation.

[14] Rules 14(5) and (7) in effect provide that whenever a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator or trustee, or customary heir where the estate is not to be administered under the Administration of Estates Proclamation 19 of 1935 may give notice to all parties and the registrar intimating that he desires, in his capacity as such, to be substituted for the party to the proceedings.

[15] It is trite law that personal actions die with the person (**Willenburg v Willenburg & Another 1908 25 SC 775 at 777**. They are however transmissible to the heir of the party dying before conclusion of the case, where the stage of *litis contestatio* had been reached or taken place. See **Makhetha v Estate Late Elizabeth 'Mabolase Sekonyela C of A (CIV) 44 of 2017 [2018] LSCA 16**.

[16] The case of **Minister of Justice and Correctional Services v**, **Estate Stranshan-Ford**(supra), illustrates the type of actions that are distinguished by the death of a party. These includes actions for divorce, or a custody dispute between the parents of minor children. This is due to the fact that in either case, a marriage is terminated by death and the contest over it or custody of the child ends.

16.1 In that case the applicant's claim was personal since the purpose of the claim was to obtain a Court order enabling him to die in a manner of his own choosing. The Court held that the course of action was extinguished by his death that there was no longer any claim capable of being adjudicated or pass to his estate. In other words, there was nothing left on which the Court could pronounce.

[17] As indicated above, personal claims for non-patrimonial loss (e.g a claim for pain and suffering and loss of amenities of life, a claim for damages for defamation) die with the claimant. These will only be transmissible to the estate of a deceased litigant if the action instituted by him/her had reached the stage of *litis constestatio*. **Hoffa NO v S.A Mutual Fire General Insurance Co Ltd 1965 (2) SA 944 © at 925 F**, **Solane v Commissioner of Police**, see also **Commander Lesotho Defence Force v Raselemane C of A (CIV) 27/2021 [2021 LSCA 13 (14th May 2021).**

[18] Reverting to the present matter, it is indisputable that *litis constestatio* had been reached in these proceedings prior to the deceased's death. It follows that this claim, though personal to the deceased, survives his death and passes to his heir.

Who then should pursue this claim?

[19] Having concluded as I did above, the next question to be answered is whether the applicant is the rightful person to continue with this litigation.

As shown earlier, his capacity to sue is predicated upon his appointment as guardian of the deceased's minor child, for whose benefit the litigation is pursued, so it is alleged.

[20] The family letter on which he relies reflects that three (3) members of the Morie family appointed him as guardian of this minor child. In spite of the fact that the family letter evidencing his appointment as guardian has not been translated into English and despite the absence of particularity on aspects such as whether Rorisang is the deceased's son or whether his mother is also deceased, it does not seem to be disputed that the deceased left a minor child behind, and there is no counter-suggestion that he is the heir to the deceased.

[21] I have also noted that the deceased's mother in her founding affidavit in support of her application for substitution made no mention that she was seeking to proceed with the action on behalf of a minor child, let alone mention its existence.

[22] Due to the fact that it is undisputed that the deceased left behind a minor child; undoubtedly his heir, I will proceed to determine the applicant's capacity to litigate on this basis. The respondent/defendant's contention is that the provisions of section 47 of the Children's Protection and Welfare Act had not been adhered to. This reads as follows;

"Conditions for taking a child into care

> 47(1) where a person takes a child into his care or guardianship, he shall, together with a person under whose care the child was at the time of the taking of the child, notify a chief, local authority or the Department of Social Welfare within one week of the taking of the child."

[23] The Department is then mandated under sub section 2 inquire into the question of suitability of the person who has taken the child in his care or guardianship to raise or take care of the child.

[24] The question that must then be answered is whether the procedure under subsection 2 must be followed where a person has been appointed by a family council as guardian of a minor child. I think not and I endeavour to explain.

[25] It should be noted that this provision (section 47) falls under Part VII dealing with conditions for taking a child into care. Discernible from this provision are the following main features; a) taking a child into custody must be publicized. By this I mean, the matter must not stay between persons from whom the child is taken and who takes respectively, but must be a fact known to relevant authorities; b) the person who takes the child must be a suitable person to raise a child.

25.1 This provision in my view finds no application on the facts of this matter. This is because the family nominated the applicant as guardian following the death of the minor's grandmother. In my view, it can be deduced from this appointment that the family members applied their minds to the suitability of the applicant to raise the child. It is therefore a known fact the child is under his care. In other words, he is authorized by the family to assume parental responsibilities over this minor child. It does not therefore appear to me that endorsement of the Department of Social Development was required.

[26] Section 203 of the Act deals with appointment of guardians. It provides the ways in which guardians may be appointed, namely; by a Will made by a parent of the child; b) an order of Children's Court; c) by a family; or d) the Master of the High Court.

[27] This provision places the appointment by all those authorised therein at an equal footing. I cannot discern any requirement to the effect that an

appointment made by the family need be endorsed by the Department of Social Development or the chief.

[28] Having decided that the applicant's appointment as guardian cannot be faulted, I turn now to the question whether the minor child ought to be represented by *a curator ad litem* in these proceedings.

[29] The position of the law is that a minor has no legitimate *persona standi in judicio*. Consequently, he cannot sue or be sued, unless duly assisted by his guardian, natural or appointed. If the minor has no guardian, or if the guardian himself is a party to; or has an interest in the proceedings, an application should be made to Court for the appointment of a curator *ad litem*. **RG Mckerron; The Law of Delict (3rd impression) 1983,** p85.

[30] A legal guardian has the same duties and responsibilities as a parent regarding care, support, education, health, safety and welfare. Generally speaking, the guardian of a minor is the proper person to represent him in Court. **Wolman and Others v Wolman 1963(2) SA 452.** In this case Hoexter J explains the position thus at p 459;

> "Generally speaking, the guardian of a minor is the proper person to represent him in Court (Grotius 1.8.4). In a lecture on this passage of Grotius, Van der Keesel Praelectiones, 338, states that one of the most important duties of a guardian is the defence of his Pupil's interests in court. it is only when a minor has no guardian that he must be represented in Court by a curator-ad-litem. In my view the statement in Kethel's case, quoted above, viz, that in a case like the present any minor beneficiary must be represented by a curator-ad-litem, refers to minors who have no guardian. There are however cases in which a minor, even if he has a guardian, must be represented in Court by a curator-ad-litem;, those are the cases in which the interests of the minor are in conflict with those of

the guardian or there is a possibility of that conflict. An obvious clash of interests occurs when the minor brings an action against his guardian …"

[31] I stated earlier that the minor child in question is the deceased's heir, who is under Rule 14(7) entitled to proceed with this action. But since the minor cannot continue with this litigation due to his minority disability, his appointed guardian, the applicant herein, is entitled to do so on his behalf.

[32] I should however add that the defendant is correct in submitting that the Master of the High Court must be involved in the administration of parental property in terms of section 38 of the Children's Protection and Welfare Act which provides;

"where a parent is survived by minor children, the surviving parent, guardian, closest relatives, or any other 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.

Under section 39(2) failure to comply with this provision is a criminal offence punishable on conviction to a fine not exceeding five thousand maloti."

32.1 This provision is indeed clear that the estate must be reported to the Master. The fact that this has yet to be done, does not, in my view, bar the applicant from being substituted as the plaintiff on behalf of the minor child.

Conclusion

[33] For reasons stated above, I conclude that the applicant is qualified to proceed with this action on behalf of the minor child. The application must therefore succeed.

Order

[34] In the result, the following order is made;

a) The point *in limine* is dismissed.

b) The application for substitution of Motsamai Morie as plaintiff is granted with costs.

P. BANYANE
JUDGE

For Applicant: Advocate Moerane

For Respondent: Miss Taka