

IN THE HIGH COURT OF LESOTHO

In the Application of :

APHAFIA KELIBONE MABONAApplicant

and

KHIBA MABONA Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 25th day of September, 1986.

The applicant herein has moved the court for an urgent order calling upon the Respondent to show cause (if any) why:

- "1. (a) The Respondent shall not be ordered to desist from burying the corpse of Joseph Tsepo Mabona, alternatively if the corpse has already been buried it shall not be exhumed and buried at the applicant's matrimonial home;
 - (b) The Respondent shall not be arrested and detained suspectus de fuga by Mafeteng Police pending the finalisation of this application.
 - (c) The applicant shall not be allowed to take the corpse of Joseph Tsepo Mabona and put same in the mortuary, pending the outcome hereof;
 - (d) The Mafeteng Police shall not be given authority to execute this process on the Respondent;
 - (e) The Respondent shall not be ordered to pay costs hereof.
 - (f) The applicant shall not be given such further and alternative relief.
2. That prayers 1(a), (b) and (d) operate as an interim order with immediate effect."

2/ The application

The application was brought to me at 11.00 p.m. on 6th September, 1986 and I was informed that the corpse had probably been buried during the day. For this reason I took the view that there was no longer any urgency to restrain the applicant from burying the corpse. Wherefor, I granted the order in terms of prayer 1 and not prayer 2 of the notice of motion. According to the return of service on 7th September, 1986, the order was served upon the Respondent who intimated his intention to oppose confirmation of the order and duly filed the answering affidavit. Replying affidavit was also filed by the applicant.

Briefly the facts disclosed by the affidavits are that Joseph Ts'epo Mabona got married to his first wife. Out of that marriage the Respondent was born. The wife, however, passed away.

According to her, in 1985 the applicant got married to Joseph Tsepo Mabona by civil rites. Copy of the marriage certificate was annexed. Respondent disputed the validity of that marriage and contended that after the death of his late mother his father, Joseph Tsepo Mabona, got married to a certain Alice Mabona according to Sesotho law and custom. At the time the purported marriage between the applicant and his father, Joseph Tsepo Mabona, was concluded, the latter was still married to Alice Mabona and could not, therefore, have entered into a lawful civil marriage with the applicant. For that reason Alice Mabona and not the applicant was the wife of Joseph Tsepo Mabona. Applicant hotly disputed the allegation and said there is no such person as Alice Mabona.

Although Respondent mentioned that Alice Mabona was married according to Sesotho law and custom he did not disclose that the requirements of a customary marriage were satisfied in accordance with the provisions of S.34 of Part II of the Laws of Lerotholi, nor has Alice Mabona filed an affidavit to support the Respondent's allegation that she was lawfully married to Joseph Tsepo Mabona.

3/ In my view

In my view the onus vested with the Respondent to prove that Alice Mabona (if such person exists) was married to Joseph Tsepo Mabona and the marriage still subsisted at the time the latter purported to conclude a civil marriage with the Applicant. He has not satisfactorily discharged that onus. On the other hand applicant has annexed a copy of her marriage certificate with Joseph Tsepo Mabona. That being so, I am prepared to accept that, on the evidence, the applicant was lawfully married to Joseph Tsepo Mabona.

It is common cause that on 12th August, 1986, Joseph Tsepo Mabona passed away whilst still working at the mines in the Republic of South Africa and arrangements were made by the mine authorities, to bring the corpse to Lesotho. The Respondent, who lives in the Republic of South Africa, received the corpse and on 5th September, 1986 transported it to the deceased's place of birth and not his matrimonial home, for burial without the consultation/consent of the applicant. In the mean time the applicant was making arrangements to have the corpse buried at the deceased's matrimonial home. When she found out that Respondent had conveyed the corpse for burial at the deceased's place of birth the applicant approached this court for an urgent order as aforesaid.,

It is not disputed from the evidence disclosed by the affidavits that the Respondent is the eldest son of the deceased, Joseph Tsepo Mabona and, therefore, his heir. On the face of the evidence I have accepted, it is clear that the applicant was civilly married to Joseph Tsepo Mabona and is, therefore, his widow.

The present dispute is clearly between the deceased's heir and widow regarding the place where the deceased's body is to be buried. The salient question is who has a final say in a dispute of this nature, the widow or the heir? In Mathibeli v. Chabalala (Civ/APN/76/85) p.4, this court quoted with approval the decision in Tseola and Another v. Maqutu and Another 1976(2) S.A. 418 at p. 424H where Munick, C.J. had this to say on the issue:

4/ ".....

".....Public policy and the sense of what is right dictates that, in a dispute of this nature the widow's wishes where she is an heir should prevail, and that it is her duty and her right to bury the deceased where she pleases."

(My underlining)

I have underscored the words "where she is an heir" in the above cited passage to indicate my view that the widow's wishes prevail where she is an heiress and not where the deceased has died leaving an heir. It is trite law that in Lesotho the eldest son of a deceased person is his heir. The question of whether the deceased's marriage had been concluded according to Sesotho law and custom or civil rites plays no part in it i.e. it does not affect the position of the eldest son as the deceased's heir.

In the present case the Respondent is the eldest son of the late Joseph Tsepo Mabona and, therefore, his heir. There is no way the applicant, who is deceased's widow, can be regarded as the heiress during the life time of the Respondent. The question I have earlier posted viz. whether the heir or the widow has a final say in a dispute of this nature must obviously be answered in favour of the heir who is the respondent in this case.

That should be enough to dispose of this matter for if the Respondent has a final word as to where the body of his father, Joseph Tsepo Mabona, is to be buried the applicant must of necessity fail in her prayer that the body should be exhumed and reburied at a place of her choice.

In the light of what has been said it is obvious that the order made on 6th September, 1986 ought to be discharged and it is accordingly ordered. This being a family dispute, the order that I make is that each party will bear his/her own costs.

B.K. MOLAI

JUDGE

25th September, 1986.

For Applicant : Mr. Z. Mda,
For Respondent : Mr. Nthethe.