

LESOTHO / JUDGMENT

Mphuto Jessie & Ano. V The Estate of the Late Mohapi Jessie & 3 Others (CIV/APN/0080/2024) [2024] LSHC 166 (17 September 2024)

[2024] LSHC 166**COURT**
High Court**CASE / FILE NUMBER**
CIV/APN/0080/2024

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**IN THE HIGH COURT OF LESOTHO
HELD AT MASERU CIV/APN/0080/24****In the matter between:**

MPHUTO JESSIE 1st APPLICANT
`MAMPHUTO JESSIE NO 2nd APPLICANT
and
THE ESTATE OF THE LATE MOHAPI JESSIE 1st RESPONDENT
EXECUTRIX OF THE ESTATE OF THE LATE 2nd RESPONDENT
MOHAPI JESSIE (LEBOHANG NTŚINYI)
MASTER OF THE HIGH COURT 3rd RESPONDENT
ATTORNEY GENERAL 4th RESPONDENT

Page | 1

Neutral citation : Mphuto Jessie and Another v The Estate of the late Mohapi Jessie and 3 Others [2024] LSHC 166 (17 September 2024)

CORAM : KHABO J.,

HEARD : 05 AUGUST 2024

DELIVERED : 17 SEPTEMBER 2024

SUMMARY

Administration of Estates - Will purportedly empowering the establishment of a family Trust - In circumstances where spouses had reached a settlement agreement at the dissolution of their marriage that included a clause to the effect that each party's share in the joint estate devolve on their two children upon each other's demise - Such made an order of court - However, former husband subsequently making a Will in which he expressed an intention to bequeath his portion of the joint estate to the family Trust - He predeceased his former wife - The validity of this Will challenged by the 1st Applicant, one of his children on the basis, firstly, that it is for a non - existent Trust, and secondly, that it violates the terms of the divorce decree - Court finds the deceased to have not acted in terms of clause 7 of the consensual agreement between him and his ex-wife which was made an order of court - the court emphasises the importance

of complying with court orders.

Page | 2

ANNOTATIONS

Statutes and subsidiary legislation

Administration of Estates and Inheritance Act, 2024

Cases cited

Lesotho

Blandina

lisene

LAC/CIV/05/2009

v

Lerotholi

Polytechnic

and

Another

Hata - Butle (Pty) Ltd v Metsing Jeremiah Khoete and 11 Others

CCA/0022/2017

Lesotho Girl Guides Association v Unity English Medium School

CIV/APN/05/94

Registrar, Lesotho Medical, Dental and Pharmacy Council and

Another v Michael Ilunga Yangindu C of A (CIV) No. 22/2022

Other jurisdictions

South Africa

Administrators, Estate Richards v Nichol and Another 1996 (4) SA 253

(C)

Page | 3

Department of Transport and Others v Tasima (Pty) Limited; Tasima

(Pty) Limited and Others v Road Traffic Management Corporation and

Others CCT 182/17 and CCT 240/17

Secretary of the Judicial Commission of Enquiry into Allegations of

State Capture, Corruption and Fraud in the Public Sector including

Organs of State v Zuma and Others (CCT521/21) [2021] ZACC 18

Sienaert Prop CC v City of Johannesburg and Another Case No.

31566/2021

United Kingdom

Hadkinson v Hadkinson [1952] (2) All ER 567

Page | 4

JUDGMENT

KHABO J.,

Introduction

- [1] It is common cause that the late Mohapi Jessie and `Mamphuto Jessie, 2nd Applicant herein, were married in community of property on 18th May, 2002. Two children were born out of this union. The said marriage was dissolved on 01st June 2022 in CIV/T/415/21, and the joint estate duly divided. Included in the divorce decree was clause 7 which forms the bone of

contention in this matter. It provided that each party's portion of the joint estate "will devolve to the parties' minor children ... (named). This will be registered in the parties' testamentary wills respectively."¹

- [2] The late Mohapi Jessie (the deceased) met his demise on 04th March 2024. It emerged that after his divorce to the 2nd Applicant he made a Will² in which he directed that his property be managed 1 Annexed as 'MJ1' to 1st Applicant's founding affidavit 2 Annexed as 'MJ2' to 1st Applicant's founding affidavit Page | 5 through a Trust named the 'Mohapi Jessie Family Trust.' It read: 'I specially give and bequeath to MOHAPI JESSIE FAMILY TRUST the undermentioned property which are (sic) in my name which derive from my estate:'
- (a) My developed site at Ha Thamae, Maseru urban area, lease number 13291 - 368;
 - (b) My developed sites at Khubetsoana in Maseru Urban Area;
 - (c) Two developed sites at Ha Hoohlo Maseru Urban Area, lease numbers 12281 - 239 and 12281 - 550;
 - (d) My developed site at Railway Station Maseru Urban Area, lease numbers 12281 - 250;
 - (e) My 330 shares in Lyma Consulting Engineers (Pty) Ltd 2008/1368;
 - (f) My equipment hire business;
 - (g) My construction company; and
 - (h) My kids entertainment business. Page | 6 He nominated the 2nd Respondent, Ms Lebohang Ntsinyi, as the executrix of his Will.
- [3] The 1st Applicant is the son of the deceased, and he averred in his founding affidavit that it was irregular for his late father to have made a Will that purports to undermine an order of court. He is, therefore, challenging the validity of this Will on two grounds, namely:
- (a) That it seeks to bequeath property to a non - existent beneficiary, the Jessie family trust; and
 - (b) that it contravenes clause 7 of the divorce decree. Prayers sought
- [4] In pursuit of the above claim, Applicants are before court to seek the following reliefs, that:
- Page | 7
- (a) The purported last will of the late Mohapi Jessie be declared invalid for being irregular and contradictory in its contents;
 - (b) The second Respondent be interdicted and restrained forthwith from carrying out the testator's instructions under the purported last will of Mohapi Jessie pending determination of this application;
 - (c) The third Respondent be directed to withhold the letters of administration, if any, of the second respondent pending determination of this application;

- (d) The third Respondent dispatches the record of proceedings where the decision to appoint the second Respondent as the executrix of the estate of the late Jessie Mohapi was made;
 - (e) The Office of the Master of the High Court shall not be ordered to appoint an independent, neutral and qualified person as executrix of the estate of the late Mohapi Jessie pending finalization of the matter; Page | 8
 - (f) The decision of the third Respondent to appoint the second respondent as the executrix of the late Mohapi Jessie estate be reviewed, corrected and set aside;
 - (g) The deceased Mohapi Jessie be declared to have died intestate;
 - (h) Further and/or alternative relief; and
 - (i) Costs of suit in the event of opposition hereof. 1st and 2nd Respondent's case
- [5] In reaction to this claim, Ms Lebohang Ntsinyi the executrix of the estate of the late Mohapi Jessie (the executor) contended in her answering affidavit that the deceased had a right to make a Will, and that he did nothing irregular by exercising this right because all the property that formed part of the deceased's share of the joint estate was the property he inherited from the estates of his father and grandfather. That the property was divided in that fashion because the deceased had the responsibility to take care Page | 9 of his siblings, uncles, aunts, and some of the children of his grandfather who are still residing at the properties that he inherited from their estates.
- [6] She averred further that, in contrast, the property that was allocated to the 2nd Applicant, 1st Applicant's mother, Mrs `Mamphuto Jessie, was the property that the couple had acquired together during the subsistence of their marriage which included the matrimonial home situate at MASOWE held under plot No. 12303 - 307, where, she says, the 2nd Applicant and the children continue to reside after the divorce.
- [7] She states further that after her appointment as an executor, and acceptance thereof, she began the administration process by initially trying to prepare an inventory of all the deceased's assets. She says she, however, was confronted with resistance from the Applicants who attempted to sabotage her by, inter alia, taking control of the deceased's properties, and locking some of the doors in the house at Ha Hoohlo No. 12281 - 239, including lease documents in respect of properties awarded to the deceased. Page | 10
- [8] She avers that she kept pleading with the 1st Applicant to desist from this sort of conduct and wrote to him on 28th March 2024 to account for funds taken from the deceased's businesses, to which he never responded. She was later served with an application leading to these proceedings. It is also 2nd Respondent's case that the Trust is yet to be established wherein the deceased's children will still benefit, and contends that all in all, this application is premature.

- [9] As far as the executor is concerned, the deceased's Will is valid, rendering the current application baseless, and prays that it should be dismissed. She contends that the deceased was well within his right to depose to a Will and direct how his estate should devolve, and that clause 7 contained in the divorce decree did not deprive him of this right. This brings the court to the issue for determination which is whether the Will of the late Mohapi Jessie is valid in light of clause 7 which Applicants say limited his freedom of testation. Page | 11 Whether clause 7 of the divorce decree limited the deceased's freedom of testation
- [10] In terms of Section 14 (1) of the Administration of Estates and Inheritance Act, 2024³ any "person aged 18 years and above owning property and being mentally capable of appreciating the nature and effect of his act may make a will." There is no question in casu that the deceased was a major when he made the Will and there is no evidence that he was mentally incapacitated to make a Will. What is at stake is the contents of the said Will. It is common cause that at the time the deceased drew up the Will, the Trust was indeed non-existent, and that clause 7 existed, with the 1st and 2nd Respondents saying it had no implication on the Will. 3 Act No. 2 of 2024 Page | 12 A non-existent Trust
- [11] A testamentary Trust can be validly established in a Will if it meets the following essential legal requirements as set out in *Administrators, Estate Richards v Nichol and Another*:⁴
- (a) That it should have a trustee;
 - (b) That it should have beneficiaries; and
 - (c) That it should be made of a legal subject-matter.
- [12] If a Will meets these requirements, the executor will be able to establish it on the wishes of the deceased. The main contention is, however, whether the deceased could legally bequeath his portion of the joint estate to the family Trust in the face of clause 7. 4 1996 (4) SA 253 (C) at 258 E - F Page | 13 The alleged contravention of the terms of the divorce settlement
- [13] One of the essential requirements for a valid Trust is that it should have a lawful object, in essence, the intention must have a legal basis. The order issued by this court in CIV/T/415/21 was consensual that upon the demise of each party their portion of the divided estate would go to their two named children. The court emphasised in *Department of Transport and Others v Tasima (Pty) Limited; Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others*⁵ that "all court orders are binding and remain legally effective unless they are set aside" and further that "in a constitutional democracy founded on the rule of law, court orders must be complied with by private citizens and the State alike."
- [14] In this court's considered view, the order is written in very clear and unambiguous terms. The order in issue is an order ad factum 5 CCT 182/17 and CCT 240/17 at para 19 Page | 14 praestandum, that is, an order to do or abstain from doing a particular thing.⁶

- [15] The importance of observing court orders cannot be overemphasised. “The legal position is clear that all orders of court, whether correctly or incorrectly granted have to be obeyed until set aside.”⁷ This principle has been reiterated over and over by courts in and outside this jurisdiction including in the Registrar, Lesotho Medical, Dental and Pharmacy Council and Another v Michael Ilunga Yangindu⁸ that an order by a competent court, with jurisdiction, may not be simply ignored, even if it is perceived to be wrong in law. The court went further to state that options such as an appeal and rescission, depending on the circumstances under which the order was issued are available to a party dissatisfied with the order. I may add review to these grounds. 6 Hata - Butle (Pty) Ltd v Metsing Jeremiah Khoete and 11 Others CCA/0022/2017 at para. 22 p. 11 and Lesotho Girl Guides Association v Unity English Medium School CIV/APN/05/94 7 Blandina lisene v Lerotholi Polytechnic and Another LAC/CIV/05/2009 para. 24 at p. 15 8 C of A (CIV) No. 22/2022 Page | 15
- [16] The court held in line with this principle in Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others 9 that “... orders of court bind all to whom they apply. In fact, all orders of court, whether correctly or incorrectly granted, have to be obeyed unless they are properly set aside ... the reason being that ensuring the effectiveness of the judiciary is an imperative. This principle echoes the sentiments expressed in Tasima (supra)¹⁰ where the court stated that the obligation to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. These two cases were cited with approval in Sienaert Prop CC v City of Johannesburg and Another.¹¹
- [17] The late Mohapi Jessie was, therefore, under a legal obligation to comply with the order issued in the divorce decree. The court cannot help but reiterate that whether correctly or incorrectly granted, court orders must be observed because as stated in the 9 (CCT521/21) [2021] ZACC 18 at paras 31 - 34 10 at para 186 11 31566/2021 at paras 18 and 19 at p.7 Page | 16 English case of Hadkinson v Hadkinson¹² they promote the rule of law. This is a case in which following their divorce, Mr. and Mrs Hadkinson were involved in a custody dispute. The latter defied a court order by taking their child abroad without permission, leading to legal proceedings. The court in that case underscored the importance of complying with court orders to uphold judicial authority. It further reinforced the underlying principle that the rule of law is foundational to justice and must be upheld to ensure fairness and order.

Conclusion

- [18] The court finds in the circumstances of the case before it that the deceased failed to honour the terms of the settlement agreement between him and the 2nd Applicant. It is worth noting that the court order granted by this court in CIV/T/415/21 (the divorce decree) flowed from the parties’ consensual agreement. If the deceased’s Will were to be enforced, it would undermine the 12 [1952] (2) All ER 567 Page | 17 provisions of this order, which has to date not been subjected to any challenge.

- [19] Applicants had further prayed that the appointment of the 2nd Respondent by the Master of the High Court (the Master), 3rd Respondent herein, as the executrix of the deceased's Will be reviewed, corrected and set aside for being based on an illegal Will. The validity of this appointment by the Master emanates from the deceased's Will and Testament. It is, therefore, dependent on the finding of this court on the validity or otherwise of this Will. The Will is found to be invalid and of no force or effect as analysed above.
- [20] It is, therefore, unenforceable for being in contravention of the divorce decree that the former spouses' property as divided upon the dissolution of their marriage shall devolve on their two named children, the 1st Applicant, and her younger sister on their parents' demise. The appointment of the executor under the said Will, therefore, falls off. Page | 18
Costs
- [21] The general rule is that costs follow the event (cause), ultimately of course, awarded at the discretion of the Judge. However, Applicants did not pray for costs on the basis that this is a family matter. ORDER
- [22] From the foregoing analysis, the following orders are granted:
- (a) The Will of the late Mohapi Jessie is declared null and void;
 - (b) The late Mohapi Jessie is declared to have died intestate;
 - (c) The decision of the Master to appoint the 2nd Respondent under the late Mohapi Jessie's Will is hereby reviewed, corrected and set aside; and
 - (d) There is no order as to costs. Page | 19

F. M. KHABO JUDGE For the Applicants : Adv., M. J. Thienyane For the 1st and 2nd Respondents : Adv., K. W. Letuka Page | 20

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