CIV\APN\290\91

IN THE HIGH COURT OF LESOTHO

In matter between:-

'MASERABELE SEROBANYANE.....Applicant

and

TEBOHO SEROBANYANE.....1st Respondent
'MATEBOHO SEROBANYANE.....2nd Respondent

REASONS FOR JUDGEMENT

Delivered by the Honourable Mr. Justice J.L. Kheola on the 25th day of September, 1991.

This is the extended return day of a rule nisi couched in the following terms:-

1. That a rule nisi do bereby issue calling upon the respondents to show cause, if any, on a date to be determined by this Honourable Court why:-

   (a) Respondents shall not be interdicted forthwith from removing the corpse of Lebohang Serobanyane from the Lesotho Funeral Services Mortuary;

   (b) Respondents shall not be interdicted forthwith from burying the corpse of Lebohang Serobanyane at Mafeteng;

(c) Applicant shall not be declared the rightful person to bury the corpse of Lebohang Serobanyane at Maseru City;

(d) Respondents shall not be directed to pay the costs hereof;

(e) Granting Applicant such further and\or alternative relief;

2. That rules 1 (a) and (b) operate with immediate effect as interim orders.

In her founding affidavit the applicant deposes that on the 5th September, 1991 she married the deceased Lebohang Serobanyane, in accordance with Sesotho law and custom. Three head of cattle were paid by the deceased's father, Neo Serobanyane to her father Matete Kabi as "bohali". The applicant's father has confirmed in his affidavit that his daughter was married to the deceased. Three head of cattle were paid as "bohali", to be more precise R600 was paid and counted as equivalent to three head of cattle. The father of the deceased had also confirmed that he paid the "bohali" mentioned above.

The applicant avers that on the 15th September, 1991 the deceased was involved in a car

accident in Qwaqwa and passed away on the same day. She agreed with the deceased's father that the deceased would be buried at Maseru where he had built his house and was living during his lifetime. She avers that this idea of burying the deceased in Maseru was first introduced to them by the first respondent . On the 17th September, 1991 the first respondent and second respondent changed their minds and insisted that the remains of the deceased shall be buried at Mafeteng. They threatened that they would remove the corpse from the mortuary by force and bury it at Mafeteng whether the deceased's wife liked it or not.

The respondents aver that at a family meeting held on the 17th September, 1991 it was agreed that the first respondent should take all the responsibility of burying the deceased. The father of the deceased was present at this meeting at which a unanimous decision was taken that the first respondent should take the responsibility of burying the deceased at Mafeteng. The applicant was not there. The first respondent says that he had always known the applicant only as the deceased's lover. When the applicant purported to marry the deceased her Swazi marriage with one

Makhowe Dlamini still subsisted and that the purported customary marriage between the applicant and the deceased is null and void ab initio.

In his supporting affidavit Makhowe Dlamini avers that he married the applicant by Swazi customary law in 1978. His story is confirmed by one Nkosana Mhlanga that Makhowe Dlamini married the applicant by Swazi law and custom and that she was smeared with red ochre in 1978 at Emlindawazwe area by Lamaseko.

The first question to be decided by the Court is whether the applicant was lawfully married to Makhowe Dlamini according to Swazi law and custom which is foreign law in this country. The onus is on the respondents to prove the foreign law. The Courts do not ordinarily take judicial notice of foreign law, which must be proved by the evidence of an expert witness. The witness must be proved to be either a professional lawyer or the holder of an office which requires legal knowledge or at any rate gives him special opportunities to become acquainted with the law (see South African Law of Evidence, 2nd edition by Hoffmann at p. 84).

It is trite law that in the absence of adequate evidence or the possibility of judicial notice, foreign law is presumed to be the same as local law (Rogaly v. General Imports (Pty) Ltd. 1948 (1) S.A. 1216).

In the present case we have the evidence of one Nkosana Mhlanga who describes his occupation as an induna employed by Chief Mafohla. It has not been explained what his occupation involves and there is no indication that his office gives him a special opportunity to get acquainted with Swazi law and custom. The respondents have therefore failed to prove that the applicant was lawfully married to Makhowe Dlamini in accordance with Swazi law and custom. I shall assume that Swazi law and custom concerning marriage is the same as Sesotho law and custom. I am also reinforced in this belief by Seymour, Native Law in South Africa 2nd edition, in which one of the most important requirements of a valid marriage according to Swazi Law and Custom is payment of part of "lobola".

It is common cause that no "lobola" was paid by the parents of Makhowe Dlamini to the parents of the applicant. So one of the legal requirements

has not been satisfied and there is no marriage by Swazi law and custom. The smearing of the bride with red ochere is not a legal requirement of a valid marriage. According to Sesotho custom a sheep known as "koae" is slaughtered for the bride when she arrives at her husband's place. That is not a legal requirement of a valid Sesotho customary marriage.

I come to the conclusion that the respondents have failed to prove the existence of a Swazi marriage at the time the applicant married her late husband. The question of polyandry does not arise. The applicant was a spinster when she married her late husband.

The existence of a Sesotho customary law marriage between the applicant and her late husband has been proved beyond all reasonable doubt. There is evidence by the father of the deceased that three cattle were paid as portion of "bohali". The father of the applicant confirms that his daughter was married to deceased and that three head of cattle were paid to him by the father of the deceased. As proof of their agreement the father of the applicant has annexed to his affidavit a

document showing his agreement with the father of the deceased on the marriage between his daughter and the deceased. (See Annexure "M55"). It is common cause that the applicant and her husband had no children and that they had their marital home here in Maseru. The parents of her husband have their home in Mafeteng where the respondents want the deceased's body to be buried.

It is now trite law that where a married man dies leaving no male heir, the wishes of her widow as to how and where the remains of her deceased husband are as to be put to rest must be given preference (See **Mathibeli v. Chabalala** CIV\APN\76\85 (unreported); **Mabona v. Mabona** CIV\APN\280\88 (unreported); **Zuma v. Zuma** CIV\APN\60 \88 (unreported)). In the present case the first respondent who is the elder brother of the deceased and the second respondent who is the mother of the deceased cannot override the wishes of the heiress of the deceased husband.

I accordingly confirmed the rule with costs on the 25th September, 1991 and indicated that reasons for judgment would follow.

J. L. KHEOLA
JUDGE

6th December, 1991.

For Applicant - Mr. Pheko
For Respondents - Mr. Z. Mda.