

IN THE HIGH COURT OF LESOTHO

In the Application of:

SAMUEL MAKHETHE MAFAESA

Applicant

and

KATISO MAKHETLA .....	1st Respondent
DISTRICT SECRETARY, MASERU .....	2nd Respondent
MINISTRY OF HEALTH .....	3rd Respondent
ATTORNEY GENERAL .....	4th Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Mr. Justice B.K. Molai

on the 18th day of June, 1990.

These are reasons for which on 15th June, 1990 I discharged the Rule Nisi which the applicant herein had, on 7th June, 1990, obtained, against the Respondents, in the following terms:

"1. That a rule nisi do hereby issue calling upon Respondents to show cause, if any, on a date to be determined by this Honourable court why:-

- (a) First Respondent and/or any member of Makhetla's family shall not be interdicted forthwith from burying the corpse of 'Matsie Mafaesa (alias Makhetla);
- (b) Third Respondent and/or officers subordinate to him shall not be directed to release the corpse of 'Matsie Mafaesa (alias Makhetla) to Applicant being the father of the deceased;
- (c) Respondent shall not be directed to pay the costs hereof;
- (d) Granting applicant such further and/or alternative relief.

2/ 2. That rule .....

2. That rule 1(a) operates with immediate effect as temporary interdict."

On 12th June, 1990 the first Respondent had intimated intention to oppose confirmation of the rule. The second, third and fourth respondents had not filed any notice of intention to oppose and it could, therefore, be assumed that they were prepared to abide by whatever decision would be arrived at by the court.

It was common cause from the affidavits filed by either parties that a certain Motlatsi Makhetla, an elder brother of the first Respondent, had abducted 'Matsie Mafaesa, the daughter of the applicant. It was not clear from the papers in what year the abduction had taken place. Whilst the applicant claimed, it was in 1964, the 1st Respondent said it was in 1962.

It was, however, further common cause that Motlatsi and 'Matsie had subsequently lived together as husband and wife. In 1977 Motlatsi passed away. On 19th May, 1990 'Matsie also passed away. They were survived by two daughters aged between 19 and 12 years i.e. they had no male issue who could be the heir to decide where and when the remains of 'Matsie would be put to rest.

In his affidavits the first respondent averred that, following the abduction of 'Matsie, his family had paid eleven (11) cattle as "bohali" to the applicant's family. The late 'Matsie had, therefore, been lawfully married to the family of Makhetla in accordance with Sesotho law and custom. That being so, the family of Makhetla and

not the Applicant had the right to bury the body of the late 'Matsie.

That was, however, denied by the Applicant according to whom the Makhethla family had paid only six (6) cattle as compensation for the abduction of 'Matsie. No cattle had been paid as "bohali". 'Matsie had, therefore, not been lawfully married to Makhethla family according to Sesotho Law and Custom or at all. As her father, the Applicant and not the first Respondent or the family of Makhethla was 'Matsie's heir who had the last word as to where and when her body would be buried.

It would appear that following her death the body of 'Matsie was placed at the mortuary of the third Respondent pending its burial. A dispute then arose as to who between the applicant and the first Respondent, representing the family of Makhethla had the right to bury the body of the deceased. In an attempt to resolve the dispute the parties were called before the office of the second Respondent who decided the dispute in favour of the first Respondent or the family of Makhethla. The applicant was unhappy with the decision, hence the present application.

As I saw it, the decision in this application pivoted around whether or not the deceased, 'Matsie, had lawfully been married to the family of the first Respondent. Whilst the first Respondent contended that the deceased had been lawfully married to the family of Makhethla, in accordance with the Sesotho

4/ law and custom, .....

law and custom, the applicant said she had not. The first Respondent had, therefore, to prove the existence of a lawful marriage between the deceased and Motlatsi, on the well known principle of he who averred bore the onus of proof.

It is trite law that the essentials of a Sesotho Customary Law marriage are that there must be

- (1) an agreement between the parties to the marriage.
- (2) an agreement between the parents of the parties or between those who stand in loco parentis to the parties as to the marriage and the quantum of "bohali" and
- (3) payment of part or all the "bohali" (vide S.34(1) of Part II of the Laws of Lerotholi).

The answering affidavit was deposed to by the first Respondent who averred that, following the abduction of 'Matsie by Motlatsi, the Makhetla family had initially paid seven (7) and later four (4) cattle to the family of the Applicant as "bohali" towards her marriage. Altogether eleven (11) cattle, had, therefore, been paid as "bohali". There were written documents as proof thereof. The documents had, however, been kept in the custody of Motlatsi and subsequently his wife, 'Matsie, both of whom had, as stated earlier, passed away and could not, therefore, be able to depose to supporting affidavits.

However, as proof that Applicant's daughter, 'Matsie, had been lawfully married to the family of Makhetla, the deponent averred that when she first arrived

in the family of Makhethla she was given the name of "Matsie" by the Makhethla family. Her first child with Motlatsi was born in 1965 and named "Tsie" by the family of Makhethla. When that child passed away in 1967 it was buried at the home of its father, Motlatsi, by the Makhethla family.

Furthermore deponent averred that when, in 1977, Motlatsi passed away, 'Matsie, was made to put on the mourning cloth by the Makhethla family. When the time to remove the mourning cloth came, the Makhethla family brought 'Matsie to the applicant together with a "Lehare" beast with which the latter performed the rituals according to Sesotho Law and Custom. The applicant never raised any objection to all these events because he knew that his daughter, 'Matsie, had in fact been legally married to the family of Makhethla.

As it has already been stated earlier, in his affidavits the applicant denied that following the abduction of the deceased, 'Matsie, eleven (11) cattle had been paid by the family of Makhethla. He averred that only six (6) cattle had been paid as compensation for the abduction, and not the "bohali", of 'Matsie.

The applicant conceded, however, that when she arrived at the family of Makhethla following her abduction by the late Motlatsi his daughter, the deceased, was given the name of 'Matsie"; her first child with Motlatsi was named "Tsie" by the family of Makhethla; when it subsequently passed away, the child was buried at the home of its natural father, Motlatsi, by the Makhethla

6/ family. ....

family. According to the applicant, the reason why he did not object to all that was because he hoped that the Makhetla family would eventually pay "bohali" towards the marriage of his daughter, 'Matsie.

Assuming the correctness of the averments that Motlatsi and 'Matsie eloped and lived together as husband and wife until they had, at least, three (3) children it must be accepted that they had agreed to marry each other. Again, if the applicant hoped, as he wished this court to believe, that following the elopement of his daughter, 'Matsie, with Motlatsi, the family of Makhetla would pay him the "bohali" cattle, it was reasonable to infer that he and the Makhetla family had agreed on the marriage of their children and the quantum of "bohali" cattle. It seemed to me, therefore, that the first and the second requirements of a Sesotho Customary Law Marriage had, on a balance of probabilities, been satisfied.

Indeed, Applicant further conceded that following the death of Motlatsi in 1977 the deceased, 'Matsie, did put on the mourning cloth and in due course the Makhetla family brought her to him together with the "Lehare" beast which he used to perform the Sesotho rituals for the removal of the mourning cloth. According to the Applicant his daughter, 'Matsie, had to put on the mourning cloth for fear that a bad luck might befall her if she did not do so after Motlatsi and she had lived together as husband and wife for many years.

7/ I was not .....

I was not persuaded. According to Sesotho law and custom a woman does not wear a mourning cloth following the death of a man to whom she is not legally married. On the contrary, it is only if she did that she may entertain fears that a bad luck will befall her.

Although the applicant averred that the family of Makhetla had not paid "bohali" cattle for the marriage of the deceased, 'Matsie, the first Respondent averred that the "bohali" cattle had, in fact, been paid. He was, in that regard, corroborated by Motsamai Chakache who deposed to an affidavit in support of the answering affidavit. In his supporting affidavit Motsamai averred that following the elopement of 'Matsie and Motlatsi, he and a certain Solomon Tjekesane were detailed by the family of Makhetla to go to, and meet, the applicant's family in connection with the marriage of 'Matsie. They did meet the applicant who was in the company of 'Mualle Mafaesa and Kopano Mafaesa. After some discussions, the applicant's party decided that "to complete the head" the Makhetla family would have to pay eleven (11) cattle because prior to her elopement with Motlatsi, 'Matsie had already had an illegitimate child not fathered by the former.

In my view, if "bohali" cattle had not been paid for the marriage of 'Matsie, the applicant would never have accepted the family of Makhetla and the "Lehare" beast which he admittedly used to perform the Sesotho rituals for the removal of the mourning cloth. But he did. That, in my finding, was a clear indication that

the first Respondent and Motsamai were testifying to the truth when, in their affidavits, averred that "bohali" cattle had been paid towards the marriage of the deceased, 'Matsie. In his denial that "bohali" cattle had been paid, the applicant was not being honest with the court. Assuming the correctness of my finding it was reasonable to infer that the third requirement of a Sesotho Customary Law Marriage had also been satisfied.

That being so, the answer to the question I have earlier posted viz. whether or not the deceased, 'Matsie, had been legally married to the family of the first Respondent had to be in the affirmative. Consequently I found that the deceased no longer belonged to the family of the Applicant but that of the Makhetla who had, therefore, the right to bury her corpse.

It had been contended that as there was a dispute on whether or not a valid marriage existed between Motlatsi and 'Matsie the issue should be reverted to viva voce evidence. It is to be remembered, however, that this court was approached on the basis of urgency. The deceased passed away on 19th May, 1990. Her corpse had since been lying in the mortuary waiting to be buried whilst at the same time the relatives were mourning with the resultant expenses according to our custom. If, on the papers before it, the court could come to a fair decision and avoid prolonging the matter more than it was necessary, viva voce evidence should not be lightly reverted to. On a preponderance of probabilities I was satisfied that the first Respondent had discharged the onus that vested on him viz. that there

9/ existed a .....



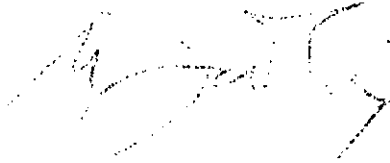
existed a valid marriage between Motlatsi and 'Matsie. I was not, therefore, prepared to agree with the contention that the question whether or not Motlatsi and 'Matsie had been legally married to each other should be reverted to viva voce evidence.

It was further argued that even if it could be held that a lawful marriage existed between Motlatsi and 'Matsie and the applicant had, therefore, no right to bury the body of the deceased, 'Matsie, the first Respondent had, himself, failed to show that he was the deceased's heir and, therefore the rightful person to bury her body.

Well, one thing clear to me was that the Makhetla family, and not the Applicant, had the right to bury the body of the deceased, 'Matsie, by virtue of her being lawfully married to that family. Nobody in the family of Makhetla claimed that he had a better right than the first Respondent to bury the deceased, 'Matsie, who admittedly died living no male issue as her heir. Until some body from the Makhetla family could approach this court and successfully claim a better right than the first Respondent, I found no good reasons why the first Respondent should not be allowed to decide how the remains of the deceased should be put to rest.

In the result, I discharged the Rule Nisi that had been granted on the 7th June, 1990 and allowed the first Respondent or the Makhetla family to bury the body of

the deceased, 'Matsie, forthwith.



B.K. MOLAI  
JUDGE.

18th June, 1990.

For Applicant : Mr. Pheko

For Respondent : Mr. Putsoane.