

IN THE HIGH COURT OF LESOTHO

In the Application of :

THABANG RAMOKONE Applicant

and

RAMAROBANE RAMOKONE 1st Respondent
MOJELA RAMOKONE 2nd Respondent
CHRISTIAN RAMOKONE 3rd Respondent

JAMES RAMOKONE Applicant

and

THABANG MORETELE DAEMANE Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 6th day of February, 1990.

On 25th January, 1990 the applicant, in CIV/APN/17/90, Thabang Ramokone, appeared before Lehohla J. and obtained (ex-parte) an interim Order whereby the Respondents were, inter alia, restrained from disrupting 'Malebaleho Ramokone's funeral which he was arranging for the 31st January, 1990. However, on the following day, 26th January, 1990, the applicant in CIV/APN/18/90, who is the 3rd Respondent in CIV/APN/17/90 also appeared before Kheola J. and obtained (ex-parte) another interim Order whereby the Respondent, who is the Applicant in CIV/APN/17/90, was restrained from burrying

2/ the corpse

the corpse of 'Malebaleho Ramokone and empowering him to bury the deceased. On 29th January, 1990 and by consent of the parties Lehohla J. ordered that the applications be consolidated. Although no notices of intention to oppose were filed in both applications answering affidavits were filed by the Respondents in CIV/APN/17/90 and the applicant in CIV/APN/17/90 also filed a Replying Affidavit.

In as far as it is relevant the facts that emerge from the affidavits are that 'Malebaleho Ramokone was lawfully married to her husband who pre-deceased her. On 12 January, 1990 'Malebaleho Ramokone herself passed away. No male issue was born of the marriage between 'Malebaleho Ramokone and her late husband. It is, therefore, common cause that the deceased and her late husband died leaving no male heir.

According to the averment of the Applicant in CIV/APN/17/90 supported by that of his mother, 'Mathabang Ramokone, the latter who is admittedly the daughter of the deceased, was never married to any man. The applicant was, therefore, brought up in the home of the deceased and her late husband who had always regarded him as their child and heir. The Respondents in CIV/APN/17/90 had never associated themselves with the affairs of the family of the deceased and her late husband. Indeed, they did not even attend the funeral of the deceased's husband consequently, the Applicant in CIV/APN/17/90 moved the court for confirmation of the order obtained against the Respondents on 25th January, 1990.

The Respondents concede that the Applicant in CIV/APN/17/90 is the son of 'Mathabang who is one of the daughters of the deceased. They further concede that the applicant in CIV/APN/17/90 was brought up by the deceased and her late husband. They aver that the

3/ applicant's

applicant's mother, 'Mathabang, was married to one Mohanoe Daemane. In support of this averment one Libitla Sekome deposed to an affidavit in which he averred that he used to be the right handman of the headman in their village. He knew that the applicant's mother was married to a certain Mohanoe who was, therefore the applicant's father. 'Mamahlelebe Daemane also deposed to an affidavit in which she averred that she was the widow of one Lebusa Daemane, the elder brother of Mohanoe. She knew that applicant's mother was married because when she arrived in the family of Daemane she ('Mamahlelebe) personally performed the necessary ritual ceremonies for a newly married woman. The applicant was given the name of Moretele by Daemane's Family and in 1981 applicant slaughtered a beast for his late father, Mohanoe.

It is trite law that in this country there are two types of marriage viz. civil rite marriage and customary law marriage. A civil rite marriage is proved by production of a marriage certificate whilst for a customary law marriage one has to prove the essentials laid down under S.34(1) of Part II of the Laws of Lerotholi. In their affidavits both Libitla Sekome and 'Mamahlelebe Daemane have conveniently avoided to prove either the civil rite marriage or the customary law marriage between the applicant's mother and Mohanoe Daemane. The onus of proof vested squarely on their shoulders on the well known principle that he who avers bears the onus of proof. They have failed to discharge that onus. I am not, therefore, convinced that the applicant's mother was lawfully married to Mohanoe Daemane.

It is significant that in his affidavit the first Respondent has deposed that he is married to one of the deceased's daughters. He is

4/ therefore,

therefore, the deceased's son in law and not her heir. In his affidavit the 3rd Respondent who is the applicant in CIV/APN/18/90 has deposed that he is the younger brother of the 1st Respondent. Although he avers that by the decision of the family of Ramokone he was appointed the heir in the deceased's house, a fact denied by the applicant in CIV/APN/17/90, the 3rd Respondent has neither called any member of Ramokone family who took part in the alleged family council nor produced any, document in support of his averment. For that reason I find his averment unconvincing. The 2nd Respondent made no attempt whatsoever to justify his opposition to confirmation of the interim order granted to the applicant in CIV/APN/17/90.

By and large, none of the Respondents in CIV/APN/17/90 has, on a preponderance of probabilities satisfied me that he has a better right than the applicant to bury the deceased. That being so, it necessarily follows that the interim order obtained by the applicant, in CIV/APN/18/90 who is the third Respondent in CIV/APN/17/90 cannot be allowed to stand. Even if I were wrong and it is held that he is not the deceased's heir it seems to me that in the absence of the rightful heir the applicant in CIV/APN/17/90 is a better person to be allowed to bury the deceased.

In the result, I would confirm the interim order in CIV/APN/17/90 and discharge it in CIV/APN/18/90 with costs.

B. K. MOLAI

JUDGE

6th February, 1990.

For Applicant : Mr. Klass
For Respondent : Mr. Pitso.