

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Civil Appeal No. 35/04
High Court Misca No. 255/2003

In the matter between:

OBOPILE POPEGO

Appellant

and

THE ATTORNEY GENERAL
(representing Serowe Customary Court)

1st Respondent

IVY CHEBUKANI

2nd Respondent

RAPHALADI RAMOTSHIDISI

3rd Respondent

Mr. A. W. Modimo for the Appellant

Mr. B. Sechele for the 2nd Respondent

J U D G M E N T

CORAM: TEBBUTT J. P.
LORD SUTHERLAND J. A.
AKIWUMI J. A.

AKIWUMI J. A.

The background to this appeal can be briefly set out. After the death of Sarah Obopile in a motor car accident on 25th March, 2002, a dispute arose between his elder brother, the appellant, and Ivy Chebukani, the 2nd Respondent – who the deceased had, before he died, been living with for six years as man and wife – as to who should inherit the deceased's estate. The Serowe Customary Court, which I shall herein refer to as the

customary court applying customary law, held, and this is not challenged, that the 2nd Respondent would be regarded as the wife of the deceased. The customary court also based its decision in favour of the 2nd respondent, on a document signed by the deceased, though not a valid will under the Wills Act, and produced by the 2nd respondent, as a genuine expression of what the deceased wanted to bequeath to the 2nd respondent, his chosen wife to be. That this can be done is reflected in the following pronouncement at page 230 of Isaac Schapera's authoritative "A Handbook of Tswana Law and Custom":

"INHERITANCE among the Tswana is governed by various traditional rules coming into force after the death of a person. Voluntary testamistation is not altogether unknown, in the sense that man informs his eldest son and some other men of his ward that after his death he wishes certain cattle or other property to be given to certain children or other relatives. His wishes are generally respected, for, as the proverb says, Lentswe la moswi ga le tlolwe, 'The words of a dead person is not transgressed'".

The 2nd respondent, as set out in paragraph 2(a) of the appellant's Notice of Motion for the review of the decision of the customary court, was declared by the customary court as the heiress to the estate of the late Sarah Popego. The appellant, being dissatisfied with this decision of the customary court, appealed to the Customary Court of Appeal which dismissed his appeal. The Customary Court of Appeal, held that the female lover of a deceased person and whom the deceased intended to marry may upon the death of the deceased, be regarded as the

deceased's wife, and also that written wishes of the deceased would, in applying customary law, be taken into account in the administration of his intestate estate. The appellant however, did not appeal against the decision of the Customary Court of Appeal. He rather sought by way of a Notice of Motion under Order 61 of the Rules of the High Court, the review and the setting aside of the decision of the customary court, by the High Court. The question on which this application was sought, has been set out in the Ruling of the judge a quo, who heard the application, as follows:

"The issue for decision by me is confined to the legal question of whether or not the Serowe Customary Court had jurisdiction to entertain, decide, and determine the competing claims concerning the administration and devolution of the estate.

This in turn involves;

- (a) the consideration of the document a copy which is attached to the founding affidavit marked "C" to determine whether or not it is a valid will in terms of the Wills Act.
- (b) The interpretation of the provisions of the Customary Courts Act and the Administration of Estates Act."

The three issues which the judge **a quo**, correctly identified as being relevant to the determination of the foregoing grounds, were whether the document in Setswana marked "C" and translated into English and marked "D" constituted a valid will in terms of the Wills Act; whether the estate of the deceased is to be administered in accordance with the Administration of Estates Act; and whether the customary court had

jurisdiction to adjudicate on the conflicting claims of the appellant and the 2nd respondent to the inheritance of the estate of the deceased.

With respect to the first issue, the judge a quo on the basis of the evidence adduced before the customary court, quite properly held that the document was not a forgery but one that had been signed by the deceased in which he expressed his wishes as to the disposal of his assets and properties set out therein, after his death, to the 2nd respondent whom he described as “my adviser and assistance in acquiring the said things (property),”; and also as “my mother and I can’t rescind or contradict such”. However, since the document was not executed by the deceased in the presence of the two who had signed it as witnesses to its execution by the deceased, the judge a quo properly held that the document was not a valid will under the Wills Act which provides under section 3 (1)(a) (ii) thereof, that no will shall be valid under that Act if its execution by the deceased testator is not witnessed by at least two witnesses, all signing at the same time.

With regard to the second issue, the judge a quo also held, and in my view, correctly, that the estate of the deceased, a tribesman, could not be administered under the Administration of Estates Act. This is so because section 3 of this Act provides that the estate of a deceased tribesman shall be administered according to customary law unless the

deceased had left a will which is valid in accordance with the Wills Act. The deceased as already determined, had not left such a will.

The decision of the judge a quo on the third issue really constitutes the crux of the appeal before this court. This is whether the customary court had jurisdiction to adjudicate on the dispute between the appellant and the 2nd respondent as to who was entitled to the estate of the deceased. For the reasons which follow, I am of opinion that this is a matter that is not related at all, to the financial value of the deceased's estate and is also not an issue in the determination of the "claim" in dispute before the customary court namely, whether it was the appellant or the 2nd respondent who under the applicable customary law, would inherit the deceased estate. The relevant provisions of the Customary Courts Act namely, section 11, which defines the civil jurisdiction of the customary court should be set down.

Section 11 of the Customary Courts Act is as follows:

"(1) Subject to the provisions of section 12, and of subsection (2), a customary court shall have and may exercise civil jurisdiction over causes and matters in which –

- (a) the matter is justiciable under any law administered by the court under section 14;
- (b) the defendant is ordinarily resident within the area of jurisdiction of that court, or the cause of action arose wholly therein; and
- (c) the claim or value of the matter in dispute does not exceed the maximum amount thereof set out in its warrant.

- (2) Notwithstanding the provisions of subsection (1), a customary court shall have jurisdiction to hear and determine suits for the recovery of liquid civil debts due to the State or any town or district council.”.

As already recounted, under section 3 of the Administration of Estates Act, the estate of a tribesman, which the deceased undeniably was, shall be administered according to customary law. The customary courts have, under section 15 of the Customary Court Act, jurisdiction to administer customary law which would include customary intestacy law but not for instance, according to section 13 (c) (i) of the Customary Courts Act, “any cause or proceeding arising in connection with a testamentary disposition of property”.

It is common cause that the Minister (who is not defined in the Customary Courts Act but who must be the Minister of Local Government, Lands and Housing), in pursuance of his powers under section 7 (2) of the Customary Courts Act determined in the Establishment and Jurisdiction of Customary Court Order, the maximum award which the customary court may grant in civil cases to be P4 000.00.

The matter in dispute viz whether the appellant or 2nd respondent was entitled under customary law to inherit the intestate estate of the deceased, is clearly a matter which, can, and should be, determined by

the customary court. What is being claimed or in dispute, is not any money owing to or property belonging to the 2nd respondent, the value of any goods sold, or compensation for damage done to the 2nd respondent's person, property or reputation, but a remedy available under customary law applicable to both the appellant and the 2nd respondent namely, the determination of the intestate succession of the deceased's estate. This was the subject matter of the proceedings before the customary court and nothing else.

Section 26 of the Interpretation Act provides that:

“Every enactment shall be deemed remedial and for the public good and shall receive such fair and liberal construction as will best attain its object according to its true intent and spirit.”.

Furthermore section 27 of the same Act provides that:

“In the construction of an enactment, an interpretation which would render the enactment ineffective shall be disregarded in favour of an interpretation which will enable it to have effect”.

These two provisions also support the interpretation that section 11 (1) (c) of the Customary Courts Act enables the customary courts to determine the heir of a deceased's intestate estate without regard to the value of such estate. A contrary interpretation will render ineffective, and be contrary to the true intent and spirit of, section 3 of the Administration of Estates Act. The estate of the ordinary tribesman in Botswana may well be worth more than P4 000.00 and to interpret the provisions of section 11 (1) (c) of the Customary Courts Act to mean that

the customary court would have no jurisdiction to determine the heir of the intestate estate of a tribesman because the value of such estate is more than P 4 000.00 would to say the least, not appear to be reasonable.

The judge a quo in his judgment with which I agree, stated that the limit to the jurisdiction in civil cases apply only in cases where money or specific property is claimed and went on to elaborate as follows:

“The issue before the customary court was not a claim sounding in money or property but the proper administration and devolution of the estate according to Customary Law. Such an issue is not subject to quantification in money terms. The gross value of the estate is not a relevant limitation to the jurisdiction of the customary court. The issue involves the application of principle, irrespective of the amount the contending parties stand to gain or lose.

In the premises the decision of the Serowe customary court cannot be successfully attacked on the ground of lack of jurisdiction and the application to review must be dismissed.”.

Before arriving at this conclusion, the judge **a quo** had, however, expressed the view which is not really the basis of his judgment, and which I think is **per incuriam**, that where a matter is beyond the jurisdiction of a court because the financial claim in the matter in dispute is more than the maximum that the court may award, a defendant may grant the court jurisdiction by participating in the hearing without objection. But if the court **ab initio**, has no jurisdiction

to hear a matter, it cannot be granted jurisdiction by a party submitting to it. As pronounced in Halsbury's Laws of England, Fourth Edition 55:

"Save where Parliament has otherwise provided, a tribunal of limited statutory jurisdiction cannot acquire jurisdiction to determine a matter by consent of the parties."

I have already expressed my views on the appellant's first two grounds of appeal. As regards the other ground of appeal, the Administration of Estates Act as already adverted to, and which makes provisions for the administration of the estate of deceased persons, clearly provides that the estate of a deceased tribesman shall only be administered according to customary law, except where the deceased tribesman has left a valid will under the Wills Act. Although the document executed by the deceased bequeathing property to the 2nd respondent had some testamentary characteristics, it was nonetheless, not a valid will under section 3 (1) (ii) of the Wills Act as it was not executed by the deceased in the presence at the same time, of the two persons who witnessed its execution. The role of the customary court under the Administration of Estates Act to administer the estates of a deceased tribesman is emphasized by the provision of section 13 (c) (i) of the Customary Courts Act which excludes from the jurisdiction of the customary court the hearing of proceedings arising in connection with a "testamentary disposition" of property, which can only mean the bequeathing of property under a will valid under the Wills Act. The matter that was

before the customary court was nothing of the sort. It is true that the customary court did take into account the deceased's wishes expressed in the document executed by him, but the customary court did not act on it within the context the Wills Act. It was because it was an expression of the wishes of the deceased which as expressed in the judgment of the Customary Court of Appeal already referred to, is given some recognition within the ever evolving customary law.

Having regard to all that I have stated herein before, the inevitable conclusion that I have arrived at, is that the present appeal must be dismissed. The appeal is therefore dismissed, with costs.

It is so ordered.

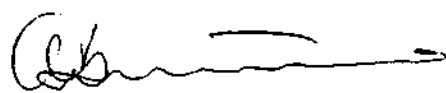
DELIVERED IN OPEN COURT OF APPEAL AT LOBATSE THIS
29th.....DAY OF JANUARY 2005.


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A. M. AKIWUMI
JUDGE OF APPEAL

I agree


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P. H. TEBBUTT
JUDGE PRESIDENT

I agree


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LORD R. I. SUTHERLAND
JUDGE OF APPEAL