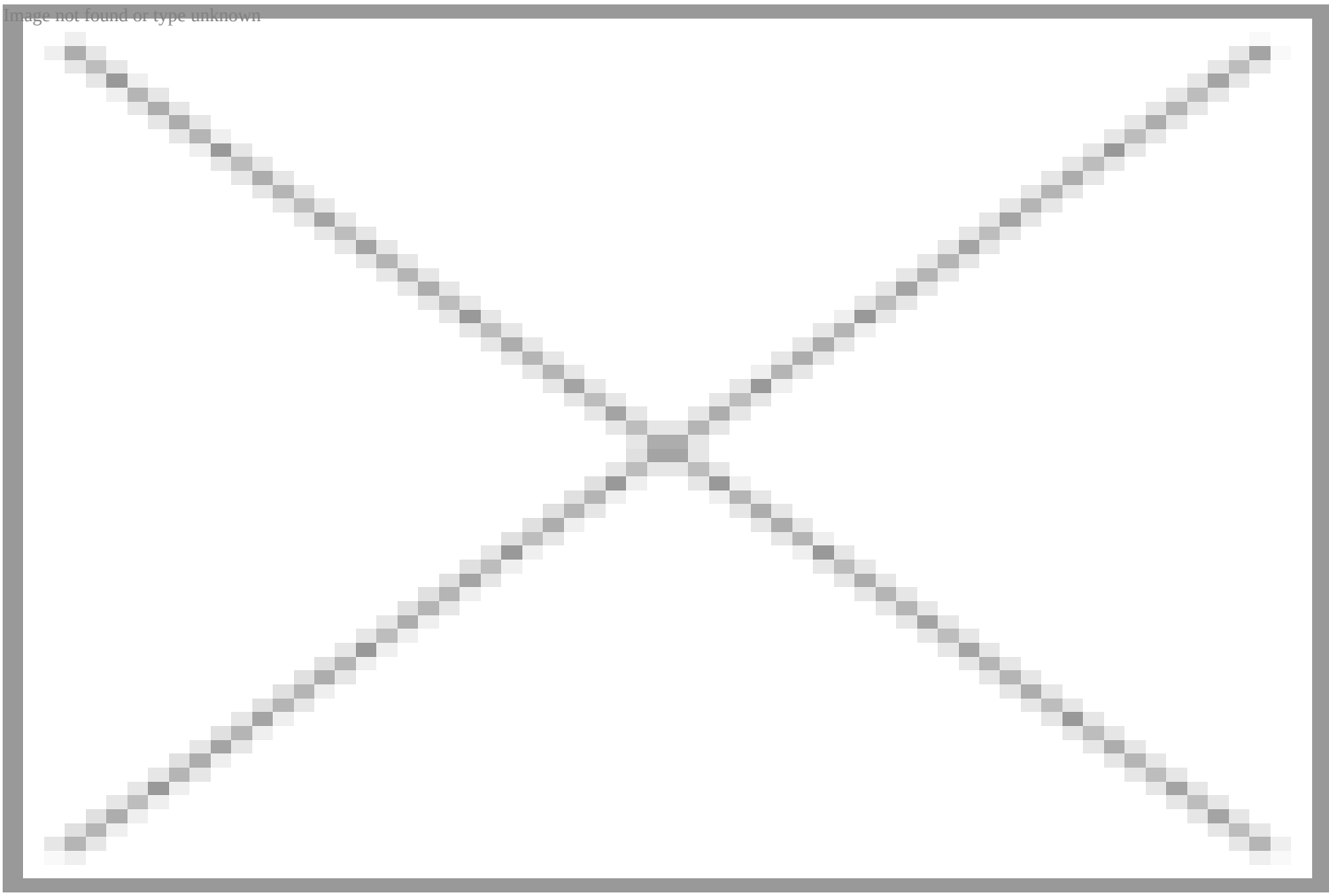
Oct
24
2018

High time to overhaul Lesotho’s offensive colonial-era laws

By Carmel Rickard

A SIGNIFICANT new decision from the high court in Lesotho has found that a widow is entitled to inherit according to the joint will that she and her husband made. The court also found that her deceased husband’s family could not contradict the wishes expressed in that will and use customary law to decide for themselves how to dispose of the estate. Judge Keketso Moahloli further spelled out that a couple may make a joint will, even if they are unmarried and, just as important, that someone is “competent to make a will” if their lifestyle is “predominantly modern” rather than “predominantly customary”. The judge also strongly criticized Lesotho’s lawmakers for not long ago having got rid of offensive, colonial era laws that he had to cite in the judgment.

Image not found or type unknown



[1]

Read the judgment here [2]

THIS is a story that begins with a divorce: in 1991 to be precise, when the marriage of Sello Matete and his first wife, Malebina Matete, ended.

Some 20 years later Matete remarried, this time to Matebello Matete. Their marriage was by Christian rites and in community of property.

They seem to have lived together for a while and to have had children together, before their official marriage. Significantly, they also signed a joint will before they married, and the will was registered with the Master of the High Court in 2005.

In that will the couple said their entire estate was left to whichever of them was the surviving spouse. The surviving spouse was also appointed as the "sole and universal heir" of all the family's assets, with the proviso that the surviving spouse should make reasonable efforts to retain the bulk of the estate for the "ultimate benefit" of their two children.

One of the assets of the estate was a security company registered by the husband and a business partner, with both partners holding 500 shares.

After the husband died the wife fully expected that, in terms of their joint will, she would inherit as provided. Instead, however, the shares in the company were transferred to Paul, Matete's son by his first marriage.

This transfer of shares took place after a meeting of the Matete family, shortly after Matete's death. At that meeting the family decided that Paul should be the heir to his father's estate, and the family presented Paul to the Master as the lawful heir.

It is this decision that the widow challenged. She said the family's appointment of Paul as the heir goes against the terms of the joint will made by her deceased husband and herself. There was yet another ground to claim that she was the sole heir: she was the lawful wife of the deceased. She therefore asked the court to order that the company shares be put into her name and that she, rather than Paul, should be entitled to dividends from them.

Paul and the rest of his family vehemently opposed the widow's application. They argued that the will was not valid since, when they made it, the couple were not married. Paul's second argument was that, even if the will was valid, under the traditional "Laws of Lerotholi", a father was not allowed to make a will that deprived his heir of the bulk of the father's estate.

The clincher, as far as Paul's legal team was concerned, was the fact that at that crucial meeting of the Matete family in 2014, Paul was "lawfully appointed heir" and this was "endorsed by their chief". It was a decision taken in terms of the "Laws of Lerotholi" which stipulates that "the heir shall be the first male child of the first married wife".

But the judge was not persuaded. Contrary to popular belief, he said, it was not true that the law in Lesotho allowed only married people to make a joint will. Couples living together who were not married could also make a joint will.

The law also said that "every person competent to make a will" had power to disinherit any relative without giving a reason, and no will could be declared invalid simply because it disinherited someone who might otherwise inherit according to a custom then in force.

He then quoted a 1935 law that interpreted the phrase "competent to make a will" to mean, in the case of an

African person, someone who had “abandoned tribal custom and adopted a European mode of life”.

There was a “more acceptable” way of putting this concept, he said, namely that someone whose lifestyle was “predominantly modern rather than predominantly customary”, was “competent to make a will”.

Paul and the family that had purported to make him his father’s heir did not claim that his father had retained tribal custom. Even if they had wanted to do so, the judge pointed out, they could not make such a claim because, in the joint will, the couple had declared that they “lead a modern mode of living” and that their estate should be administered accordingly.

Three years ago, Lesotho’s court of appeal had made it clear that a widow who had “abandoned” customary ways for a “European lifestyle” was competent to make a will. As for Paul’s argument that he could not be deprived of more than half of his father’s estate, this was only so where the estate had to be administered in terms of customary law. In this matter the couple had made clear how they wanted their estate handled, said the judge, and the Law of Inheritance Act made it plain that when a person competent to do so made a valid will those wishes had to be carried out, regardless of any restrictions that might apply in “Sesotho law”. He therefore ordered that Paul be removed as share-holder and that the provisions of the will should apply, so that the wife inherited the shares and the dividends.

This is an interesting case for several reasons. It shows the continuing tension between members of families living under traditional law and those family members who have chosen not to be bound by custom. It also shows the efforts that women in the second group must often make to secure their inheritance as the traditionalists object to them inheriting.

But at least that is an understandable problem. What is inexplicable, however, is the failure of Lesotho’s political classes to update highly objectionable colonial era laws such as those relevant to the resolution of the Matete dispute.

How is it possible that 1935 legislation continues on the statute books in Lesotho, despite containing what the judge described as “very offensive overtones”? The offensive language contained in the law “ought to have been jettisoned long ago by our lawmakers”, he added.

For example, the law defined “African” as “any person belonging to any of the aboriginal races or tribes of African south of the Equator”, while it defined someone “competent to make a will”, in the case of an African, as people who “have abandoned tribal custom and adopted a European mode of life”.

Politicians in Lesotho spend a great deal of time chasing after power, making political alliances and jockeying for more clout. This judgment shows however that they should have other priorities: they should be spending time tidying up the statute books, clearing out offensive racially objectionable legislation, and bringing the country’s laws into the 21st century.

This is only one of several recent major decisions involving women and customary law. From SA’s Constitutional Court, for example, came a judgment this week on how an estate should be divided in divorce proceedings. The dispute concerned the constitutionality of section 7(3) of the Divorce Act insofar as it does not apply to marriages entered into under the Transkei Marriage Act 21 of 1978 (Transkei Marriage Act). You can read this judgment here [3]

Tags:
Lesotho [4]
Customary law [5]

Links
[1] https://africanlii.org/sites/default/files/Lesotho%20palace%20of%20justice.jpg
[2] http://•	https://lesotholii.org/ls/judgment/high-court/2018/7-1
[3] http://www.saflii.org/za/cases/ZACC/2018/40.html
[4] https://africanlii.org/og-blog-tags/lesotho
[5] https://africanlii.org/og-blog-tags/customary-law