CIV/APN/194/90

IN THE HIGH COURT OF LESOTHO

In the Application of:

'MAMOTSEOA SENYANE — Applicant

v

RETSELISITSOE SENYANE	1st Respondent
LEBOHANG PULING	2nd Respondent
MOLELEKI SENYANE	3rd Respondent
MOTAUNG SENYANE	4th Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 30th day of August, 1990

The applicant is the wife of the deceased Sefatsa Edmund Senyane.

The applicant approached this Court ex-parte and prayed for an order restraining the respondents from burying the remains of her late husband.

The 1st respondent is the heir of the deceased by the latter's late wife who pre-deceased the deceased.

The applicant relying on what she alleges to be the deceased's "intention" interpreted by this Court to be the deceased's wishes or desire avers that the deceased during his life time expressed the wish to be buried at the parties' marital home at Lithabaneng. She avers that

/she

she heard over the radio on 30th July, 1990 that the respondents had resolved that the remains of the deceased were due to be buried at Ha Motloheloa on 11th August, 1990.

Expressing the view that this would be contrary to the wishes of the deceased the applicant felt that she would take no part in the burial arrangements intended for the deceased's burial elsewhere than at Lithabaneng Ha Keeiso. She accordingly approached this Court to have the respondents restrained from going ahead with burying the deceased at Ha Mamotho in MOtloheloa region.

It appears that the deceased prior to his death had disappeared. A search was mounted to secure him. Some days after his disappearance all that was recovered of him were bones and portions of the clothing believed to be his. The remains were recovered from the bed of the PHuthiatsana river which had previously been in flood.

It is common cause that there was ill-blood between the applicant and the respondents. The respondents expressed dissatisfaction with the manner the deceased had disappeared from his and the applicant's joint home. Their dissatisfaction was deepened by the fact that when recovered the deceased had long been dead and what remained of him were only bones. The applicant averred that respondents held her responsible for the death of the deceased. This allegation has not been denied by the respondents. It thus stands to reason that they truly believe the applicant murdered the deceased. A development of this proposition makes it difficult to comprehend how after murdering the deceased, the applicant could in turn wish to bury his remains.

The Court interpreted the word "intention" of the deceased as it appears in paragraph 12 of the applicant's founding affidavit to mean the deceased's wish. Used in the context of the paragraph where it appears taken in

/conjunction

conjunction with the subsequent paragraph where it is stated:

> "It is also the intention of 4th respondent that the wishes of the deceased be obeyed and that his remains be buried at Lithabaneng ....."

it becomes indisputable that the word intention as applied in paragraph 12 of the applicant's affidavit refers to the deceased's desire or wish.

Needless to say the respondents have not gainsaid this crucial factor which to all intends and purposes required them to challenge it if they felt - and I can think of no reason why they shouldn't have felt - that it stood starkly in the way of their own interests in this case.

Mrs Kotelo argued that the applicant failed to discharge the onus cast on her in that she did not call viva voce evidence to establish that it was the deceased's wish to be buried at Lithabaneng. But in my view there would be no need for the applicant to call any such evidence when no attempt by the respondents was made to gainsay the applicant's averment on as crucial a matter as this to the respondent's case. A principle has been enunciated in many cases that there is no call on the opposite side to call any witnesses to prove a fact which is not in issue. Small vs Smith 1954(3) 434 is authority for the view that the party calling the witness is entitled to know which facts are in issue and which not. Thus if a factor is let pass over in silence Counsel for the opposing side is entitled to assume that a fact is not in issue if it has been deposed to and is not challenged.

It is my considered opinion that this whole case stands to be resolved on the above principle. I am therefore satisfied that the applicant has discharged her onus.

It is now trite that where the deceased left no instructions as to the place of his burial the heir is to decide. If the heir for one reason or the other fails to

/decide

decide then the widow's right to decide prevails over any other person's to do so.

In this case the widow was uncontradicted in her averment that the deceased wished to be buried at the new home at Lithabaneng.

I accept an explanation offered from the bar in response to the assertion in the supplementary affidavit that the family practice was to bury the relatives at the family grave yard at Ha Motloheloa including the applicant's own children. The explanation from the bar is that the applicant's children were buried there before she and the deceased had removed to Lithabaneng. Thus the impression created by the respondents that the bodies of the applicant's children were conveyed from their parental home at Lithabaneng to Ha Motloheloa for burial is highly if not purposefully misleading.

It is not too remote a factor to infer that on account of the bad blood existing between the applicant and the respondents the deceased confided to the applicant where she should lay his remains to rest. She is after all his wife and her averment was not challenged.

The rule is confirmed with costs.

.....
J U D G E
30th August, 1990

For Applicant : Mr. Malebanye
For Respondents: Mrs. Kotelo