

IN THE HIGH COURT OF LESOTHO

In the Application of :

MAIME MOKOLOKOLO

Applicant

v.

MOOROSI PITA MOKOLOKOLO
DISTRICT SECRETARY

1st Respondent
2nd Respondent

J U D G M E N T

Delivered by the honourable Acting Chief Justice Mr.
Justice J.L. KHeola on the 4th day of September, 1986.

On the 1st day of September, 1986 the applicant brought an urgent application in which he sought a Rule Nisi to be issued calling upon the respondents to show cause why:

- "1. (a) First Respondent shall not be restrained from stopping applicant from burying the body of applicant's father the late Sello Alexander Mokolokolo at Ha Ratsiu Teyateyaneng in the district of Berea.
 - (b) First Respondent shall not be interdicted from burying the body of the late Sello Alexander Mokolokolo.
 - (c) Second Respondent shall not be ordered to allow Applicant to have the body of the late Sello Alexander Mokolokolo which is at Teyateyaneng Government Hospital Mortuary for burial.
 - (d) Why First Respondent shall not be directed to pay costs of this application.
2. That the Rule operate as an Interim Interdict pending the the finalisation of this application."

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I granted the rule and made it returnable on the 3rd September, 1985. Only the 1st respondent opposed the confirmation of the rule on the ground that the applicant's mother was not legally married to the late Sello Alexander Mokolokolo.

Most of the facts disclosed by the affidavits are common cause. They are that on the 5th August, 1986 Sello Alexander Mokolokolo (hereinafter referred to as the deceased) died at his home at ha Ratsiu, Teyateyaneng in the district of Berea. Before he went to live at Ha Ratsiu the deceased lived at Qeme ha Pita where most of his family are still living. He left Qeme in 1949. The deceased's father is the half-brother of the father of the 1st respondent. The first wife of the deceased was the late Alice who passed away in 1985. She had no male issue.

It is common cause that the deceased and the mother of the applicant had been living together as man and wife for well over forty years, and that the applicant was fathered by the deceased. That during the lifetime of the deceased no one ever challenged the validity of his marriage to the applicant's mother ('Maseitebatso), in fact, one of the applicant's sisters was brought up by the 1st respondent. The applicant had made arrangements to bury the body of deceased on the 16th August, 1986 but the 1st respondent went to the Government mortuary where the body was kept and informed the authorities concerned that the body should not be released to the applicant because he (1st respondent) has a better title or right to it than the applicant. The 2nd respondent then decided that he would not release the body to anybody unless he was served with a court order.

It seems to me that the decision of the 2nd respondent was rather unfair to the applicant. His records clearly showed the name

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of a person who had brought the corpse to the mortuary. The 2nd respondent was keeping the corpse on behalf of that person. He should have told the 1st respondent that unless he (1st respondent) served him with a court order within a specified period, he would release the corpse to the person who had brought it to the mortuary. His decision forced the applicant to incur the expenses of bringing this application to Court and yet it was the 1st respondent who had to incur such expenses. The first respondent did not take any action for about two weeks after stopping the 2nd respondent from releasing the corpse to the applicant. This inaction on his part tends to show that he did not have genuine interest in the corpse and did not care much how long it remained in the mortuary.

I now turn to the main issue in this application, viz. the validity of the marriage between the deceased and 'Maseitebatso. On the return day I decided that I would hear viva voce to resolve the issue. The applicant's evidence was that he took the dead body to the mortuary and that his sister, Seitebatso, signed for it at the mortuary. He testified that his mother is a mental patient at Mohlomi Mental Hospital though she has lucid intervals. His will and that of his mother is that the deceased should be buried at his (deceased's) home at ha Ratsiu.

'Maletsika Pita deposed that the father of the deceased was one Liau Mokolokolo who is the half-brother of her late husband Nyefolo Christopher and 1st respondent's father Lekhotso Mokolokolo. She was present in 1945 when the deceased married 'Maseitebatso. She was sent with the late Clement Pita and 'Masechaba Pita to go to Makeneng and handed over the "bohali" cattle for 'Maseitebatso. They gave the parents of 'Maseitebatso an amount of £45 which was computed as 15 head of cattle as each beast was valued

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at £3. She said that it was in 1952 or 1953 when they paid the "bohali" cattle. She denied that it was not Sesotho custom that women should be assigned such duties. Her evidence was that when they gave the "bohali" cattle to the parents of 'Maseitebatso it was never disclosed to them that 'Maseitebatso was previously married to another man. When the deceased abducted 'Maseitebatso in 1945 or 1946 her late husband, Christopher was still alive, and went to negotiate with the parents of 'Maseitebatso. However no "bohali" cattle were paid until 1952 or 1953 after the death of her husband.

The second witness was one Halekheteloe Nketsi. He is the brother of 'Maseitebatso. He remembers that his sister was abducted by a man named Rapase and she never went there again. After that she was abducted by the deceased but he does not know how many cattle were paid as "bohali" because at the relevant time he was living at the cattle post and came home once in a year.

The first respondent deposed that he was 25 years old when the deceased started cohabiting with 'Maseitebatso in 1954. He, however, admits that Seitebatso was born in 1948. He knows very well that no "bohali" was paid.

Teboho Ponya is an old man of 80 years of age. His evidence was that the deceased and 'Maseitebatso lived as man and wife and that their children were regarded as legitimate. He does not know anything about the "bohali" for 'Maseitebatso but he admits that it could have been ^{paid} without his knowledge because in the case of Alice he had ^{been} assigned to take the "bohali" cattle to her parent's home. On that occasion he was accompanied by a lady named Maria.

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The 1st respondent hopelessly failed to prove on a balance of probabilities that the deceased was not legally married to the mother of the applicant. The evidence shows that the 1st respondent was about 12 years old when the marriage took place and that he could not have known that any "bohali" was paid. 'Maletsika Pita gave me the impression that she was a truthful witness and knew what she was talking about. Her evidence was challenged on the ground that women are never assigned to take "bohali" cattle to the home of the girl. The 1st respondent's own witness Teboho Ponya said that when he drove the "bohali" cattle to the home of deceased's first wife's parents he was accompanied by a woman.

I come to the conclusion that a valid marriage has been proved and that according to Sesotho law and custom the applicant is the heir. His mother has also expressed her wish that the deceased should be buried at his home at ha Ratsiu. The law has been stated in a number of cases as to who shall be entitled to bury the body where the deceased has not expressed his wishes as to his burial. The deceased's heirs should decide where the deceased ought to be buried (Tsepo Motlohi v. Eliza Lenono and another, CIV/APN/208/79, Human v. Human and others, 1975 (2) S.A. 251., Saiid v. Schatz and another, 1972 (1) S.A. 491 and Tseola and another v. Maqutu and another, 1976 (2) S.A. 418).

In the present case the deceased did not express his wish as to where he should be laid to rest, so the wishes of the heir and the widow must prevail.

The rule was confirmed with costs.


J.L. KHEOLA
ACTING CHIEF JUSTICE.

21st October, 1986.