

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/119/2021

In the matter between

MONITI DERRICK MPUTSOE NO

1ST APPLICANT

LATE ESTATE MATEESE NINICO MOTHIBELI

MPUTSOE E193/20

2ND APPLICANT

V

MATHATO MOTHIBELI

1ST RESPONDENT

GEORGE TS'UPANE

2ND RESPONDENT

MASTER OF THE HIGH COURT

3RD RESPONDENT

MINISTRY OF PUBLIC WORKS AND TRANSPORT

(DEPARTMENT OF TRAFFIC)

4TH RESPONDENT

COMMISSIONER OF TRAFFIC

5TH RESPONDENT

ATTORNEY GENERAL

6TH RESPONDENT

Neutral Citation: Moniti Derrick Mputsoe and Anor v 'Mathato Mothibeli and 6 Others [2022] LSHC 224 Civ (13 September 2022)

CORAM : M. G. HLAELE J

HEARD : 29 AUGUST 2022

DELIVERED : 13 SEPTEMBER 2022

SUMMARY

Duties of an executor in terms of the Administration of Estates Proclamation no.19 of 1935. Alienation of matrimonial property in terms of the Legal Capacity of Married persons 2006.

ANNOTATIONS:

CITED CASES

Palesa Mpolokeng Ramaili v Master of The High Court and 2 others CIV/APN 69 of 20) [2020] LSHC 22

Executor Estate of the late Pusetso Makotoane v Attorney General and Another C. of A. (CIV) No. 6/98) [1998] LSCA 76

Moshoeshoe V Moshoeshoe (C of A (CIV) 81/19) [2020] LSCA 47

Mofolo-Ntšihlele v Mofolo CIV /APN 337/2021 LSHC52

STATUTES:

Administration of Estates Proclamation 19 of 1935

Legal Capacity of Married Persons Act, 2006

JUDGMENT

INTRODUCTION.

[1] This is an application wherein the Applicant seeks the court to intervene and assist the executor who is in the process of carrying out his duties as an executor of the estate of the late **Mateese Ninico Mothibeli Mputsoe**. The Applicant has couched his application in the following manner;

That the Respondents are called upon to answer why;

The normal Rules pertaining to periods of notice and modes of service shall not be dispensed with on account of urgency of this matter.

1.1 That the 2nd Respondent shall not be interdicted from alienating, destroying and or disposing of the vehicle in his possession of the following particulars pending finalization of this application.

Make: Volkswagen Polo

VIN: WVVZZZ9NZ6Y167346

Engen Number: BKY347855

Registration Number: R7359

That the 1st Respondent shall not be interdicted from alienating, disposing, and or destroying the following items in her possession pending finalization of this application:

- (a) Educational certificate belonging to the late Mateese Ninico Mothibeli Mputsoe.
- (b) South African Passport and Identity documents of the late Mateese Ninico Mothibeli Mputsoe.

- (c) Birth Certificate of Boitumelo Teese Mputsoe and Christian Nkoba Mputsoe.
- (d) Mercedes Benz travel bag.

That the 4th and 5th Respondent shall not be interdicted from passing ownership and transfer of the vehicle registered R7359 in the names of Mateese Ninico Mothibeli Mputsoe to the 2nd Respondent and or any person who may claim ownership thereof and renewing the motor vehicle license pending finalization of this application.

That the Rule Nisi shall not be issued returnable on a time and date to be determined by this Honourable Court calling upon the Respondents to show cause if any why the following orders shall not be made final;

- a) That the 2nd Respondent shall not be directed to release to the Applicants the vehicle in his possession of the following particulars to be administered in terms of the law in the estate of Mateese Ninico Mothibeli Mputsoe E193/20;
Make: Volkswagen Polo
VIN: WVVZZZ9NZ6Y167346
Engen Number: BKY347855
Registration Number: R7359
- b) That the 1st Respondent shall not be directed to release the following items in her possession to the Applicant to be administered in terms of the law in the estate of Mateese Ninico Mothibeli Mputsoe E193/20:
- c) Educational certificate belonging to the late Mateese Ninico Mothibeli Mputsoe.

- i) South African Passport and Identity document of the late Mateese Ninico Mothibeli Mputsoe.
- ii) Birth certificates of Boitumelo Teese Mputsoe and Christian Nkoba Mputsoe.
- iii) Mercedes |Benz travel bag.
- d) That 4th and 5th Respondent shall not be directed and ordered to effect change of ownership and transfer of title in accordance with the instructions of the 1st Applicant as executor of the late estate Mateese Ninico Mothibeli Mputsoe E193/20.
- e) That 1st and 2nd Respondent pay costs of this application jointly and severally one paying to absolve the other and other Respondents pay cost only in the event of opposition.
- f) Further and alternative relief as the Court may deem fit.

1.21 The issues for the determination of this court are;

2.1 Can the court order a vindicatory relief against the 2nd Respondent in favour of the 1st Applicant in respect of a motor vehicle in possession of the 2nd Respondent, on the basis that the 1st Applicant has been appointed by the Master of the High Court as the executor of the estate of his late wife.

2.2 The court is called upon to determine whether the car which is currently in the possession of the 2nd Respondent was legally sold to him by the deceased and whether in turn, this entitles him to register it in his own name. If not, can the 3rd and 4th Respondents be interdicted from registering the car in the name of the 2nd

Respondent? In order to make this determination this court has to establish the following:

- i. Whether the 1st Applicant has been appointed the executor of the Estate of his deceased wife.
- ii. Whether the car which is the subject matter of the Application can and should be the subject matter of the vindication order sought.
- iii. Whether the Deed of sale entered into by the deceased during her lifetime and the 2nd Respondent constitutes a legal bar against the vindication order being granted in favour of the 1st Applicant in his capacity as executor.

[3] All these issues arise from the undisputed facts. It is apposite at this juncture to tabulate facts which are common cause in order to eventually arrive at the disputed facts.

- i. It is common cause that the 1st Applicant was married to one **Ninico Mothibeli**.¹ It is also common cause that the said Ninico died on the 13th July 2020.²
- ii. It is common cause that at the time of her death, she was no longer living with the 1st Applicant.
- iii. Upon the death of Ninico, the estate was reported to the Master of the High Court and the 1st Applicant was appointed as the executor of the Estate.³
- iv. Documents petitioned for in prayer 3 of the notice of motion are still in possession of the 1st Respondent.

¹ The marriage certificate appears at page 13 of the record

² Death Certificate appears on page 14 of the record.

³ Letters of Administration appear at page 15 of the record

- v. The car which is the subject matter of prayers 2 and 5 is still in the possession of the 2nd Respondent who claims possession of the car by virtue of being a buyer.

[4] MATERIAL FACTS WHICH ARE IN DISPUTE ARE;

- a. Did the deceased and the 2nd Respondent enter into a valid deed of sale of the motor vehicle which is the subject matter of this application?
- b. Is the 1st Applicant entitled in law to dispossess the 2nd Respondent of the car?

[5] I have deliberately and intentionally used the words “material facts” to distinguish the above cited facts from any other facts which appear on paper to be disputed which I deem to be peripheral and have no bearing to the outcome of the case. For instance, whilst the Applicant alleges that the deceased’s cause of death was Asthma. The 1st Respondent alleges that it was TB. The case does not turn on the truthfulness or otherwise of this fact. Also, the state of the marriage of the parties during the deceased’s lifetime does not as a fact, determine the legal requirements of the prayers sought. This could only be an eyebrow raiser questioning his benefices and moral campus.

[6] APPLICANT’S CASE.

6.1 In a nutshell, the Applicant’s case is that he was married to the deceased in community of property. Upon her demise, he reported the estate and was appointed the executor. As an executor his duties include amassing the property of the deceased so as to

distribute it in terms of the law. It is his contention that the deceased was the owner of a motor vehicle bearing the following identifying marks; Make: Volkswagen Polo; VIN: WVWZZZ9NZ6Y167346; Engen Number: BKY347855, Registration Number: R7359. His case is that this car formed part of the matrimonial property.

6.2 It is common cause that the car is still registered in the names of the deceased. After the demise of Ninico, the car was traced to be in the possession of the 2nd Respondent. He requested the car from the 2nd respondent who claimed that he had purchased it from the deceased during her lifetime.

6.3 He sought the intervention of the 3rd Respondent to acquire the possession of the car. When the 2nd respondent was not forthcoming despite the intervention of the 3rd Respondent he came before this Honourable court.

6.4 The basis of the application is to cause an inventory to be attended to and the initial stage of this process is to amass the property of the deceased.

[7] THE SALE OF THE CAR TO THE 2ND RESPONDENT.

During oral submissions, Advocate Molapo was of the view that the allegation of sale stands not to be considered by the court as a fact and should be disbelieved for the following reasons;

7.1 The 1st applicant had not consented to the sale of the motor vehicle. He said that by 1st Respondent's own version, the sale between deceased and the 2nd

Respondent was supposed to be a secret.⁴⁵ For this submission he relied on the statutory provisions of the Legal Capacity of Married Persons Act 9 of 2006.

7.2 Advocate Molapo continued to assassinate the sale of the car on the grounds that the 1st and 2nd respondents failed to disclose the deed of sale to the 3rd Respondent when requested to do so.⁶ It is his conclusion that this behavior leads to a reasonable conclusion that the deed of sale was an afterthought hence it only surfaced in court when they failed to produce it before the Master. What is probable, he submitted, is that the deed was drafted after the death of Ninico. He supported this by saying even the signature that appears on the Deed of sale and the one that appears on the deceased's passport are different, leading to a conclusion that she did not sign the deed.⁷

7.3 Even if the deed of sale was a reflection of the sale, a fact he was not conceding to, the fact that the car was still registered in the names of the deceased meant that it formed part of the estate. As such the 1st Applicant has the obligation to acquire it so that it may form part of the inventory and the distribution account. He contended that, if the 2nd Respondent has a claim against the estate, this will be a subject matter of another forum and cause of action in due course.

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⁵ See paragraph 9 of the affidavit.

⁶ Page... of the record

⁷ The signatures appear on page 38 and 40 of the record.

[8] RESPONDENT'S CASE

8.1 On the other side of the argument, Advocate Mabote argued on behalf of the 1st and 2nd Respondent that the 2nd Respondent and the deceased entered into a legitimate contract of sale as evidenced by the deed of sale annexed to their papers.⁸ Quizzed about the sudden appearance of the Deed in the light of the fact that the 1st and 2nd Respondent failed to produce it before the Master, her contention was that nothing turns on this fact. What was of importance is that it existed even then as evidenced by the date when it was executed. It is worth mentioning therefore that the deed was supposedly executed on the 15th May 2020. During this period, Ninico was still alive.

8.2 Asked about the absence of the Applicant's consent to allow the matrimonial property to be disposed of, Advocate Mabote relied on the fact that it was impossible to acquire it since the parties were no longer living together leading up to the death of Ninico. She reluctantly admitted that the 1st Applicant had not consented to the

sale. She insisted that their living conditions rendered it impossible for them to make decisions together like a married couple.

[9] THE LAW

9.1 It is imperative to delve into the law governing deceased's estate in order to establish whether the Applicant has a claim to

⁸ Annexure... of the answering affidavit at page... of the record

the property. Reliance will be placed on the ***Administration of Estates Proclamation 19 of 1935.***

[10] APPOINTMENT OF AN EXECUTOR

Section 31 of the Administration of Estates Proclamation states that

“31. (1) The estates of all persons dying either testate or intestate shall be administered and distributed, according to law, under letters of administration granted by the Master in the form "B" in the First Schedule to this Proclamation.

Such letters of administration shall be granted to the executors testamentary duly appointed by persons so dying or to such persons as, in default or executors testamentary, are appointed, as in this Proclamation described, executors dative to the persons so dying.

10.1 In breathing life to this section, Mokhesi J in the case of ***Palesa Mpolokeng Ramaili v Master of The High Court and 2 others*** states;

And in terms of S.31(1) of the same Proclamation once the estate of the deceased has been reported in terms of s.13 (above) the Master of High Court is enjoined to issue Letters of administration to whoever in law is entitled to administer the estate and for its distribution. It does not matter whether the deceased died testate or intestate, administration of the deceased estate must be done under letters of administration.⁹

⁹ CIV/APN/69/2020 paragraph 12 p10

10.2 In terms of **Section 31(2)** Letters of Administration shall authorise the executor to administer the estate wherever situate.

[11] The duties of an executor.

Section 44 of the Proclamation reads:

44. Every executor shall, as soon as letters of administration have been granted to him, make, subscribe and transmit to the Master, an inventory showing the value of all property belonging to the estate; and if he comes to know thereafter of any property which is not contained in any inventory lodged by him with the Master he shall make, subscribe, and transmit to the Master an additional inventory showing the value thereof and shall find such further security as the Master may direct under section thirty-nine of this Proclamation.

11.1 The case of ***Executor Estate of the late Pusetso Makotoane v Attorney General and Another***¹⁰ is instructive in assisting in articulating the duties of a person who is appointed as an executor once letters of administration have been issued. Leon J.A states that these duties include amassing the property of the deceased in preparation of an inventory which will form the basis of a distribution account. The Executor is then charged with the obligation to issue a publication inviting creditors of the estate to make claims.

11.2 Once the letters of administration are issued, an executor literally becomes a headless chicken running all around accessing the property of the deceased wherever it is, in order to comply

¹⁰ C. of A. (CIV) No. 6/98) [1998] LSCA 76 (31 July 1998)

with his statutory duties. As seen in the case of Makotoane, not even a judgement creditor can access such property before all the processes relating to distribution have come to closure.

[12] Drawing an inventory

Section 29 of the Proclamation which provides as follows:

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"29. Every person, not being the executor or curator of the estate of a deceased person duly appointed by the Master, who has in his possession or custody any property belonging to that estate, shall forthwith either deliver that property to the executor or curator duly appointed and authorised to administer the estate, or report the particulars of the property to the Master; and if any such person fail[s] to do so or part[s] with any such property to any person not authorised by the Master by letters of administration or other direction to receive the same, he shall, apart from any other liability he may incur thereby, be liable for all duties, taxes, or fees payable to the Government in respect of that property."

13.2 The literal and logical interpretation of this provision is that whomsoever has the property of the deceased as at the time an executor is issued with Letters of Administration is obliged to deliver such property to the executor.

[14] LEGAL CAPACITY OF MARRIED PERSONS AND ALIENATION OF MATRIMONIAL PROPERTY.

14.1 In *Moshoeshoe V Moshoeshoe*¹¹ Mosito AJ stated

¹¹ Moshoeshoe v Moshoeshoe (C of A (CIV) 81/19) [2020] LSCA 47 (30 October 2020)

Ever since the abolition of marital power through the **Legal Capacity of Married Persons Act, 2006** (the Act) and within the meaning of s8(1)(b) of the Act, either spouse is able to perform legal acts involving the joint estate within parameters set by ss 7, 11 and 12 of the Act. A wife married in community of property has the same powers with regard to the joint estate as previously enjoyed by the husband. Generally speaking, either spouse can perform a legal act involving the joint estate.

14.2 The Act was promulgated by the legislature mainly to cure the dire consequences married persons suffered as the result of marital power which husbands enjoyed under the regime of marriage in community of property. As such, the provisions of this Act should be interpreted in line with the mischief which the Act intended to cure. Mosito J said so in many so words in the Moshoeshoe judgement above, he said;

With the advent of the Act, spousal consent is required for there to exist a successful legal alienation of joint matrimonial property. Any purported sale of matrimonial property violates the precepts of the Statute as a result such sale stands to be invalidated.

14.3 In determining whether the purported sale of the motor vehicle by the deceased is legitimate or not the court will be guided by **section 7 of The Legal Capacity of Married Persons Act 9 of 2006**. Section 7(1) (e) provides thus;

...a spouse married in community of property shall not, without the consent of the other spouse alienate, pledge or otherwise burden any furniture or other effects of the common household forming part of the joint estate.

14.4 The Namibian case of **AN v FN**¹² also dealt with an issue whereby the section similar to our Section 7 of the **Legal Capacity of married Persons Act** was interpreted and it was held as follows;

Section 7(1) (e) of the Married Persons Equality Act (MPEA) states the following:

“7. (1) ... a spouse married in community of property shall not without the consent of the other spouse –...

(e) alienate, pledge, or otherwise burden any furniture or other effects of the common household forming part of the joint estate;...’What is meant by ‘effects’ in the above sub-section remains subject to interpretation as the MPEA does not provide a definition, therefore, The Law Dictionary defines the word ‘effects’ as ‘property’ or ‘worldly substance’. The Merriam-Webster Dictionary defines the word ‘effects’ as ‘moveable property’.

14.5 The deceased in terms of Section 7(1) (e) above and also as evidenced by the Namibian case as cited above should have requested for consent from the 1st Applicant to sell the car to the 2nd Respondent. However, she did not do so. This is evidenced by the words of the deceased’s sister Mary Mothibeli in paragraph 4 of her supporting affidavit where she states;

In 2020 my husband Thabang Nts’onyana had an affair and left. The first thing he did after he moved out was to contact 1st Applicant and told him that my sister was planning to sell her car, buy a house and divorce him. The 1st Applicant

¹² CI 1839/2015) [2017] NAHCMD

confronted my sister about it, and we were surprised that my husband could stoop so low as to reveal my sister's "secrets". It is not true that the 1st Applicant was in the dark about the sale of the car. He knew that his wife was planning to sell it and that there was one person who was interested in buying it.

The foregoing paragraph shows that the sale was actually kept a secret by the deceased and also the Counsel for the first and second respondents did confirm that the consent to sell the car was not granted to the deceased by the Applicant.

14.5 In these circumstances, section 8(7) applies, and it provides as follows;

...if it is proved in any civil proceedings that a spouse entered into a contract without the consent required under section 8(1) or leave granted under section 12, it shall be presumed, unless the contrary is proved that the spouse knew that he or she would not obtain the consent or leave.

It is the view of this court therefore, based on the foregoing Section that the deceased knew that the 1st Applicant would not have given her the consent to sell the car and that is why she did not even request for such consent. Hence, it is my view that the purported sale of this motor vehicle cannot be said to be valid.

[15] APPLICATION OF THE LAW TO THE FACTS OF THE CASE.

It was indicated above that the Applicant was appointed executor dative by the 3rd Respondent and the Letters of Administration

were issued as a result of the appointment. By evoking the provisions of Section 44, the 1st Applicant in his capacity as executor has the statutory duty to amass all property of the deceased in order to draw an inventory for the presentation to the 3rd Respondent.

The pertinent question becomes whether the car in the possession of the 3rd respondent forms part of the property envisaged in Section 44 of the Proclamation.

15.2 It is common cause that the Applicant and the deceased were married to each other in community of property. In the ***Moshoeshoe case above, Mosito JA*** proposes that it is trite law that where parties are married by civil rites, their property regime automatically becomes community of property. This therefore means that in order for the deceased to successfully alienate the matrimonial property, she had to have sought and obtained the consent of the husband in terms of the ***Legal Capacity of Married Persons Act***. It is common cause that she didn't. In fact, the Respondent's supporting affidavit does indicate that the deceased had at one stage kept it a secret that she had intended to sell the car. As a result of this, any purported sale between the deceased and the 3rd Respondent can be invalidated. What compounds the problem of the 2nd Respondent's ownership of the car is the fact that the car is still registered in the names of the deceased. It is for this reason that the motor vehicle that is the subject matter of this application falls within the property contemplated by section 29 Of the Administration of Deceased's Estate Proclamation of 1935. Any other remedy that the 2nd

Respondent may have against the estate is not the subject matter of this litigation.

[16] CONCLUSION

It is for this reason that I find that the Applicants have made out a case for the granting of the orders prayed. More so because during submissions the Respondents indicated that the request for the documents envisaged in prayer 5(b) was never made for if it had been, they would have given the Applicants the said documents.

ORDER

It is for this reason that I make the following order:

1. The Application is granted as prayed.
2. There is no order as to costs.

**M. G. HLAELE
JUDGE**

For Applicants : Adv. L.D Molapo
For Respondents : Adv. L.L Mabote