

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/APN/396/2021**

In the matter between:-

**MATSIU ANNA KHASANE**

**1<sup>ST</sup> APPLICANT**

**LIBOKANYO JOSEPHINE KHASANE**

**2<sup>ND</sup> APPLICANT**

**AND**

**MARETSEPILE KHASANE**

**1<sup>ST</sup> RESPONDENT**

**(NEE NYAKALLO BRIDGET MOHAPI**

**STANDARD LESOTHO BANK**

**2<sup>ND</sup> RESPONDENT**

**OFFICE OF THE MASTER OF THE**

**HIGH COURT**

**3<sup>RD</sup> RESPONDENT**

**ESTATE OF THE LATE MOSOATSI LEBOHANG**

**ZAKHIA KHASANE**

**4<sup>TH</sup> RESPONDENT**

Neutral citation- ‘Matsiu Anna Khasane and one vs Maretsepile Khasane and 3 others [2022] LSHC Civ (22<sup>nd</sup> August 2022)

---

**JUDGMENT**

---

**CORAM** : **M. P. RALEBESE J.**  
**HEARD** : **02 AUGUST 2022**  
**DATE OF JUDGMENT** : **22 AUGUST 2022**

**SUMMARY**

*Law of Contract – Application based on Contract for the benefit of a third party vis Stipulatio alteri – The alleged contract not annexed as evidence – No evidence pleaded to support applicant’s case – Application dismissed with costs.*

**ANNOTATIONS****CITED CASES:****LESOTHO**

Mankhasi Mahao v Lesotho Electricity Company (Pty) Ltd and Others C of A (CIV) No.8 of 2009.

Lesotho National Olympics Committee v Morolong (2000 – 2004) LAC 450

Ramahata v Ramahata C of A No 8 of 1986

Sehlomeng ‘Mota v Motlatsi Motokoa C of A 23 of 2001

**SOUTH AFRICA**

Hart v Pinetown Drive-In Cinema (Pty) Ltd, 1972(1) SA 464

Mokuena and Others v Lengoabala: In re: Lengoabala v Nhlapo and Others (1166/2012) [2016] ZAFSHC (22 January 2016)

**STATUTES:**

High Court Rules No.9 of 1980

### **BOOKS:**

Cilliers, Loots and Hendrik. Herbstein and Van Winsen – The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa; 5<sup>th</sup> Edition, 2009, Juta & Co Ltd

### **Ralebese J.**

#### **Background**

1. The main issue in this case centres around the rights of a beneficiary in a *stipulatio alteri* otherwise known as a contract for the benefit of a third party vis a vis the rights of a spouse married in community of property over the employment benefits of a deceased worker.
2. The 1<sup>st</sup> applicant is a mother and 2<sup>nd</sup> applicant is a sister (*suing in a representative capacity for her minor child*) to the late **Mosoatsi Lebohang Zachia Khasane** (the deceased). The applicants have instituted this application wherein they are seeking:

- “1. *That the late reporting of the death and estate of the late **Mosoatsi Lebohang Zachia Khasane** be condoned.*
2. *That the said estate be administered in accordance with the **Administration of Estates Proclamation 19 of 1935**.*
3. *That the 2<sup>nd</sup> respondent be directed and ordered to pay out the benefits of late **Mosoatsi Lebohang Zachia Khasane** in terms of the nomination form as kept by the 2<sup>nd</sup> respondent.*
4. *Costs of suit at attorney and client scale.*
5. *Further and or alternative relief that this Honourable court may grant.”*

## Facts

3. The brief background to this case, which is common cause, is that the deceased was married to the 1<sup>st</sup> respondent ('**Maretšepile**) by customary rites. Out of this marriage, a minor child was born on 09<sup>th</sup> November 2019. The deceased passed away on 25<sup>th</sup> April 2021 while in the employ of the 2<sup>nd</sup> respondent (Standard Lesotho Bank Ltd). Standard Lesotho Bank has not yet paid out the employment benefits of the deceased as there is an issue of the rightful people to whom Stand Lesotho Bank should make a pay-out. The applicants are claiming that the deceased, during his lifetime, nominated 1<sup>st</sup> applicant and the son of the 2<sup>nd</sup> applicant as beneficiaries of his employment benefits. The decessé's wife on the other hand is contesting the alleged nomination.
  
4. On the date of hearing of this matter, it was reported that the 1<sup>st</sup> applicant passed on sometime in March 2022. Since the claim, in this case, is premised on the alleged appointment of the 1<sup>st</sup> applicant and 2<sup>nd</sup> applicant's son in their personal capacities as beneficiaries of the deceased's employment benefits, the 1<sup>st</sup> applicant could not be substituted. This is basically because benefits flowing from a contract for the benefit of a third party (*stipulatio alteri*) are for the benefit of the specified third parties and these benefits are not transferrable. **Ramolibeli JA in Mahao v Lesotho Electricity Corporation and Others**<sup>1</sup> stated that:-

*“The rights of the beneficiary or stipulans flow directly from the contract itself. ... As soon as the third party accepts the stipulation made in his favour in the contract he is entitled to enforce it. In such a case the question of the deceased's estate or inheritance is irrelevant.”*

---

<sup>1</sup> (C of A (CIV) NO.8/09) [2009] LSCA 35 (23 October 2009)

It follows therefore that the 2<sup>nd</sup> applicant is the only remaining claimant under the alleged *stipulatio alteri*, in respect of whom the court has to make a determination.

5. The 4<sup>th</sup> respondent, (**Mater of the High Court**) has filed a report entitled "*Report in terms of High Court Rule 8(19)*" in which it is stated that the estate of the deceased has not been reported to the office of the Master of the **High Court**. This report implies that prayers 1 and 2 in the notice of motion relating to condonation for the late reporting of the estate of the deceased and a request for administration of the deceased's estate in terms of the **Administration of Estates Proclamation No.19 of 1935** fall off as being moot since there is practically no estate forming the subject matter of these two prayers.

### **Issue**

6. The only remaining prayer for determination by this court, therefore, is the sought mandamus to direct **Standard Lesotho Bank** to pay out the employment benefits of the deceased according to the nomination form kept by the bank. It is 2<sup>nd</sup> applicant's case, as the only remaining applicant, that the pay-out should be made in favour of her minor son as the alleged beneficiary of the deceased's employment benefits. The application has been opposed by the deceased's wife only and she contests the alleged appointment of 2<sup>nd</sup> applicant's son as a beneficiary to the deceased's employment benefits.

### **Analysis**

7. 2<sup>nd</sup> applicant's case as detailed in the founding affidavit of her late mother, which 2<sup>nd</sup> applicant has affirmed in her supporting affidavit, is that the deceased had, during his lifetime appointed her minor child as

one of the beneficiaries of his employment benefits. This claim is a bare one as it is not supported by any documentary proof of the alleged nomination form. All that is alleged in prayer 3 in the notice of motion is that the nomination form is kept by the Bank. In terms of the founding affidavit of the late mother, it is merely stated that “*The deceased had appointed 1<sup>st</sup> applicant and the child of the 2<sup>nd</sup> applicant...as beneficiaries to his employment benefits with the 2<sup>nd</sup> respondent*”. In the replying affidavit, the late mother states that “*The applicants are claiming the benefits that were awarded to them by the deceased from his employ. And this is a claim for a contract for a benefit of a third party.*”

8. Undoubtedly, the alleged ‘nomination form’ wherein the 2<sup>nd</sup> applicant’s son is said to have been appointed as a beneficiary to the deceased’s employment benefits forms the cornerstone of the 2<sup>nd</sup> applicant’s case. No such document has been annexed to the founding papers. I consider this omission to be fatal to 2<sup>nd</sup> applicant’s case as her claim entirely rests on that ‘nomination form’. By failing to bring evidence of the alleged contract for the benefit of her son, 2<sup>nd</sup> applicant has failed to allege facts upon which she bases her claim. This is contrary to the trite principle that in motion proceeding, the applicant should make out a case and allege facts on which she relies for the relief sought in the founding affidavit. As oft-stated, the applicant stands or falls by her papers (**Lesotho National Olympics Committee v Morolong**<sup>2</sup>).
9. In motion proceedings, affidavits constitute both pleadings and evidence and the founding affidavit should contain sufficient facts and evidence upon which a court is called to find in the applicant’s favour. The applicant stands and falls by her founding affidavit. (**Mokuena and**

---

<sup>2</sup> Lesotho National Olympics Committee v Morolong (2000 – 2004) LAC 450 at 457

**Others v Lengoabala: In re: Lengoabala v Nhlapo and Others**). In **Hart v Pinetown Drive-In Cinema (Pty) Ltd**<sup>3</sup> the following remarks though made in reference to a petition, are pertinent:

*"It must be borne in mind, however, that 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 file 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 a 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 he does not support the relief claimed is sound."*

10. In the absence of the document evincing the alleged appointment of 2<sup>nd</sup> applicant's son as a beneficiary of the deceased's estate, this court is not in a position to assess the merits or demerits of the inferred *stipulatio alteri*. The court is in the dark regarding the nature of the alleged nomination form and the claimed employment benefits; whether they are in a form of a pension, provident fund, severance pay or unpaid salaries. In the circumstances, the court is unable to make a proper determination regarding the alleged nomination of 2<sup>nd</sup> applicant's son and the sought mandamus.

11. It is trite that where the applicant's cause of action is premised on the contents of a written contract, the applicant should not only allege the contents of the contract but should also annex such contract to the

---

<sup>3</sup> 1972(1) SA 464 at 469 C-E

founding affidavit. Evidence of the alleged nomination form or contract for the benefit of 2<sup>nd</sup> applicant's son is even critical in this case where the 1<sup>st</sup> respondent is contesting its existence or its validity. In all the cases that 2<sup>nd</sup> applicant's counsel cited in argument, the contract which formed the subject matter of a claim for *stipulatio alteri* had been produced as evidence<sup>4</sup>.

12. In the circumstance of this case, 2<sup>nd</sup> applicant has failed to make out a case for her minor son and to prove his alleged appointment as the beneficiary of the deceased employment benefits. She has failed to plead evidence necessary for the determination of the issue now before the court in favour of her son.<sup>5</sup> This application stands to be dismissed on this ground alone.

13. The following order is therefore made:

The application of the 2<sup>nd</sup> respondent is dismissed with costs.

---

**M. RALEBESE**

**JUDGE**

For the 2<sup>nd</sup> applicant: **Adv. Makhera**

For the 1<sup>st</sup> respondent: **Adv. Moruri**

---

<sup>4</sup> *Ramahata v Ramahata C of A No 8 of 1986; SehloMeng 'Mota v Motlatsi Motokoa C of A 23 of 2001; and Mankhasi Mahao v Lesotho Electricity Company (Pty) Ltd and Others C of A (CIV) No.8 of 2009.*

<sup>5</sup> Cilliers, Loots and Hendrik. *Herbstein and Van Winsen – The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5<sup>th</sup> Edition, 2009, Juta & Co Ltd at page 439.



