IN THE HIGH COURT OF LESOTHO

Held at Maseru

CIV/APN/322/2021

In the matter between:

'MASECHABA MOHAPI (nee LEKHANYA)	**1ST APPLICANT**
PALESA MOFUBETSOANA (nee LEKHANYA)	**2ND APPLICANT**
MARETHABILE KHATIBE (nee LEKHANYA)	**3RD APPLICANT**

And

CHRISTOPHER LEKHANYA	**1ST RESPONDENT**
MASTER OF THE HIGH COURT	**2ND RESPONDENT**
ATTORNEY GENERAL	**3RD RESPONDENT**

JUDGMENT

Neutral citation: 'Masechaba Mohapi (nee Lekhanya) & 2 Ors v Christopher Lekhanya & 2 Ors LSHC 226 CIV (23rd September 2022).

CORAM:	T.J. MOKOKO J
HEARD:	08 AUGUST 2022
DELIVERED:	23 SEPTEMBER 2022

SUMMARY

Whether the deceased abandoned customary way of life in favour of European way of life- principles applicable. While matter proceeding, the Administration of Estates Proclamation (Amendment) Act,2022 promulgated- whether it has retrospective application- statutory interpretation discussed.

ANNOTATIONS

Cases

1. *Du Toit v Minister of Safety and Security [2008] ZASCA 125 2009 (1) SA 176 SCA*
2. *Garikapati Veeraya v N. Subbiah Choudhry, AIR 1957 SC 540 the SC*
3. *Hoohlo V Hoohlo 1967- 70 HCTLR 318*
4. *Innes CJ in Curtis V Johannesburg Municipality 1906 TS 308*
5. *Khakale v Khakale and Others LAC (2007-2008) 193 at 200 F-H*
6. *Khatala v Khatala 1963 HCTLR 92*
7. *Khatala v Khatala 1963 – 1966 HCTLR 97*
8. *Minister of Home Affairs and Others v Mofolo (C of A) 2/05 CIV/APN/418/04 [2005] LSHC83*
9. *Mokete & Others v Mokete & Others (C of A civ) No. 19/2007 [2008] LSCA*
10. *Mokorosi v Mokorosi 1967-70 HCTLR 1*
11. *Montateli v Tekane (C of A civ) No. 17/09 [2010] LSCA 7*
12. *National Director of Public Prosecutions v Carolus and Others 2000 (1) SA 1127 at 1138-1139*
13. *Peterson v Cuthbert and company Ltd 1945 AD 420 at 430*
14. *Rakhetla v Aldiea C of A civ No. 20/2009*
15. *Smt. Dayawati v Inderjit (AIR 1966 SC 1423)*

16. Veldman v TPP, Witwatersrand Local Division 2007 (3) SA 210 (CC)

statutes

1. *Administration of Estates Proclamation of 1935*
2. *Administration of Estates Proclamation (Amendment) Act, 2022*
3. *Interpretation (Amendment) Act, 1993*

Introduction

Applicants approached this Court on urgent basis on the 14th September 2021. A *rule nisi* was issued calling upon the respondents to show cause if any; why;

1. Normal rules pertaining to the modes of service and process shall not be dispensed with on account of urgency of this matter.

2. (a) The first respondent shall not be interdicted from accessing and or disposing the joint estate of the late Metsing Lekhanya and Sofia Lekhanya without the full contingent of the other beneficiaries to the estate of the late Metsing and Sofia Lekhanya.

   (b) The first respondent shall not be interdicted from receiving rentals from the tenants of the properties located at a filling station in Thaba-Tseka, and all other rented properties of the deceased parents.

   (c) That all rentals shall not be deposited into the trust account of Attorney Monaheng Rasekoai, who shall hold them in trust for the estate, pending finalisation hereof.

   (d) That all expenses borne form the farms at Mants'onyane and Sehlabeng shall not be paid from the moneys collected in the trust.

   (e) That all the children of the deceased shall not be declared as the joint heirs and beneficiaries of the deceased estate.

(f) The estate shall not be reported at the office of the Master for administration.

(g) That the estate shall not devolve in terms of the ***Administration of Estates Proclamation of 1935***.

(h) That the late reporting of the estate shall not be condoned.

Background

[1] It is worth mentioning from the onset that the three applicants and the first respondent are siblings. The first respondent is the youngest child of the late Metsing Lekhanya and Sofia Lekhanya and is the only male child of the deceased parents. It is a matter of common cause that the late Metsing Lekhanya and Sofia Lekhanya died on the 20th January 2021 and 23rd January 2021, respectively. It would seem that problems emerged when the first respondent was appointed as the sole heir by the family members. As a result of this appointment, the first respondent then started dealing with the estate in the manner he so wished. It is further worth mentioning that, after the demise of the deceased parents, their death was not reported to the office of the Master of High Court within fourteen days as required by the law.

Applicants' Case

[2] It is applicants' case that after the death of their parents, three applicants and the first respondent were appointed by the Lekhanya family as the heirs to the estate of their late parents. To prove this fact, they attached a document **Annexure "L2"**. Applicants stated that, contrary to the family wishes, the first respondent abused his position, as their little brother to fraudulently acquire a family letter, appointing him as the sole heir to the estate of their late parents. They attached the said letter and was marked **Annexure "L3"**.

[3] It was applicants' case further that, after the funeral of their parents, their uncle Lekhanya Lekhanya confirmed that no one was going to be appointed as the sole heir, because the wish of the deceased- Metsing Lekhanya was that his estate should be shared by all his children, irrespective of their marital status.

[4] While applicants were still contemplating reporting the estate to the offices of the Master, their brother-the first respondent had started exhausting the estate. The first respondent through his lawyers had instructed tenants at Thaba-Tseka filling station premises to deposit the monthly rentals into his personal bank account. Before this incident, applicants and the first respondents were amicably sharing proceeds from their late parents' estate, without any objections from the first respondent.

[5] That the first respondent's appointment as the sole heir is void in law, in that the meeting that appointed him did not include the other children of the deceased, whereas in the initial meeting in respect of **"L2"** all the children of the deceased were consulted. That the deceased parents led European mode of life, as they even married according to civil rites. Their mode of farming was progressive, as such their estate should devolve in terms of the Proclamation.

First Respondent's Case

[6] On the other hand the first respondent pleaded that he instructed tenants to pay the rentals into his personal account, upon realisation that the applicants were already taking and using rentals for their own benefit. First respondent disputed that **"L2"** is a valid family letter of appointment, because it was done in the absence of other siblings. Their parents died intestate and he is the only surviving male child, while the applicants are all females and are all married.

[7] The first respondent sold the truck after his appointment by the family as the heir and had obtained its ownership as the heir according to Basotho custom, and that it was well within his rights to dispose of it. The first respondent pleaded further that the third applicant failed to disclose to this court that she sold a water generator from Sehlabeng farm. The first respondent said that his appointment as the sole customary heir, was done by the family council in terms of customary law principles, as the family council meeting was well constituted. That his late parents had not adopted the European mode of life, but were farmers leading customary way of life, as it was found by the Master of High Court, when the applicants attempted to report the estate.

[8] That applicants are all married women, whose rights are recognizable at their matrimonial homes. The first respondent buttressed the point that as the only male child of his parents, he is the sole heir.

[9] The court having heard oral arguments from both counsel and having read pleadings, felt that the issue regarding the mode of life of the deceased parents was not well canvassed in the pleadings, as a result of which the court ordered that viva voce evidence should be led by the parties, on the mode of life led by the deceased parents during their life-time. The first applicant, second applicant and the first respondent led viva voce evidence in this regard and were cross-examined, respectively.

[10] Be that as it may, it is worth mentioning that while this matter was pending before this court, the ***Administration of Estates Proclamation (Amendment) Act, 2022*** was promulgated and came into operation on the 12th July, 2022, as the date of its publication in the Gazette. It is critical to mention that the Principal Law was amended by deleting *section 3* and substituting the following:

"This Act shall apply to-

(a) all estates whether customary or civil; and

(b) all wills written before commencement of this Act"

Powers, Duties and Jurisdiction of Master

3. The Principal Law is amended by deleting *section 6 (2)* by and substituting the following:

> "6(2) From the date of coming into operation of the Act, all the property and estate of every deceased person, minor, lunatic, person permanently absent from the Territory without a lawful representative and whose whereabouts is unknown, or person under curatorship, and persons certified ill and incapable of managing their own affairs, shall be administered under the supervision of the Master."

[11] It is a matter of common cause that the deceased, namely; Metsing Lekhanya and Sofia Lekhanya died around January 2021, respectively. This court upon realisation of the promulgation of the ***Administration of Estates Proclamation (Amendment) Act, 2022***, directed both counsel in the matter, to file supplementary heads of arguments, and address the court on whether to apply the Principal Law or the ***Amendment Act of 2022***.

[12] Adv. Mpo counsel for the applicant submitted that the ***Amendment Act*** is applicable, in so far as it is no longer a requirement to satisfy to the Master that

the deceased led a fully European mode of life. However, counsel did not support this view with any authorities. On the other hand, Adv. Shakhane, counsel for the first respondent submitted that the Amendment Act is retrospective in its nature and applicability. He referred to the provisions of *section 2 of the Act*. He submitted further that the retrospectivity of the provisions of the Act are made explicitly clear in terms of provisions of *section 3 (b) of the Act* and the wording used thereof. He referred this court to the case of ***Minister of Home Affairs and Others v Mofolo***[1].

The Law- Retrospective Operation of Statutes

[13] In ***Garikapati Veeraya v N. Subbiah Choudhry***[2] observed as thus (*Para 25 of AIR*)

> "The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed."

[14] In ***Smt. Dayawati v Inderjit***[3] it is held thus:

> "Now as a general proposition, it, may be admitted that ordinarily a court of appeal cannot take into account a new law, brought into existence after the judgment appealed from has been rendered, because the rights of the litigants in an appeal are determined under the law in force at the date of suit. Even before the days of Coke whose maxim- a new law ought to be prospective, not retrospective in its operation-is off-quoted. Courts have looked with disfavour upon laws which take away vested rights or affect

[1] (C of A) 2/05 CIV/APN/418/04 [2005] LSHC83 (20 April 2005)
[2] AIR 1957 SC 540 the SC
[3] (*AIR 1966 SC 1423*)

pending cases. Matters of procedure are, however, different and the law affecting procedure is always retrospective. But it does not mean that there is an absolute rule of inviolability of substantive rights. If the new law speaks in language, which expressly or by clear intendment takes in even pending matters, the court of trial as well as the court of appeal must have regard to an intention so expressed, and the court of appeal may give effect to such a law even after the judgment of the court of first instance."

[15] In the case of ***National Director of Public Prosecutions v Carolus and Others***[4] the following was said:

"An important legal rule forming part of what may be described as our legal culture provides that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under the existing laws), unless the legislature clearly intended the statute to have effect. See ***Peterson v Cuthbert and company Ltd***[5]."

[16] This court would like to make a further reference to ***Du Toit v Minister of Safety and Security***[6], with reference to an English decision that generally there is a strong presumption that a legislature does not intend to impose a new liability in respect of something that has already happened, because generally it would not be reasonable for a legislature to do that. On the presumption against the retrospective operation of legislation, the Constitutional Court in the case of ***Veldman v TPP, Witwatersrand Local Division***[7], endorsed the position on

[4] *2000 (1) SA 1127 at 1138-1139* Para [33] to [36]
[5] *1945 AD 420 at 430*
[6] *[2008] ZASCA 125 2009 (1) SA 176* SCA Para 10
[7] *2007 (3) SA 210 (CC) Para 48* and *68*

Innes CJ in Curtis V Johannesburg Municipality[8] where the following was said:

> "The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that there should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation. The legislature is virtually omnipotent, but the courts will not find that it intended so inequitable a result as to the destruction of existing rights unless forced to do so by language so clear as to admit of no other conclusion."

[17] In the case of ***Minister of Home Affairs v Mampho Mofolo***[9], the Court of Appeal amongst others discussed the presumption against retrospective operation of the statutes. The court at *page 16* stated that the presumption may be applied in two different contexts; first, where a statute operates backwards, i.e. if an Act provides that at a past date the law shall be taken to be that which is not, sometimes referred to as retroactive operation, and, second, when a statute interferes with the existing rights and obligations.

[18] ***Interpretation (Amendment) Act, 1993*** provides for retrospectivity. *Section 27C* reads:

> "Subsidiary legislation shall not be expressed to take effect from a date before the date of its publication in the Gazette where, if the legislation so took effect-

[8] *1906 TS 308 at 311*
[9] C OF A (civ) 2/05

(a) The rights of a person (other than the Government of Lesotho or a statutory corporation) existing at the date of publication would be affected in a manner prejudicial to that person; or

(b) Liabilities would be imposed on a person (other than the Government of Lesotho or a statutory corporation) in respect of any act or omission before the date of publication,

And where any subsidiary legislation contains a provision in contravention of this section that provision is void and of no effect."

[19] The ***Administration of Estates Proclamation (Amendment) Act, 2022*** at *section 1* provides that the Act shall come into operation on the date of publication in the Gazette. The date of the publication appearing on the Gazette is the 12th July 2022. The Act at *section 2* provides that the Act shall apply to all estates whether customary or civil and all wills written before commencement of this Act.

[20] It is a matter of common cause that the deceased in this matter died intestate, therefore a will is not subject for determination.

[21] This court has a considered view that ***the Administration of Estates Proclamation (Amendment) Act, 2022*** does not have retrospective operation, because there is nothing in the enactment to show that it has retrospective effect. The ***Amendment Act*** clearly states that it shall come into operation on the date of its publication in the Gazette, which date was the 12th July 2022. This court finds further that there is nothing in the ***Amendment Act, 2022*** that can be construed to have the effect of altering the law applicable to the relief sought in this matter, at the time when the Act was promulgated. This court would like to

align itself with the maxim- a new law ought to be prospective not retrospective in its operation.

[22] This court finds that the ***Amendment Act, 2022*** in terms of *section 2* cannot be interpreted so as to operate retrospectively, because the general rule as enunciated by the cases referred to above, is that statutes should be considered as affecting future matters only, unless there is an express provision to the contrary.

The Mode of Life Test and Applicable Principles/Law

[23] This court having heard viva voce evidence on the mode of life of the deceased, has to make a determination as to the mode of life of the deceased, as required by *section 3(b)* of the Proclamation. The question is which law is applicable between the European Law or the customary Law. The factors that can help the court in determining which law to apply are inter alia, whether the deceased Metsing Lekhanya and Sophia Lekhanya, have abandoned the customary mode of life in favour of the European mode of life. There is a plethora of authorities to assist the court in this regard.

[24] See: ***Khatala v Khatala***[10], ***Mokorosi v Mokorosi***[11], ***Hoohlo V Hoohlo***[12]. *Section 3(b)* of the ***Administration of Estates Proclamation 1935***; reads as follows:

> "This Proclamation 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 estates of Africans who have shown to the satisfaction of the

[10] 1963 HCTLR 92
[11] 1967-70 HCTLR 1
[12] 1967- 70 HCTLR 318

master to have abandoned their custom and adopted a European mode of life and who if married have married under the European law" (my underlining).

[25] Now the question whether a person has abandoned a customary mode of life and adopted a European way of living is obviously a question of fact, to be judged on the particular facts of each case.

[26] In the case of ***Mokete & Others v Mokete & Others***[13], **Ramodibedi JA**, as he then was had this to say at *Page 9*:

"[12] In holding that the common law governed the estate of the deceased, the judge a quo appears to have been of the view that the proviso to section 3(b) of the Proclamation is satisfied where there has been a marriage by civil rites (European Law). This is not the case. (**Khatala v Khatala**[14]**)**. The proviso excludes from the operation of section 3(b) Basotho who have abandoned tribal custom and adopted a European mode of life, and who if married have married under European law. It therefore postulates two requirements both of which have to be present for the proviso to come into operation. Only the second (marriage under European law) has been established. The first (abandonment of tribal custom and adoption of a European mode of life was not raised in the affidavit and has never received proper consideration in this matter."

[27] The matter for consideration by this court when dealing with the applicable legal principles, is the meaning of the phrase "to have abandoned tribal custom and adopted a European mode of life."

[13] (C of A civ) No. 19/2007 [2008] LSCA 6 (11 April 2008)
[14] 1963 – 1966 HCTLR 97 at 100. B.C

[28] In the case of ***Mokorosi v Mokorosi***[15]***(****supra)*, **Roper J** at *page 6* in consideration of the meaning of the phrase "to have abandoned tribal custom and adopted a European mode of life" had the following to say:

> "This does not seem to contemplate two separate and distinct acts or processes, namely one act or process of abandonment of tribal custom and another act or process of adoption of a European mode of life. The adoption of one mode of life and the abandonment of another is all one process. The ideas underlying the phrase is that the person concerned has forsaken one mode of life in favour of another."

[29] In ***Rakhetla v Aldiea***[16], **Smallberger JA** at *page 6* stated that Basotho have chosen to marry by civil rites may indicate their choice of a European way of life but is by no means conclusive of that fact.

[30] In the case of ***Montateli v Tekane***[17], **Ramodibedi J** as he then was had this to say:

> "[16] It is instructive to point out that in concluding that the deceased had not abandoned the customary mode of life the court a quo took into account the following factors, namely;
>
> - That the deceased was a subject of a chief.
>
> - That only one of her children had gone to University.
>
> - That she earned her living by brewing Sesotho beer.

[15] LLR 1967-1970 1 (*Supra*)
[16] C of A civ No. 20/2009
[17] (C of A civ) No. 17/09 [2010] LSCA 7 (23 April 2010)

- That she wore traditional clothes.

- That she believed in spirits (balimo), she also threw feasts to honour the ancestors.

[31] In the case of ***Mokorosi v Mokorosi*** (*supra*) the court took into account the following factors as to the personal mode of life of the deceased;

- he wore European clothes

- ate and slept and lived with his family in the European way

- he belonged to the Protestant Church

- none of his children had been circumcised (if boys) or put through initiation school (if girls)
- all his children who had been married had been married by Christian rites, and neither in the case of his own marriage nor of those of any of his children had Bohali been paid.

- in the Reserve the deceased had first worked in a shop, and thereafter had carried on his own business, which were a butchery, a café, and transport business, for which he owned a motor truck.

[32] This brings me to the question whether the deceased (Metsing Lekhanya and Sophie Lekhanya) in the present case, had abandoned customary mode of life and adopted a European mode of life. The applicable principles for consideration in determining this question, are well articulated in the authorities referred to above.

Discussion

[33] From the evidence led and the pleadings, the court has established that the deceased- Metsing Lekhanya was born at Sehong-hong in the Thaba-Tseka district, and later on relocated to Mantsonyane in the Thaba-Tseka district. The deceased (Metsing Lekhanya and Sophia Lekhanya) were married by civil rites and were members of the Roman Catholic Church. Within the church, Metsing Lekhanya was a member of the sodality of the Sacred Heart of Jesus, while Sophia Lekhanya was a member of the sodality of St. Anna. It would seem that the deceased were devout Christians. The deceased- Metsing Lekhanya studied at the Roma College and thereafter pursued his Philosophy studies through correspondence with Lincoln University. During his lifetime he was employed as a member of the Lesotho Defence Force, and later became the Commander of the Lesotho Defence. Metsing Lekhanya and his wife- Sophie had farms, which could be classified as commercial, because grains harvested from the farms were sold to Lesotho Flour Mills in Maseru. Milk from the dairy farm was sold to Dairy here in Maseru. The deceased further earned income from the sale of mohair and wool.

[34] The court has established further that the deceased- Metsing Lekhanya and his wife- Sophie, wore European clothes, slept on a bed and ate their three daily meals at the dining table. The deceased- Metsing Lekhanya was fond of reading newspapers, watching BBC News channel and spoke English with his grandchildren. Evidence was led further that he enjoyed watching cartoon channels on television. Metsing Lekhanya jointly with his Wife-Sophie had both private cars for personal use, as well as vehicles for their businesses. Neither the deceased nor their children had gone to the initiation school. Their children have been to school, but only one child had gone to the level of University, though she did not complete her studies due to ill health. Sophie

Lekhanya was a Nurse by profession and worked as a Manager for the businesses. The deceased- Metsing Lekhanya and Sophie Lekhanya had abolished the wearing of the mourning cloth within the Lekhanya family. It has been established that after the burial of the deceased, no wearing of the morning cloth was performed, but the children of the deceased performed ho "**tlosa khutsana**" ceremony. It is worth stating that this ceremony was not performed by the deceased, rather it was performed by the family members. See: The Executor of the Estate ***Khakale v Khakale and Others***[18], where the Court stated that the concern should be about the mode of life of the deceased, but not that of the family. The court has established that the deceased (Metsing) did not believe in the traditional medicines, because he was concerned that the traditional medicine does not have a prescribed dosage, therefore he regarded it as a health hazard.

[35] On the other hand it was, it was suggested that the deceased- Metsing Lekhanya believed in ancestors/spirits and that annually around the month of August, he would slaughter an animal and a traditional doctor would come to his house to perform certain traditional rituals. Further that he would occasionally go to Thaba- Tseka to consult with the traditional doctor, and that his skin and that of the first respondent were cut by the traditional doctor. Lastly that at Lithakong in the Thaba-Tseka district, there is a secluded cemetery for the Lekhanya family members.

[36] The court does not believe the fact that the deceased- Metsing Lekhanya would consult with the traditional doctor. Evidence was led by the applicants that Metsing Lekhanya did not believe in traditional medicine, because of the danger that such medicine does not have a prescribed dosage. The court does not find the first respondent's evidence credible in this regard, because if the

[18] LAC (2007-2008) 193 at 200 F-H

deceased did not believe in the traditional healing, why would he consult a traditional doctor, who would ultimately prescribe a traditional cure. It was suggested to the two applicants that the traditional doctor would cut their skin to administer medicine, and this fact was denied by the applicants. However, first respondent stated that the deceased and himself used to go to the traditional doctor, and the doctor would cut their skin. Under cross examination of the two applicants, it was put to them that their skin was cut. However, while giving evidence in chief, the first respondent said that the two applicants did not have their skin cut, because only himself and Metsing Lekhanya would consult with the traditional doctor. How would Metsing Lekhanya then consult with the traditional doctor who would ultimately give out the traditional medicine, while it has not been denied by first respondent that Metsing Lekhanya did not believe in the traditional medicine. The court on the basis of this fact does not find the first respondent's evidence credible in this regard. The court has also taken into account that Mr. Metsing Lekhanya, was not only a member of the Roman Catholic Church, but was also a member of the Sodality of the Sacred Heart of Jesus, therefore it is highly improbable that he would consult with the traditional doctor, in contravention of the Roman Catholic Church dogma.

Conclusion

[37] In the light of the above, it follows in my view that the late Metsing Lekhanya and Sophia Lekhanya, must be taken to have abandoned customary mode of life, and adopted a European way of life and that the deceased-Metsing Lekhanya and Sophie Lekhanya estate follows to be distributed under the common law relating to intestacy.

Order

The Court makes the following Order:

1. The late reporting of the estate to the Office of the Master of High Court is condoned.

2. The estate should be administered in terms of the ***Administration of Estates Proclamation of 1935***.

3. Applicants awarded costs.

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T.J. MOKOKO

JUDGE.

FOR THE APPLICANTS:	ADV. M. MPO
FOR THE 1ST RESPONDENT:	ADV. SHAKHANE
FOR THE 2ND AND 3RD RESPONDENTS :	UNREPRESENTED