CIV/APN/253/91

IN THE HIGH COURT OF LESOTHO

In the Application of:

ROSALIA MAPANYA ..... Applicant

and

'MASECHABA MAPANYA ..... 1st Respondent
THE DIRECTOR OF LESOTHO
FUNERAL SERVICES (Mr. L.J.Sello). 2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 30th day of August, 1991.

On 22nd August, 1991 the applicant herein filed, with the Registrar of the High Court, a notice of motion in which she moved the court for a Rule Nisi framed in the following terms:

"1. That the rules prescribed for service be dispensees with on the basis of the urgency of this application;

2. That a rule nisi issue returnable on a date and time to be determined by this Hon. Court calling upon the Respondent herein to show cause, if any why;

(a) The 2nd Respondent shall not be interdicted and/or res-

trained from releasing the body of the late Solomon Mapanya to the 1st Respondent;

(b) The body of the late Solomon Mapanya shall not be released by the 2nd Respondent to the Applicant for burial.

(c) The 1st Respondent shall not be ordered to pay costs of this application.

(d) This Honourable Court shall not grant applicant such further and/or alternative relief as it may deem fit.

3. That prayer 2(a) operate with immediate effect as an interim interdict."

The notice of motion was moved, ex-parte, before me on 23rd August, 1991 when I granted the rule in terms of prayers 1, 2 and 3. The return day was fixed as 30th August, 1991. The motion papers, together with the rule nisi were duly served upon the Respondents apparently on the same day, 23rd August, 1991. The 1st Respondent has intimated her intention to oppose confirmation of

the rule and anticipated, as she was entitled to do, the return day to 29th August, 1991. The 2nd Respondent has, however, not filed notice of intention to oppose confirmation of the Rule and it may, therefore, be safely assumed that he is prepared to abide by whatever decision will be arrived at by the court.

Both the applicant and the 1st Respondent have duly filed affidavits. In as far as it is relevant the facts disclosed by affidavits are that in 1934 the applicant and Solomon Mapanya got married to each other in Lesotho in accordance with Basotho Law and Custom. Their matrimonial home was established at Maphutseng in the district of Mohale's Hoek where the Applicant is still living. The marriage was blessed with seven (7) children who are still alive. They are :

1. Arola Mapanya, a boy born in 1939,
2. Tlhoriso Mapanya, a boy born in 1943,
3. Keketso Mapanya, a boy born in 1946,
4. 'Masekepe Mapanya, a girl born in 1949,
5. Molelekeng Mapanya, a girl born in 1952,
6. Letlotlo Mapanya, a boy born in 1956, and
7. Daniel Mapanya, a boy born in 1959.

In 1944 Solomon Mapanya married the 1st Respondent, again in Lesotho and in accordance with Basotho Law and Custom, as his junior wife. Of this second marriage there were born four (4) children who are still alive. They are:

1. Daniel Mapanya, a boy born on 24th March, 1947,
2. Elsie Mapanya, a girl born on 6th November, 1949,
3. Sechaba Mapanya, a boy born on 22nd March, 1954 and
4. Thabo Mapanya, a boy born on 24th September, 1956.

It is not really disputed that after they had entered into the esotho customary law marriage the 1st Respondent and Solomon Mapanya went to live in the Republic of South Africa where the latter was working. They contracted a civil marriage in the Transvaal province of the Republic of South Africa on 15th September, 1945 and a marriage certificate has been annexed as proof thereof. However, in 1977 the 1st Respondent and Solomon Mapanya returned to Lesotho and established their matrimonial home at Matsieng in the district of Maseru. They have been living there ever since.

It is significant that although she does not dispute that applicant and Solomon Mapanya entered into a valid Sesotho marriage in 1934 the 1st Respondent contends that with the exception of Tlhoriso Mapanya (born in 1943) the rest of the applicant's children have not been fathered by Solomon Mapanya, presumably because after her (1st Respondent's) marriage to him in 1944 she and Solomon had been living together in the Republic of South Africa. This is, however, denied by the Applicant according to whom whilst working in the Republic of South Africa, Solomon

Mapanya used to go home at Maphutseng on leave. On those occasions she lived with Solomon as husband and wife, and conceived the children who come after Tlhoriso.

Well, assuming the correctness of the 1st Respondent's assumption that after she got married to Solomon Mapanya the latter did not live with the applicant as husband and wife, and could not, therefore, have fathered the children that came after Tlhoriso Mapanya. I see no reason why the applicant's first child, namely Arola Mapanya who was born in 1939 could not have been fathered by Solomon Mapanya.

Be that as it may, it is common cause from the affidavits that on 14th August, 1991 Solomon Mapanya passed away. When his remains were to be put to rest at Matsieng where he had admittedly been living with his junior wife, the 1st Respondence, since 1977, the applicant, as the senior widow, approached this court for an order as aforesaid.

As I see it, this is basically a question of whether or not as the senior widow, the applicant is the person who has the last say as to where the remains of the late Solomon Mapanya are to be put to rest. I entirely agree with the view expressed by Munik, C.J. in Tseola and Another vs Magutu and Another 1976(2) S.A. 418 at p. 424 where the learned Chief Justice had this to say on the issue:

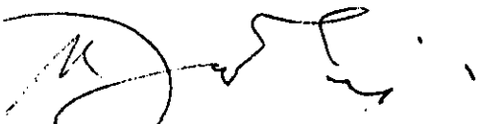
".....in a dispute of this nature, the widow's wishes where she is an heir should prevail and it is her duty and her right to bury the deceased where she pleases, ..."

(My underlinings)

It is trite law that in our society the heir is the first male issue. In the present case it is common cause that the late olomon Mapanya is survived by Arola Mapanya and other male issues (in the two houses) who are his heirs by order of their succession. Their ages now range from 35 to 52 years. The applicant cannot, in the circumstances claim that when he passed away on 14th August, 1991, Solomon Mapanya had no male issues who are his heirs. I have underlined the words "where she is heir" in the above cited passage from the judgment in Tseola and Another vs Maqutu and Another, Supra, to indicate my view that as the widow of the late Solomon Mapanya the applicant could have the last say as to where the remains of the deceased, Solomon Mapanya, would be buried only if the latter were not survived by male issues who are his heirs. It follows, therefore, that the question I have earlier posted viz. whether or not as the senior widow, the applicant is the person who has the last say as to where the remains of her late husband, Solomon Mapanya, are to be put to rest must be answered in the negative.

In short the applicant had no locus standi to institute this application which ought not to succeed. The rule is accordingly

discharged. This being a dispute between the late Solomon Mapanya's two widows who must naturally be under going great distress at this moment I would make no order as to costs.



B.K. Molai

JUDGE

30th September, 1991.

For Applicant : Mr. Putsoane,

For Respondent : Mr. Matsau.