

IN THE HIGH COURT OF LESOTHO

In the Application of :

MARTHA MAMAKARA LEPELESANA

Applicant

V

TAOA LEPELESANA

1st Respondent

EMMANUEL MALEFO LEPELESANA

2nd Respondent

LEPELESANA LEPELESANA

3rd Respondent

JOSEPH PEISO LEPELESANA

4th Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 3rd day of October, 1986.

The applicant herein moved the court for a Rule Nisi calling upon the Respondents to show cause on a date to be determined why:

- "(1)(a) The Respondents should not be restrained from proceeding with the burial of the applicant's husband on 20th September, 1986 as previously arranged by them. That the applicant has a right to determine the place where her late husband can be buried;
- (b) The Respondents should be restrained from saying and/or using abusive language to the applicant in regard to the burial of the applicant's husband;
- (c) The Respondents should not be restrained from causing any trouble during the funeral of the applicant's late husband.
- (d) The authorities of Queen Elizabeth 11 Hospital should not be ordered to release to the applicant her late husband's death certificate;

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- (e) Granting such further and/or alternative relief as the Honourable Court may deem fit.
 - (f) The Respondents should not be ordered to pay the costs of this application jointly;
- (2) That prayers (b) (c) and (d) and prayer (a) to the extent that it restrains the Respondents from proceeding with the burial of the deceased should operate as an immediate interdict until the finalisation of this application."

On 16th September 1986 I granted the application as prayed and on 17th September, 1986 the rule was duly served on the Respondents. 2nd and 4th Respondents intimated their intention to oppose confirmation of the rule. The founding, answering and replying affidavits were filed by the applicant, the two Respondents and the applicant respectively.

It may be mentioned that in addition supplementary affidavits were filed by the parties but these were subsequently withdrawn and rightly so, in my opinion, because the Rules of this court permit only three sets of affidavits to be filed unless, of course, the court has ordered otherwise. It is also significant to mention that after reading the affidavits it became clear to me that there were a number of disputed issues, in this matter, that could not be decided on affidavit papers. Wherefor, I pointed out to the legal representatives of the parties that it might be necessary to order viva voce evidence to be led. In order to save time it was agreed by both counsels that the parties should proceed straight away to call witnesses. I accordingly ordered viva voce evidence to be adduced even before hearing arguments.

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At the commencement of the hearing, the Court was informed that the applicant was withdrawing the application against the 1st and the 3rd Respondents who had not opposed confirmation of the rule. The hearing therefore proceeded against only the 2nd and the 4th Respondents.

It is common cause from the affidavits and the evidence adduced before me that on 12th September, 1986 a certain Ramokotjo Vincent Lepelesana passed away at Queen Elizabeth II Hospital in Maseru. During his life time Ramokotjo got married to a certain woman by the name of Lorah. The marriage was later dissolved by this Court. He then got married to the present applicant by civil rites. A marriage certificate was handed in as Exh.A. The marriage was never dissolved and there were four minor children born of that marriage - three boys and one girl.

According to the applicant she was therefore, the sole widow of the late Ramokotjo Vincent Lepelesana. However, following the death of her husband the Respondents held a family meeting at which a decision was taken without her consultation, that the deceased should be buried on 20th September, 1986 in the yard of his matrimonial home. When she tried to point out that it was the deceased's wish that he should be buried at a mission grave yard the Respondents became abusive and told her that she did not have a say in the matter. They in fact told her that she was never lawfully married to the deceased for at the time she purportedly got married to him by civil rites the deceased was already married according to Sesotho law and custom to the mother of the 4th Respondent who

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was, therefore, the deceased's customary heir. She was told to hand over the deceased's bank books and threatened with expulsion from the family of Lepelesana. The 4th Respondent had in fact instructed the authorities at Queen Elizabeth II hospital not to release the deceased's death certificate to her.

The Respondents denied to have used any abusive language towards the applicant or demanded the deceased's bank books from the applicant and threatened her with expulsion from the family of Lepelesana. They however conceded that at the time the applicant got married by civil rites to the deceased, the latter was already customarily married to the 4th Respondent's mother who was, therefore, the senior widow of the deceased. Consequently the 4th Respondent was the deceased's customary heir who had a final say about when and where the remains of his father were to be put to rest.

There can be no doubt therefore, that there is here a dispute about whose wishes should prevail regarding the burial of the deceased - the wishes of the applicant or that of the 4th Respondent. It seems to me the decision in the matter pivots on whether or not the mother of the 4th Respondent was legally married by the deceased and the 4th Respondent, therefore his legitimate son. In this regard D.W.3, Martha 'Makhosi Lepelesana (nee Tsotsotso) told the court that in 1948 she was working at a shop in Cape Town when she fell in love with the deceased Ramokotjo Vincent Lepelesana. They then lived as husband and wife and on 13th March, 1950 the 4th Respondent was born out of that union. The deceased then wrote home and reported the birth of the 4th Respondent

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to his mother (P.W.1). P.W.1 quickly replied advising that the names of the 4th Respondent were Joseph Lebohang Peiso Lepelesana.

Shortly, thereafter, D.W.3 received a letter from her maiden home in Ficksburg informing her that her own mother was seriously ill. With the agreement of the deceased she and the 4th Respondent who was still suckling went to Ficksburg. The deceased later came to see them in Ficksburg. After he had returned to Cape Town. D.W.3 was told by her parents that the deceased had paid as bohali some money which amounted to eight (8) head of cattle. Later on, the deceased wrote her a letter in which he advised her that his parents would come to Ficksburg. P.W.1 subsequently came to Ficksburg and D.W.3 was again informed by her parents that she (P.W.1) had paid money which amounted to three (3) head of cattle as bohali. On her request the 4th Respondent was released to P.W.1 who returned to Lesotho with him. After this the deceased sent her (D.W.3) some money with which to return to him in Cape Town. She did return to Cape Town and join the deceased who fathered her second child Moeketsi. Moeketsi is now living with her in Ficksburg although he had previously been staying with the deceased in Lesotho.

After Moeketsi was born, D.W.3 came to Lesotho with the deceased who was on leave. It was during that time that she received another letter from Ficksburg advising that her mother had again taken seriously ill. She and the deceased rushed to Ficksburg. When his leave expired the deceased returned to his place of work in Cape Town

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but she remained in Ficksburg nursing her own mother. She never returned to the deceased who, however, once told her that he was intending to get married to another woman by the name of Lorah. As the deceased and the 4th Respondent had no one to wash and cook for them she approved of the marriage. She did not however, know of the marriage between the deceased and the applicant who used to work as a sales lady in the deceased's shop.

D.W.1 who is the second Respondent and the younger brother of the deceased testified that he was told by P.W.1 about the marriage of the deceased to D.W.3 and he himself had no personal knowledge of the matter. According to him at the time D.W.3 and the deceased came to Lesotho on leave they were with the 4th Respondent. He mentioned nothing about another child called Moeketsi. He did, however, concede that it was his mother, P.W.1 who brought the 4th Respondent to her home. Both D.W.1 and D.W.2, Joseph Lebohang Peiso Lepelesana, who is the 4th Respondent, testified that the deceased was fond of the 4th Respondent, treated him as his son and even paid bohali for his marriage.

In her evidence, P.W.1 Mataoa Lepelesana, testified that she was the mother of the deceased Ramokotjo Vincent Lepelesana who succeeded her first born child, Taa Lepelesana. She denied that D.W.3 was married to the deceased and therefore her daughter-in-law.

According to P.W.1 before he got married to Lorah the deceased had informed her that he had fathered a child of D.W.3 who originally came from Ficksburg but was, at the time, working in Cape Town. The deceased informed her that according to the law of South Africa he had to

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maintain that child until it attained the age of 20 years. He was, however, unable to do so while the child was living in South Africa.

According to P.W.1 the child was brought to her home at Ha Ramatlalla by the deceased himself. That child was the 4th Respondent whose names were written on a piece of paper as Jeremiah Lebohang Tsotsotso. She brought up the 4th Respondent until he reached the school going age. The deceased then took him to Alwynskop where he was living with his wife Lorah.

P.W.1 later learned that the 4th Respondent was re-named Joseph Peiso Lepelesana. She denied ever sending those names to the deceased when the 4th Respondent was born in Cape Town. Nor had she ever gone to Ficksburg and met D.W.3's parents whom she did not even know. She conceded however that when the 4th Respondent got married to his first wife the deceased did pay bohali although she personally did not know how many cattle.

After the dissolution of the marriage between Lorah and the deceased, the latter got married to the applicant according to Sesotho law and custom. The marriage was subsequently solemnized according to civil rites. At the time of his death, the deceased had therefore, only the applicant as his wife.

P.W.2, Taa Lepelesana, told the court that in 1950 he and the deceased were respectively working at Sea Point and Salt River in Cape Town when his father instructed him to go to the deceased and inform him that the parents of a girl he (deceased) wanted to marry had agreed. He

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Accordingly, went to the house where the deceased was living at Salt River. He found the deceased with D.W.3 who was pregnant.

After the deceased had left for work D.W.3 told him that his brother (deceased) had made her pregnant and as a result she had lost her job. When the deceased returned home from work P.W.2 confronted him about what D.W.3 had reported to him (P.W.2). The deceased conceded to have impregnated D.W.3 and told P.W.2 that he was in danger of being sued for seduction and maintenance in accordance with the laws of South Africa. He asked him not to disclose the matter to their parents and he (P.W.2) agreed.

Shortly after he had returned to his place of work P.W.2 received a message that D.W.3 had given birth to a baby. He went to the hospital and found that D.W.3 had a baby boy. That baby was the 4th Respondent who clearly resembled the deceased. He was satisfied that the 4th Respondent had been fathered by the deceased.

Before D.W.3 could be discharged from the hospital her brother arrived saying he had brought the names of the child. The 4th Respondent was given the names of Jeremiah Lebohang Tsotsotso. When he asked him what he was proposing to do about D.W.3 and the child the deceased told him (P.W.2) that he would return them to Ficksburg.

Shortly thereafter, P.W.2 left Cape Town and went to work in Johannesburg. When he later came to Lesotho he was surprised to find the 4th Respondent staying at Ha Ramatlalla with P.W.1 who explained that the child had

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been brought to her home by the deceased.

It was only when the 4th Respondent was already 16 years old and attending school at Villa Maria that P.W.2 found that he had been renamed Joseph Peiso Lepelesana. The deceased's explanation was that he had difficulties in registering the 4th Respondent at school under the names he had from South Africa. P.W.2 denied therefore that D.W.3 was ever lawfully married to the deceased and the 4th Respondent was his legitimate child.

According to P.W.2 he was once invited by D.W.3 to go to Ficksburg where her parents wanted to have a chat with him. When he came to them D.W.3's parents asked him when the 4th Respondent would be returned to them. He suggested that D.W.3 should come to Lesotho with him and discuss the matter with the deceased. D.W.3 had however difficulty with her travelling documents and could not cross into Lesotho.

According to him when the 4th Respondent got married, P.W.2 was sent to Ficksburg by the deceased to inform the family of Tsotsotso. He was given an amount of £30 which he paid as bohali to the parents of the wife of the 4th Respondent. He confirmed the evidence of P.W.1 that after the dissolution of his marriage with Lorah the deceased got married to the applicant who was his only wife at the time of his death.

P.W.3, Martha Mamakara Lepelesana who is the present applicant testified that she knew nothing about the marriage between D.W.3 and the deceased. She got married to the deceased after he and Lorah had divorced. They first got

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married according to Sesotho Law and custom in 1973. On 5th September, 1979 their marriage was solemnized according to civil rites. At the time the deceased passed away she was her only wife.

P.W.3 conceded that at the time she got married to the deceased the 4th Respondent was already staying with him. The deceased explained to her that the 4th Respondent's home was in Ficksburg and he (deceased) was just bringing him up. Deceased never disclosed to her that he had fathered the 4th Respondent who was, therefore, his child.

It is trite law that for a valid Sesotho customary marriage, three requirements must be satisfied, viz, the agreement of the parties to the marriage, the agreement of the parents or those who stand in loco parentis to the parties as to the marriage and the bohali and the actual payment of the bohali or part thereof. See S. 34(1) of Part 11 of the Laws of Lerotholi. In the instant case there is the evidence of D.W.3 that she lived with the deceased as husband and wife in Cape Town. Out of that union the 4th Respondent was born. This was confirmed by P.W.2. There was also the unchallenged evidence of D.W.3 that the deceased had been going with her to her maiden home in Ficksburg.

In my view the deceased would not have gone with D.W.3 to her maiden home unless the latter was his girl friend with whom he had agreed to enter into a marriage contract. It seems reasonable therefore to infer from this that the deceased and D.W.3 had agreed to marry each other. That granted, it must be accepted that on the evidence, the first requirement of a valid Sesotho

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customary marriage has been satisfied.

The evidence of D.W.3 that P.W.1 went to Ficksburg to negotiate with her (D.W.3's) parents the question of the marriage between herself and the deceased and that 3 head of cattle were paid as bohali is, however, denied by P.W.1. At any rate D.W.3 herself conceded that she had no personal knowledge that P.W.1 entered into marriage negotiations with her (D.W.3's) parents and in fact paid the 3 head of cattle as bohali.

What D.W.3 was told by her parents has clearly no evidential value for the simple reason that it is inadmissible hearsay evidence. Indeed, in reply to a question from the bench as to how it came that when she went to seek an agreement for the marriage between the parties P.W.1 already carried with her the money for the bohali upon which there was apparently no agreement as yet D.W.3 conceded that she was wrong and the truth of the matter was that she had been told that the money for the bohali had been brought by P.W.2 at a later occasion. That was however denied by P.W.2.

Apart from being inadmissible evidence, the story of D.W.3 that she was told by her parents that the deceased himself had paid some money amounting to 8 head of cattle as bohali is highly improbable for at that time the parents of the deceased had not yet met with the parents of D.W.3 to reach any agreement regarding the marriage of their children and the quantum of bohali. In the absence of any such agreement by the parents of either side the deceased could not have started paying on his own the cattle for bohali.

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In my view, for a valid Sesotho customary marriage, all the requirements referred to under the provisions of S. 34(1) of Part 11 of the Laws of Lerotholi must be satisfied. The second requirement has, on a balance of probabilities, not been satisfied. I come to the conclusion, therefore, that on the evidence no valid Sesotho customary marriage has been proved between the deceased and D.W.3. That being so, the 4th Respondent cannot be regarded as the deceased's legitimate child and therefore his customary law heir, notwithstanding the fact that he had fathered him.

In the result I come to the conclusion that the first woman to whom the deceased was lawfully married was Lorah. It is not disputed that after the dissolution of their marriage the deceased civilly got married to the present applicant who was his only lawful wife at the time of his death. As has been indicated earlier, the deceased had no children with Lorah. The children born out of the marriage between the deceased and the applicant have however not yet attained the age of majority. There are many decisions indicating that where a spouse dies leaving no heir who has reached the age of majority public policy and the sense of what is right dictates that the wishes of the remaining spouse should prevail and that it is his/her duty and right to bury the deceased where he//she pleases - Tseola and Another v Maqutu and Another 1976(2) S.A. 418 p. 424H; Mathibeli v Chabalala CIV/APN/76/85 (unreported) Mabona v Mabona CIV/APN/280/86 (unreported).

From the foregoing it is obvious that the view that

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I take is that in the instant case the wishes of the applicant regarding the time and the place ~~where~~ the remains of the deceased should be put to rest must prevail. I would therefore, confirm the order of 16th September, 1986. This being a family dispute I would make no order as to costs.

J U D G E.

3rd October, 1986.

For Applicant : Mr. Mphalane
For Respondent : Mr. Seotsanyana.