

Chapter 1

The mode of life test wins at last: Interpreting section 3 of Botswana's Administration of Estates Act

Elizabeth Macharia-Mokobi*

Abstract

It is over 100 years since Botswana received Roman Dutch common law from the Cape Colony of Good Hope. The rights of men, women and children, once tidily defined by customary law of succession now yield unsatisfactory outcomes. Citizens of Botswana, now alive to the greater breadth of rights to be enjoyed under the common law, have sought to break their bonds to customary law, with varying degrees of success. This paper explores several High Court decisions which have attempted to demarcate the boundaries of the customary law and common law of succession. The paper questions the categorisation of members of tribal communities in Botswana as "tribesmen" and the consequence of having customary law apply to such people in spite of their decidedly modern, sophisticated lifestyles. The paper examines if the courts have done enough to honour the wishes of citizens who wish to escape the discrimination of the customary law of succession by seeking refuge in common law. Ultimately, the paper asks, should personal law in matters of inheritance be unified under the fairer more inclusive common law.

Keywords: Mode of life; tribesmen; Botswana

1 Introduction

The debate on the meaning of the word "tribesman" as it appears in section 2 as read with section 3 of Botswana's Administration of Estates Act¹ (the Act) has raged for several years. Section 3(a) of the Act provides that the estates of deceased's tribesmen must devolve in accordance with the Customary Law, except in cases where the deceased tribesman has left a valid will. In such instances, the estate of the tribesman would devolve under the provisions of the Administration of Estates Act.²

*Senior Lecturer, Department of Law University of Botswana. Macharia-mokobi@UB.AC.BW

¹ Section 2 of the Act defines a tribesman as any member of a tribe or tribal community in Botswana.

² Section 3(a) of the Act provides that the Act "shall not apply- (a) to the estates of deceased tribesmen, which as heretofore, shall be administered according to the customary law: Provided that whenever a tribesman dies after the commencement of this Act leaving a will valid in accordance with the Wills Act, this Act shall, notwithstanding any partial intestacy, apply as far as may be to the administration of the whole of his estate..."

The difficulties with this approach are immediately apparent. Section 3 of the Act corralled an entire section of the population, deeming them tribesmen by virtue of their membership of a particular community. The definition of a tribesman under the Act did not take any cognisance of the particular circumstances of any individual. It was as if customary law was literally foisted individuals as their personal law in matters of succession by accident of birth. For some, of course, this presented no difficulties. Their lives were decidedly traditional, and they owned none of the trappings of modern life. For others, section 3 was damning. Having lived their lives in cosmopolitan cities, with little connection to their tribal communities and the rural lifestyle, their estates now fell to be distributed through a law quite foreign to them in life and in death.

2 The tribesman debate through the cases³

In *BHC v Letsholo*,⁴ Chief Justice Mokama adopted a purposive interpretation of section 3 of the Act. He stated that the decisive factor in determining whether a person was a tribesman was the mode of life test and the assets in the estate.⁵ Applying the mode of life test, which test was revived from previously repealed versions of the Act, Chief Justice Mokama found that the deceased was not a tribesman and that his estate was to devolve under Act and not under customary law because his lifestyle was modern and his assets unknown to customary law. This decision was followed in several other cases including *Mmereki v Seleke and Another*⁶ and *Samsam v Seakarea*.⁷

There was a second stream of cases that adopted a strict interpretation of section 3. These cases favoured a more literal interpretation, and always concluded that the language of the Act was unambiguous. Therefore, in the absence of a will, any member of a tribe or tribal community in Botswana would have his estate governed by the customary law. In this body of cases, we find several cases. In *Image Tongomani Khilane v The Registrar of the High Court and Another*,⁸ the

³ For a full discussion of these decisions see E Macharia-Mokobi, 'Who is a tribesman? An Examination of the Continued Utility of section 3 of Botswana's Administration of Estates Act' (2013) 17 University of Botswana Law Journal 23.

⁴ Misca 399/93.

⁵ *BHC v Letsholo* Misca 399/93 (unreported) as cited in *Samsam v. Seakarea* 2004 (1) BLR 378 at 383.

⁶ 2001 (2) BLR 601.

⁷ 2004 (1) BLR 378.

⁸ Civil Appeal no F 171 of 2003.

learned judge expressed concern with Chief Justice Mokama's "ingenious interpretation" of the ambiguous section 3 of the Act. In *Popego Obopile v the Attorney General*,⁹ the court considered the provisions of section 3 of the Act to be clear and free from ambiguity and not deserving of a purposive interpretation. In the *Obopile* case, the court broke ranks with *Letsholo*¹⁰ decision rejecting the mode of life test. This Court of Appeal decision was followed in *Tshepo Mbenge Mosienyane v Lesetedyana Lesetedi (N.O) and 15 others*.¹¹ In this decision, Justice Masuku felt bound to respect the findings of the Court of Appeal jettisoning the purposive approach in favour of the strict interpretation of the provisions of section 3. Nevertheless, he too made a call for law reform stating that the law ought to be responsive to the realities of our times.¹²

The last in this line of cases was *Thipe v Thipe*,¹³ where Justice Kirby took the view that section 3 of the act was unambiguous and left no room for a purposive interpretation. Justice Kirby also lamented the absence of the flexibility that had existed under the Dissolution of Marriages of Persons subject to Customary Law (Disposal of Property) Act.¹⁴ This statute made provision for a mode of life test to be applied where devolution under customary law would be inequitable. This statute, though still on the law books, only applied to marriages celebrated before 16 July 1926 and was effectively redundant.

These two streams of cases presented diametrically opposite views. What is clear is that judges appreciated the challenges presented by section three. Some sought to circumvent them; others sought change by encouraging a legislative response. Parliament did not amend the law to resolve the obvious difficulties. However, an opportunity presented itself to the Court of appeal to reconsider the question. This time, the decision was decisive and clear. The tribesman debate finally came to a satisfactory conclusion in the *Pony Hopkins v The Representatives of the Estate of the Late Nkopo Phiri and Ntuka Phiri and 3 others*¹⁵ decision. The next section examines the decision in the *Pony Hopkins* case and outlines how the debate has finally been laid to rest.

⁹ 2005 (1) BLR 86 (CA)

¹⁰ Note 4.

¹¹ Misca F 257/2005.

¹² See para 45 (n. 11 above).

¹³ 2007 (3) BLR 273).

¹⁴ Chapter 29:05. This act applied to marriages concluded between Batswana under Christian religious rites before 1 April 1926 and marriages solemnised by a marriage officer after 1 April 1917 and before 16 July 1926.

¹⁵ Civil Appeal No. CACGB 087 – 17 (Unreported).

3 The *Pony Hopkins* decision

The vexing question of the applicability of section 3 of the Administration of Estates Act to estates of deceased's tribesmen would not belong out of the courts. In 2017, the relatives of the deceased persons Nkopo and Ntuka Phiri approached the High Court presenting much the same issues and arguments that had been presented in the cases discussed above in previous years. This time, however, the Court of Appeal settled the debate once and for all. The opinion of the majority written by Judge President Kirby will be discussed first. The separate opinion of Judge of Appeal Lesetedi, which agreed with Judge President Kirby on all salient points, but highlighted some questions of the interpretation of law, that was not addressed in the main judgment, will follow.

The facts

This case arose following the passing of Nkopo and Ntuka Phiri. The two were members of the *Bakgatla* tribe. They had a home in Mosanta Ward in Mochudi Village. They had married in a civil ceremony. There was no exclusion of customary law through any instrument signed upon marriage because they probably married prior to the promulgation of the Married Persons Property Act¹⁶ on 1 January 1971. Their marriage was governed by the Marriage Act of 1917 which was the law in force at the time. The marriage was therefore in community of property, as all civil marriages before 1970 were, in the absence of an antenuptial contract. Their property would have been subject to the customary law in terms of section 19 of the Marriage Act of 1917.¹⁷

Nkopo died in 2004 predeceasing his wife Ntuka by a few years. Ntuka took care of the joint estate which remained undivided until she passed away in 2009.¹⁸ There were six children of the marriage. Dr. Lucas Gakale, Chiki Moganetsi, and Pony Hopkins survived their parents. Disono Gakale had passed and was survived by his wife Thenese and two children. Two other sisters Sarah Molatlhegi and Nanki Wright had also passed away. The estate consisted of a 19-hectare field, a house in Gaborone, a firearm and the family home at Mosanta Ward. The estate was valued at just over P1 000 000.¹⁹ In accordance with *Sekgatla* customary law, the eldest son, Lucas Gakale, attempted to distribute the estate of his deceased parents at

¹⁶Act no. 69 of 1970; Laws of Botswana Cap 29:03.

¹⁷ See Chapter 144 of the 1959 Edition of the Laws of Bechuanaland.

¹⁸ *Pony Hopkins* (n. 15 above) para 1 – 3.

¹⁹ *Pony Hopkins* (n. 15 above) para 1 – 3.

the family level with the advice from *Kgosi* Mothibe Linchwe,²⁰ senior uncles and other family members. His efforts were unsuccessful. At the centre of the tussle between the siblings was the house built at the family home at Mosanta Ward.

The roots of the dispute arose from a decision taken by the sibling's late mother. Upon the passing of the youngest son, Disono, the matriarch Ntuka had requested his wife Thenese to move into the house with her children. The house had, in any event, been built by Disono and Thenese, although it was not complete. Thenese moved in and completed the house. She had been residing there ever since. This decision had pitted family members against one another. On the one hand, Pony Hopkins together with the now deceased Sarah took the view that the family home should be shared equally between the three surviving children of the marriage and children of their deceased siblings. This would have resulted in Thenese being evicted from the home. For his part, Lucas Gakale believed that in accordance with custom, the family home had been bequeathed to Disono as the youngest son, and that being the case, the yard ought to be inherited by his surviving spouse Thenese.²¹

The parties approach the High Court

Unable to agree, with her siblings, Pony Hopkins approached the High Court in 2016 seeking a declaration that Nkopo and Ntuka Phiri had died intestate; that given the size of their estate, it could not be distributed under customary law; that the estate ought to be placed under the administration of the Master of the High Court who would appoint an executor to distribute the estate under customary law, and that the surviving children of Nkopo and Ntuka, together with the estates of those siblings who had also died, should inherit the estate in equal shares.²²

The matter came before the High Court where it was agreed that the second prayer in the pleadings, that is whether the estate should be placed under the administration of the Master of the High Court who would appoint an executor to administer the estate under customary law, should be hived off and dealt with first. The rationale for dealing this issue first was that if the High Court were to find that the estate could not be administered by the Master of the High Court, that would bring the case to an abrupt end at the High Court and the parties would have to reconvene at the suitable forum dictated by customary law in order to conclude the devolution of the estate.²³

²⁰ The tribal chief of Bakgatla at the time.

²¹ *Pony Hopkins* (n. 15 above) para 4-5.

²² *Pony Hopkins* (n. 15 above) para 6.

²³ *Pony Hopkins* (n. 15 above) para 8.

The findings of Justice Nthomiwa at the High Court regarding the question of appointment of the master to administer the estate of the late Nkopo and Ntuka Phiri had five limbs. First, Nthomiwa J found that the office of the executor is unknown under customary law. The appointment of an executor who distributes the estate under the supervision of the Master of the High Court following the rules of the Administration of Estates Act was a process known to statutory law and not customary law. This was a restatement of the law as stated in *Teapot v The Attorney General*.²⁴ Second, the learned judge also stated that the process of distribution of estates under *Sekgatla* customary law was led by a family member, usually the eldest son, in consultation with other family members, the Chief or the headman. The debts of the estate were settled first followed by the distribution. Anyone with a grievance was free to approach the Customary Court to appeal the distribution. The Court of Appeal endorsed this finding as correct.²⁵ Third, the Court of Appeal accepted Nthomiwa J's finding that customary law was transparent and was understood widely. Further, the court accepted that the size of the estate should not be a hindrance to its distribution under that law.²⁶ Fourth, Justice Nthomiwa, apparently relying on the decision in *Mmereki*²⁷ found that the Master of the High Court was empowered to administer the estates of deceased tribesmen. Lastly, the High Court considered the conflicting decisions on whether the estates of deceased tribesmen could be administered under the Administration of Estates Act. In this regard, the *Letsholo*²⁸, *Mmereki*²⁹ and the *Samsam*³⁰ decisions which favoured the mode of life test were considered against *Thipe*³¹; *Sipo Sami Engineering v Seipobi*³² and the *Obopile*³³ all of which seemed to adopt a strict view of the meaning of section 3 of the Administration of Estates Act.³⁴

In his High Court decision, Justice Nthomiwa took the view that the later line of cases was to be preferred.³⁵ Justice Nthomiwa then held that the estate of the late Nkopo and Ntuka Phiri had to devolve under customary

²⁴ [1998] BLR 515 at 517

²⁵ *Pony Hopkins* (n. 15 above) para 10.

²⁶ *Pony Hopkins* (n. 15 above) para 10.

²⁷ N. 6 above.

²⁸ N. 4 above.

²⁹ N. 6 above.

³⁰ N. 7 above.

³¹ N. 13 above

³² [2009] 2 BLR 196 CA.

³³ N. 9 above

³⁴ *Pony Hopkins* (n. 15 above) para 13.

³⁵ *Pony Hopkins* (n. 15 above) para 14.

law and that the Master of the High court could not administer the estate as that would be tantamount to appointing an executor.³⁶ It is this order of Justice Nthomiwa which the Appellant, Pony Hopkins, challenged at the Court of Appeal.

The Judge President Kirby's Opinion

The case at the Court of appeal was heard by Judge President Kirby, Justice Lesetedi and Justice Brand. The main opinion was written by Judge President Kirby. Justice Lesetedi, although agreeing with the findings of the majority, opted to write a separate opinion addressing some points not mentioned in the main judgment. This opinion is discussed later in this article. This section confines itself to Judge President Kirby's opinion starting with the grounds of appeal, then traversing the development of the law since the early 1900s to 1974, and concluding with the findings of the majority.

The Grounds of Appeal

The grounds of appeal were listed as follows: First that the High Court erred in finding that the Master³⁷ had jurisdiction over all estates in Botswana and then finding that the master did not have jurisdiction over the deceased estates of Nkopo and Ntuka. Second that the High Court erred when it held that the Master of the High Court was not empowered to apply customary law in the devolution of estates. Third, that the High Court erred when it held that the estate of the late Nkopo and Ntuka was not so large that the application of customary law would be excluded by reason of the size of the estate alone. Fourth, that the High Court erred in finding that the lifestyle of the deceased persons did not exclude the operation of customary law despite oral evidence presented to the contrary.

The development of the law from the early 1900s to 1974

Judge President Kirby's opinion delved into statutes, both current and obsolete, to paint a picture of the development of the law of succession since the early 1900s. His particular focus was to illustrate how the law affecting "deceased Africans", later referred to as "tribesmen", developed over almost 100 years.

³⁶ *Pony Hopkins* (n. 15 above) para 19.

³⁷ The Registrar and Master of the High Court is the Chief Executive Officer of the Administration of Justice whose functions extend to deceased person's estates.

Judge President Kirby pointed out that the Administration of Estates Act, which came into force in on 1 July 1974, was not intended to apply to the estates of deceased tribesmen who died intestate.³⁸ Parliament had anticipated that such estates were to continue to be administered under the customary law. There is a caveat to this, however. The *proviso* to section 3(a) of the Administration of Estates Act provides that were a tribesman died leaving a will, his estate would be administered under the Administration of Estates Act despite any partial intestacy. Further, any voluntary testamentation under customary law would be deemed valid and would be given effect provided it was not inconsistent with the will.³⁹

Judge President Kirby noted that the Administration of Estates Act of 1974 had replaced the Administration of Estates Proclamation of 1933⁴⁰ whose application did not extend to the estates of deceased Africans. Such estates were to devolve in accordance with the laws and customs of the tribe to which such individuals belonged. There was once exception to this rule. This exception was found in section 4 of the African Divorce Proclamation of 1926 - also referred to as Chapter 77.⁴¹

Section 4 of the African Divorce Proclamation Act provided that any Africans spouses married under civil law were entitled, upon divorce or upon the death of one of the spouses, to have their property devolve under civil law, if it appeared to the court that it would not be just and equitable that the property of the spouses be dealt with under African law and custom having regard to the mode of life of the spouses and of any disposition of property made by either of the spouses during the subsistence of the marriage. Interestingly though, section 4 applied to marriages subsisting as of 16 July 1926. The effect was that over the course of time, the Act ceased to have operation.⁴² It suffices to say that this provision was the origin of the mode of life test in Botswana. As Kirby notes, the drafters were mindful of the fact that "there might be circumstances where the mode of life of a deceased

³⁸ *Pony Hopkins* (n. 15 above) para 25.

³⁹ See *Pony Hopkins* (n. 15 above) para 25. The proviso to section 3(a) of the Administration of Estates Act reads as follows: whenever a tribesman dies after the commencement of this Act leaving a valid will, this act shall, notwithstanding any partial intestacy apply, insofar as may be to the administration of the whole of his estate; and for the purpose of such application informed testamentary instructions in accordance with any written law relating to customary succession given by the deceased shall be deemed insofar as they are not inconsistent with the will, to be part of the will.

⁴⁰ No. 33 of 1933.

⁴¹ No. 19 of 1926 which came into force on 16 July 1926. This Proclamation was renamed in 1973 as the Dissolution of Marriages of Persons Subject to Customary Law (Disposal of Property) Act Cap 29:05. Its essential provisions remained the same.

⁴² *Pony Hopkins* (n. 15 above) para 28. As Judge President Kirby notes at [29] anyone whose marriage could be subject to the provisions of this statute would be well over 100 years.

person was such as to make the distribution of his estate according to customary law inequitable.”⁴³

When the Administration of Estates Act of 1933 was re-enacted into the current Administration of Estates Act of 1974, the proviso allowing for the mode of life test to apply to estates of spouses who had contracted a civil marriage was omitted. Kirby surmises that the reason for the exclusion must have been the promulgation of the Married Persons Property Act (MPPA).⁴⁴ The MPPA allowed persons married under civil law to exclude the operation of customary law to their marital property.⁴⁵ This provision replaced the law as it stood under the old Marriage Act of 1917 which provided that in the absence of an antenuptial contract, a civil marriage between Africans would not affect the property of spouses which would be disposed of under Tswana customary law unless disposed of by will.⁴⁶

This was the trajectory of the development of the law from the early 1900s to 1974. This informed the position of the statutory law with respect to the application of customary law to the property of a deceased tribesman. In summary, unless the customary law is excluded by way of an instrument signed under section 5 of the Married Persons Property Act 2014, or by the execution of a valid will, the estate of a deceased’s tribesman will devolve under customary law. The mode of life test remained ring-fenced in a statutory provision that limited its application to estates of persons married before 1 July 1926. The relevance of the mode of life test, therefore, diminished steeply over the years.

The question “who is a tribesman?” arose from this state of affairs. The two streams of case law discussed above developed. One stream supporting a strict interpretation of section 3 of the Administration of Estates Act, and the other supporting a more purposive approach which include the mode of life test and attempted to apply its rules to snatch the estates of deceased tribesmen from the jurisdiction of customary law and place them squarely under the umbrage of the statutory law of succession. The cases will be discussed below, to reveal to the reader the jurisprudential underpinnings of *Pony Hopkins*.

⁴³ *Pony Hopkins* (n. 15 above) para 28.

⁴⁴ Act no. 69 of 1970.

⁴⁵ See section 5 of the Married Persons Property Act (amended in 2014). Formerly section 7 under the 1970 statute.

⁴⁶ Section 19 Marriage Act No. 1 of 1917. See also *Pony Hopkins* (n.15 above) para 31.

Distinguishing previous case law⁴⁷

Judge President Kirby traversed the history of interpretation of section 3 of the Administration of Estates Act by considering the decisions in the steady stream of cases that were spawned by the seemingly innocuous section 3 of the Administration of Estates Act. The purpose of this exercise was to distinguish the cases and establish which decisions had dealt directly with the question of section 3 of the Act, which cases considered section 3 merely in passing, and the reasoning behind each decision.

Letsholo

The first case to come to the courts regarding the applicability or otherwise of the Administration of Estates Act to the deceased estates of tribesmen was *Letsholo*.⁴⁸ The case arose out of allegations of fraud brought against Letsholo's estate by Botswana Housing Corporation (BHC), for whom the deceased Joseph Letsholo had worked as Chief Executive Officer. BHC sought to recover millions of Pula from the estate of the deceased, or from his widow an expatriate named Nicola Jane Letsholo, which it claimed had been improperly acquired. His widow resisted the proceedings brought by BHC. She claimed that her late husband was a tribesman and that his estate could not be wound up under the Administration of Estates Act but in accordance with customary law in keeping with the provisions of section 3 of the Administration of Estates Act.

The court took a different view. Applying a purposive interpretation to section 3, Chief Justice Mokama held that the mode of life test should prevail. In so doing, he revived the chapter 77 exception which was found in the Administration of Estates Act of 1933, and not in the later amendment of the same act. He held that section 3 of the Administration of Estates Act could not apply to the estates of deceased tribesmen who had modern assets that were not amenable to administration under customary law.⁴⁹ This High Court decision was never the subject of an appeal.

In the end, Judge President Kirby took the view that the decision in *Letsholo* to adopt a purposive interpretation of section 3 was to ensure that the investigation and redress for suspected fraud alleged to have been perpetrated on BHC by the deceased were not frustrated by the case being dealt with under customary law. A reliance on customary law would have resulted in a failure of the state's effort to recoup embezzled funds through

⁴⁷ A full discussion of the case law can also be found in Mokobi (n 3 above).

⁴⁸ N. 4 above.

⁴⁹ *Pony Hopkins* (n. 15 above) para 40.

a process of sequestration, a procedure unknown to customary law. This was only possible following the order that the mode of life test was applicable and that the estate should be distributed under the Administration of Estates Act.

Judge President Kirby concluded that the court was motivated by the need to ensure the interests of justice were met by the case being resolved under the more robust common law, the focus of the court in *Letsholo* was not to define and indicate the effects of section 3 of the Act.

Mmerekhi

*Mmerekhi*⁵⁰ was another decision which followed the finding in *Letsholo*. In this decision, the Applicant sought to set aside the decision of the Master of the High Court who had determined that a vehicle registered in the name of the Applicant's deceased paramour was part of his estate. The Applicant claimed ownership of the vehicle. She averred that the Master had no jurisdiction over the state because the deceased was a tribesman whose estate should have been administered under customary law.

In his findings, Justice Chatikobo upheld the decision of *Letsholo* holding that the lifestyle of the deceased was non-tribal and that the assets concerned were unknown to customary law. Chatikobo J also made an interesting finding regarding the power of the Master of the High Court to administer estates of all persons. He held that section 6 and section 28 of the Administration of Estates Act directed that the estates of all persons were to be administered and distributed under the Act.

Justice Kirby differed fundamentally with the finding of Justice Chatikobo that all estates fell under the purview of the Masters Office. According to Kirby, this could not possibly be correct because Parliament clearly intended for estates of tribesmen to devolve under customary law.⁵¹ He also took the view that this decision may have been motivated by the need to avoid the injustice of disinheritance of a concubine and illegitimate children.⁵² It is difficult to follow this argument because the status of unmarried women and illegitimate children is equally precarious under common law. Perhaps this was a reference to the possibility of claims of maintenance against the estate for dependents of the deceased which could be made under the Succession Act, and the possibility available to the cohabiting partner to assert the existence of a universal partnership under common law. Despite the suggestion that common law would treat the

⁵⁰ N. 6 above.

⁵¹ *Pony Hopkins* (n. 15 above) para 41.

⁵² *Pony Hopkins* (n. 15 above) para 49.

illegitimate child and cohabiting partner more justly, it is lamentable that this point was not elaborated by the court.

Samsam

*Samsam*⁵³ followed the *Mmerek*⁵⁴ decision. This case was brought by the lover of the deceased. She and the deceased had cohabited for a long period of time and shared children. The deceased lived a modern life, working as a bank manager and educating his children in English Medium Schools. On the other hand, he also owned livestock and had a house in Serowe which he had developed on his sister's piece of land. The Applicant sought to have the estate devolve under statutory law.

The deceased's mother, for her part, argued that the estate should devolve under customary law insisting that her son had died intestate and was a tribesman in terms of section 3 of the Administration of Estates Act. Lesetedi J took the view that the deceased lived a decidedly modern life evidenced by his occupation, his urban home and the modern technological gadgets that he owned. The court also put emphasis on his choice to educate his children in an English-medium school. The court placed little weight on the deceased's residence in Serowe holding that it was not uncommon for people to keep residential premises in the rural areas for convenience. The ownership of livestock was also given short shrift. The court characterised the ownership of cattle as a status symbol or a sentimental or purely economic activity that did not in any way evidence a connection to the customary way of life. The court adopted a purposive interpretation of section 3 of the Administration of Estates Act.⁵⁵

Judge President Kirby distinguished this decision on the basis that it a purposive definition of section 3. Just as he did in *Mmerek*⁵⁶, the learned Judge President suggested that the court may have been driven by the need to arrive at a just decision that did not result in disinherison of a concubine and illegitimate children.⁵⁷ As mentioned above, how such disinherison could have been avoided at common law is not immediately apparent. In a stream of cases adopting an entirely contrary view, the High Court and Court of Appeal took the view that section 3 should be given a strict and literal interpretation dismissing the mode of life test in its entirety.

⁵³ N. 7 above

⁵⁴ N. 6 above.

⁵⁵ *Pony Hopkins* (n. 15 above) para 42.

⁵⁶ N.6 above.

⁵⁷ *Pony Hopkins* (n. 15 above) para 49.

Thipe

The first of these cases is *Thipe*.⁵⁸ This case concerned a dispute over the estate of a wealthy man who had died intestate. Contesting his estate was his two wives, both past and present. Justice Kirby had dealt with this case at the High Court in 2007. He had found the use of the mode of life test in *Letsholo*⁵⁹ *Mmereki*⁶⁰ and in *Samsam*⁶¹ doubtful in law. His view was that the mode of life test, which was contained in the Dissolution of Marriages Subject to Customary Law (Disposal of Property) Act, had been repealed in the 1972 revision of the Administration of Estates Act. It was for parliament to reinstate the test should it wish to do so by revising both the Administration of Estates Act and the Dissolution of Marriages subject to Customary Law Act.

In *Thipe*⁶², Justice Kirby took the view that section 3 of the Administration of Estates Act was unambiguous and that there was not permissible in law to “recast or modify a statutory definition in the absence of clear ambiguity.”⁶³ The decision in *Thipe* did not turn on a definition of a tribesman because the deceased had concluded a civil marriage wherein he had, through a statutory instrument concluded with his wife Seteng under section 7⁶⁴ of the Married Persons Property Act, excluded the application of customary law to the matrimonial property. This express exclusion of the customary law meant that the question whether the deceased was a tribesman or not never arose and no detailed analysis of that question was carried out in the judgment.⁶⁵

To Judge President Kirby’s mind, the underpinning for the decision in *Thipe*⁶⁶ was section 7 (as it then was) of the Married Persons Property Act and not section 3 of the Administration of Estates Act. *Thipe*’s case was relatively straight forward because all needed to give effect to the deceased’s choice of law though through the instrument signed at the conclusion of his civil marriage excluding customary law from matters regarding the disposal of his estate.⁶⁷

⁵⁸ *Thipe* (n. 11 above).

⁵⁹ N. 4 above

⁶⁰ N. 6 above..

⁶¹ N. 7 above.

⁶² . 13 above.

⁶³ *Pony Hopkins* (n. 15 above) para 45.

⁶⁴ Now section 5.

⁶⁵ *Pony Hopkins* (n. 15 above) para 45– 46.

⁶⁶ N. 13 above.

⁶⁷ *Pony Hopkins* (n. 15 above) para 49. Judge President Kirby noted two further decisions in a similar vein. In *Ramantele v Mmusi and Others* 2013 2 BLR 658 CA the use of customary law rules to discriminate against women was rejected in favour of a more equitable outcome.

Sipo Sami

Discussing *Sipo Sami*⁶⁸ Judge President Kirby found that whilst the decision concluded that the estates of deceased tribesmen did not fall to be administered under section 3 of the Administration of Estates Act, the court did not address any arguments as to the mode of life of the deceased and therefore did not fully ventilate the issue of the interpretation of the relevant section.⁶⁹

The Popego and Moaro Judgements

Judge President Kirby also mentioned the decisions in *Obopile*⁷⁰, and *Selato v Moaro*.⁷¹ He stated that the *Obopile* and *Selato* decisions did not have much bearing in the interpretation of section 3 of the Administration of Estates Act.⁷² In the *Obopile* decision, the customary law would have achieved a fairer outcome because the deceased had left informal instruction regarding the distribution of his estate using the tool of voluntary testamentation under customary law. These instructions would have to be respected.

Following a review of the above decisions, Judge President Kirby then set the stage for a thorough examination of the meaning of section 3 of the Administration of Estates Act. He began with a discussion of relevant principles of statutory interpretation.

Understanding section 3 through the lens of statutory interpretation

Judge President Kirby began this section of his judgment by pointing out that constitutional and statutory provisions should be interpreted by the words and grammar used – that is the literal interpretation, but also in their current

Customary law had to be responsive to societal change, and any rules incompatible with written law or contrary to morality, humanity or natural justice (per section 2 of the Customary Law Act) could not fall within the definition of customary law. One such evolution can be observed in *Kealeboga and Another v Kehumile and Another* (CACGB 045 – 13) unreported, in which Judge of Appeal Legwaila ruled that customary law recognised the right of children to inherit regardless of illegitimacy.

⁶⁸ N. 27 above.

⁶⁹ *Pony Hopkins* (n. 15 above) para 47.

⁷⁰ N.9 above.

⁷¹ [2010] 3 BLR 565 (CA).

⁷² *Pony Hopkins* (n. 15 above) paras 43 and 48.

social and political context.⁷³ In making this pronouncement, Judge President Kirby relied on the provisions of section 28 of the Interpretations Act⁷⁴ which provides that statutes couched in the present tense should be interpreted as always speaking to the circumstances as they occur in order to give effect to the true intent and spirit of the legislation. Applying these principles to sections 2 and 3 of the Administration of Estates Act, Judge President Kirby took the view that both the words “tribesman” and “tribesmen” appeared in provisions couched in the present tense and so had to be interpreted in the correct socio-political context. He noted the radical differences between Botswana in the sixties and seventies and modern-day Botswana. The court recognised that in the past, the most accessible system of administration of estates for ordinary Batswana would have been customary law. Fifty years later, the position was now fundamentally different. Batswana now lived modern lives, eschewing their customary identity in favour of national identity. The court, he said, should take judicial notice of these societal shifts in identity and norms when interpreting the relevant provisions of the Act.

Judge President Kirby noted that his decision in *Thipe’s* case, in which he had held that the interpretation of section 3 of the Administration of Estates act was unambiguous, may have been too hasty.⁷⁵ He then found that the word “tribesman” had many nuances. It could mean the “practicing tribesman, a man living a rural life in his home village. But other factors could come into play, for example, his place of residence, his mode of life - where a choice of an urban or modern lifestyle would be a strong indicator that the subject was not a tribesman. Marrying outside one's tribe, race or religion, sometimes into a way of life or faith that had its own rules for disposition of property, would also be regarded as a strong indicator of having abandoned tribal norms and practices.⁷⁶

The court found that the nature of the assets in the estate, whilst relevant, was now not definitive of the personal law of the deceased. Judge President Kirby found that customary law was flexible, fluid and constantly evolving to meet the changing situation of its subjects. With proper legal advice, he noted, customary law could now accommodate the distribution of most modern assets. The size of the estate was also a factor to be considered, although not a conclusive one. The court took the view that large estates could better devolve under the Administration of Estates Act where formal processes and proper record keeping meant that distribution of the

⁷³ *Pony Hopkins* (n. 15 above) para 52. See also *Botswana Democratic Party and Another v Umbrella for Democratic Change and Another* CACGB 114 – 14 (unreported) para 45.

⁷⁴ Laws of Botswana Chapter 01:04.

⁷⁵ *Pony Hopkins* (n. 15 above) para 59.

⁷⁶ *Pony Hopkins* (n. 15 above) para 59.

estate and any challenges arising therefrom could be easily resolved. The justices ruled that the Administration of Estates Act could still be used to distribute an estate in terms of customary law or any other recognised religious law.⁷⁷

The court then ruled that it would be possible for estates of deceased's tribesmen to devolve under the Administration of Estates Act. Outlining the procedure that could be followed, the Court found that the party seeking devolution of an estate under the Administration of Estates Act would need to apply to the High Court for such an order. The High Court would then decide the law to apply, between common law or customary law, having regard to the particular circumstances of the case, the parties before it, the deceased's lifestyle and the nature and magnitude of the deceased's estate. The same application could be made by a beneficiary aggrieved with a distribution order of the Customary Court. Such a person would be required to make such an application to the appropriate Customary Court which may order that the estate be reported to the Master of the High Court and administered under the Administration of Estates Act.

The decision in the Pony Hopkins Case

In the particular circumstances of this case, the court found as follows. First, that the estate of the late Nkopo Phiri and his wife Ntuka Phiri was to devolve under customary law. They were Bakgatla tribespeople, living in their home village of Mochudi, and further, the issue before the court with regard to their estate was customary law dispositions of property made during their lifetimes.⁷⁸ Second, that the Master of the High Court does not have unlimited jurisdiction over the administration of all estates in Botswana. This is because the estates of deceased tribesmen who die intestate are governed by the customary law.⁷⁹ Third, estates reported to the Masters office should devolve under the Administration of Estates unless there was some dispute. In this regard, the Master would have the capacity to administer estates reported to his office even if the applicable law was customary law.⁸⁰ Fourth, the lifestyle of a deceased tribesman could exclude him from the operation of the Administration of Estates Act.⁸¹ Fifth, the size of the estate or its value would be no bar to customary courts distributing such an estate. Further, distributions of customary estates are made by the

⁷⁷ *Pony Hopkins* (n. 15 above) paras 60– 63.

⁷⁸ *Pony Hopkins* (n. 15 above) para 66b.

⁷⁹ *Pony Hopkins* (n. 15 above) para 65a.

⁸⁰ *Pony Hopkins* (n. 15 above) para 66b.

⁸¹ *Pony Hopkins* (n. 15 above) para 66b.

family in consultation with the elders in the first instance and not by the customary court.⁸²

The next section considers the separate opinion of Judge of Appeal Lesetedi. Though he arrived at a similar conclusion, Judge of Appeal Lesetedi provided separate reasons for his finding which are edifying and serve to buttress the finding that the mode of life test is to be preferred over a strict interpretation of section 3 of the Administration of Estates Act.⁸³

4. The Lesetedi Separate opinion

Judge of Appeal Lesetedi agreed with the findings Judge President Kirby in the main judgment on both reasoning and outcome.⁸⁴ However, he opted to write a separate opinion to specifically address the meaning of the words “member of a tribe or tribal community.”⁸⁵

The meaning of the word “member of a tribe or tribal community”

Judge of Appeal Lesetedi pointed out that two schools of thought had developed on the interpretation of what was a member of a tribe means. On the one hand, the appellants argued that membership of a tribe did not make one a tribesman and in fact, mode of life was the determining factor. The Respondents argued the opposite. That one’s personal law was customary law simply by the fact of belonging to a tribe. Mode of life was therefore irrelevant.⁸⁶ In order to arrive at the true meaning of the word “tribesman”, Judge of Appeal Lesetedi sought to discover the purpose of the Administration of Estates Act.

According to Judge of Appeal Lesetedi the best ways to discover the purpose of any statute is to consider the social, economic or legal mischief that parliament intended to resolve through legislation.⁸⁷ He also emphasised that the role of the courts was to give effect ascertain and give effect to the true intention of parliament. He found section 26 of the Interpretations Act instructive in their providing that all enactments must be given their fair and liberal construction best to attain their true spirit and intent. Section 27 of the Interpretations act was also helpful in interpreting

⁸²Pony Hopkins (n. 15 above) para 66c.

⁸³ *Pony Hopkins* (n. 15 above) para 64– 65.

⁸⁴ *Pony Hopkins* (n. 15 above) Lesetedi opinion para 1.

⁸⁵ *Pony Hopkins* (n. 15 above) Lesetedi opinion para 6.

⁸⁶ *Pony Hopkins* (n. 15 above) Lesetedi opinion para 5.

⁸⁷ *Pony Hopkins* (n. 15 above) Lesetedi opinion at para 8. See also *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 at 882.

statutes by providing that courts should lean toward interpretations that give effect to statutes and not those that render statutes ineffective.⁸⁸

In applying the principles above, Judge of Appeal Lesetedi noted that the Administration of Estates Act came into force in 1972 at a time when Botswana was a least developed country with no road network to speak of, with a rudimentary and inaccessible Master's Office, and with 90 percent of the population living in the rural areas. To his mind, Parliament enacted section 3(a) of the Administration of Estates Act having had regard to the fact that the population had access to a reliable, simple inexpensive, convenient and accessible means of administration of deceased estates through the institution of customary law. Parliament recognised that the distribution of estates under statutory law would have been alien, expensive and inaccessible to most citizens.⁸⁹ The strictures of section 3 were not absolute though. The law still provided tribesmen a means to opt-out of the application of customary law to their deceased's estates. This was possible in two ways. First, through the "mode of life test". This test was created by the 1921 Dissolution of Marriages of Persons Subject to Customary Law (Disposal of Property) Act. According to section 2(1) persons married according to the rites of Christian religion before 1 April 1917 and person married by a marriage officer under the Marriage Act on or after 1 April 1917 until July 1926 could, upon the death of either spouse, apply to the court to have the devolution of their property excluded from the customary law if the results of the devolution would not be just and equitable under customary law, having regard to the mode of life of the spouses. The second route to escape the application of section 3 of the Administration of Estates Act he noted was the Married Persons Property Act.⁹⁰ Section 5(1) as read with section 5(2) of the Married Persons Property Act provided that customary law would apply to the property of married persons, subject to the provisions of the 1921 Dissolution of Marriages of Persons Subject to Customary Law (Disposal of Property) Act 1921 Dissolution of Marriages of Persons Subject to Customary Law (Disposal of Property) Act. Section 5(1) was in effect reinforcing the status quo existing at the time that the law applicable to tribesmen was customary law unless specifically excluded through the application of the mode of life test or through execution of a valid will. However, section 5(2) took matters a little further and for the first time, and allowed persons, upon marriage, to specifically exclude customary law from the devolution of their property through a signature to that effect. The upshot of this development is that the mode of life test would no longer be

⁸⁸ *Pony Hopkins* (n. 15 above) Lesetedi opinion para 7.

⁸⁹ *Pony Hopkins* (n. 15 above) Lesetedi opinion paras 9 – 10.

⁹⁰ Act 69 of 1970 which was further amended in 2014.

necessary. A couple could, by signing a section 5(2) instrument, escape the bounds of customary law.⁹¹

Judge of Appeal Lesetedi noted that no one could have predicted the meteoric economic transformation that Botswana would experience, transforming itself from a least developed country with a negligible number of educated people to a middle-income country with an urban population of more than 60%.⁹² The country transformed with massive infrastructural growth and a good road network. The courts became more accessible and as Lesetedi observes, many people now live a more modern life where the Master's Office is the more convenient and accessible route to resolve devolution matters. Judge of Appeal Lesetedi states as follows

'The mischief or object of section 3(a) no longer applies to the majority of the people. Without statistical data, one can still confidently believe, from divorce cases that come before the courts, that many people who marry under the Marriage Act, sign an instrument under the Married Persons Property Act to exclude the application of customary law. Many unmarried persons do not get to make the same deliberate choice because they have not gone into matrimony. Yet, some who had in their marriages consciously excluded the application of customary law and subsequently divorced have maintained the same mode of life pointing away from subscribing to a customary choice of law. It would be absurd and inconsistent with the intention of the legislature to have a law which they consider alien to them and of which they had previously derogated from, apply to the devolution of their estates'⁹³

Judge of Appeal Lesetedi correctly noted that many tribesmen had nothing better than "tenuous links" to the tribal roots and that accessing the customary law processes was for them "cumbersome and expensive if not obscure" because their day to day lives had little or naught to do with customary rules, norms, and practices.⁹⁴ Whilst recognising that customary law was not static and that it continued to grow, Lesetedi found that the law, at this time, was not well equipped to deal with complex estate matters that may require the participation and protection of third parties, for instance, creditors. Judge of Appeal Lesetedi concluded that affording section 3(a) a restrictive meaning that is holding that it applied to persons solely by accident if birth, would lead to undue hardship and may create difficult unintended challenges.⁹⁵

⁹¹ *Pony Hopkins* (n. 15 above) Lesetedi Opinion para 11 to 13.

⁹² 2011 Population and Housing Census Analytical Report Statistics Botswana 2014.

⁹³ *Pony Hopkins* (n. 15 above) Lesetedi opinion at para 15.

⁹⁴ *Pony Hopkins* (n. 15 above) Lesetedi opinion para 16.

⁹⁵ *Pony Hopkins* (n. 15 above) Lesetedi opinion paras 18 and 19.

5 Conclusion

In conclusion, the principles' elucidated, in this case, were long-awaited. The *Pony Hopkins* decision provided much-needed clarity on the meaning and scope of section 3 of the Administration of Estates Act. The strictures of the word tribesman, strictly interpreted in *Thipe*, have now been loosed. This judgment is now in lockstep with current societal norms surrounding cohabitation, marriage, children, life and death and distribution of estates after death. The law now stands as follows.

First, section 3 of the Administration of Estates Act is a choice of law section. Where there is no dispute that a person is a tribesman, his property should devolve under the customary law. Where an estate is reported to the Master under the Administration of Estates Act, then the Master must distribute the estate under the common law where the deceased is not a tribesman, and there is no allegation that he may be one, or where the deceased has specifically expressly excluded the operation of customary law through a will or signing the relevant instrument under section 5 of the Married Persons Property Act. Choice of personal law made by will or exclusion of the application of the customary law upon marriage under section 5 of the Married Persons Property Act should be respected and given effect.

Second, where there is a dispute regarding the status of the accused as a tribesman, the mode of life of the deceased will determine the choice of law. The court will be bound to examine the life of the deceased, his assets, the size of his estate, his connections with rural and modern life to determine which law would best provide for the devolution of the estate.

Third, the Master may, where an estate is reported to his office, administer the estate under the proper law, including customary law. In other words, nothing precludes the Master of the High Court from administering an estate reported to his office according to customary law where this is the applicable law. Where a person has partially disposed of his property under a will but has made some indications of voluntary testamentation under customary law, a proper reading of section 3 of the Administration of Estates Act would require that the Master respect such dispositions and give effect to them.

Lastly, the master does not have jurisdiction over all estates of deceased persons in Botswana. Estates of deceased tribesmen who die intestate are governed by the customary law.

Citizenship and Customary Law in Africa

The *Pony Hopkins* judgment marks the end of a long debate regarding the meaning of the words tribesman under section 3 of the Administration of Estates Act. The conclusions reached by the court are satisfactory and responsive to societal change. No longer shall one have to pose the question - "who is a tribesman?"

BIBLIOGRAPHY

Literature

Macharia-Mokobi, E (2013) 'Who is a tribesman? An Examination of the Continued Utility of section 3 of Botswana's Administration of Estates Act' 17 *University of Botswana Law Journal* 1-26.

Cases

BHC v Letsholo Misca 399/93

Botswana Democratic Party and Another v Umbrella for Democratic Change and Another CACGB 114 – 14 (unreported)

Image Tongomani Khilane v The Registrar of the High Court and Another, Civil Appeal no F 171 of 2003.

Mmereki v Seleke and Another 2001 (2) BLR 601.

Phiri and 3 others Civil Appeal No. CACGB 087 – 17 (Unreported).

Pony Hopkins v The Representatives of the Estate of the Late Nkopo Phiri and Ntuka

Popego Obopile v the Attorney General, 2005 (1) BLR 86 (CA)

Samsam v. Seakarea 2004 (1) BLR 378

Selato v Moaro. [2010] 3 BLR 565 (CA).

Sipo Sami Engineering v Seipobi [2009] 2 BLR 196 CA.

Thipe v Thipe, 2007 (3) BLR 273).

Tshepo Mbenge Mosienyane v Lesetedyana Lesetedi (N.O) and 15 others, Misca F 257/2005.

Foreign Cases

Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800

Table of Legislation

African Divorce Proclamation No. 19 of 1926

Administration of Estates Act

Dissolution of Marriages of Persons Subject to Customary Law (Disposal of Property) Act Cap 29:05

Interpretations Act Laws of Botswana Chapter 01:04.

Marriage Act of 1917

Married Persons Property Act, No. 69 of 1970; Laws of Botswana Cap 29:03.