CIV/APN/318/91

IN THE HIGH COURT OF LESOTHO

In the Application of :

MOJELA THAELE ..... 1st Applicant
'MAKALI THAELE ..... 2nd Applicant
'MAREFILOE THAELE ..... 3rd Applicant

and

TSOLOANE THAELE ..... 1st Respondent
PAPAKI THAELE ..... 2nd Respondent
LESOTHO FUNERAL SERVICES ... 3rd Respondent
'MALIAU THAELE..... 4th Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 18th day of October, 1991.

On 9th October, 1991 the 1st and the 2nd applicants filed with the Registrar of the High Court, a notice of motion in which they moved the court, on the basis of urgency, for a Rule nisi calling upon the 1st, 2nd and 3rd Respondents to show cause why an order in the following terms should not be granted:

"(a) Interdicting 1st and 2nd respondents or any members of Thaele family from removing from the mortuary for burial and burying the deceased Motsiri Seth Thaele;

(b) Directing the Respondents not to interfere in any manner with the funeral arrangements and burial of the late Motsiri Seth Thaele

by the applicants;

(c) Directing the 3rd Respondent not to release the dead body of the deceased to 1st and 2nd Respondents or their agents pending finalisation of this application;

(d) Ordering 1st and 2nd Respondents to pay the costs of this application;

(e) Granting the applicant such further and/or alternative relief;"

Prayers (a) (b) and (c) above were to operate as interim orders, with immediate effect. It is, perhaps, worth mentioning that on the previous week CIV/APN/299/91 in which 'Marefiloe Thaele sought an identical order against the 1st, 2nd and 3rd Respondents was placed before me. When the application came for arguments it was clear from the affidavits that two women viz. 'Marefiloe and 'Maliau claimed to have been lawfully married to the deceased, Motsiri Seth Thaele. the application was withdrawn by consent of the parties. The following week the present application was, however, instituted.

When this application was moved before me on 9th October, 1991, there was no doubt in my mind, therefore, that 'Marefiloe Thaele and 'Maliau Thaele were interested parties. They had, however, not been joined as parties. I therefore, made an order that they should be joined. 'Marefiloe and 'Maliau were accordingly joined as 3rd applicant and 4th Respondent, respectively. I granted the Rule nisi as prayed

in the notice of motion save that only prayer (c) i.e. not prayers (a) and (b), was to operate as an interim order with immediate effect.

According to the return of service the rule nisi was, on 10th October, 1991, apparently served upon the Respondents. With the exception of the 3rd Respondent, all the Respondents have intimated intention to oppose confirmation thereof. It may safely be assumed, therefore that the 3rd Respondent is prepared to abide by whatever decision this court will arrive at.

Affidavits have been duly filed by the parties. It is common cause from affidavits that in September, 1991, Motsiri Seth Thaele passed away. His body is still at the mortuary of the 3rd respondent waiting to be put to rest with dignity. What this case is about, is basically who, between the 3rd applicant and the 4th Respondent, has the right to bury the deceased.

It is not suggested that the deceased is survived by a male issue who is a major and, therefore, competent to decide where and when his remains are to be put to rest. However, the applicants claim that the 3rd applicant was lawfully married to the deceased by civil rites. She is his widow and, therefore, the only person who has the last word as

to where and when the remains of the deceased are to be buried. On the other hand, the 1st, 2nd and 4th Respondents claim that at the time of his death the deceased was still married to the 4th Respondent by Sesotho Customary Law. She is, therefore, his only widow who has the right to bury the deceased.

In my view, the decision in this case pivots around who of the two women viz. the 3rd applicant and the 4th Respondent was lawfully married to the deceased at the time of his death. However, that was not an issue that could be determined on affidavits. It was necessary to lead viva voce evidence. I accordingly ordered that such evidence be adduced to establish who of the two women viz. 'Marefiloe and 'Maliau was lawfully married to the deceased at the time of his death.

The gist of the evidence adduced in support of the contention that the 3rd Applicant was lawfully married to the deceased at the time of the latter's death was that initially the 3rd applicant was married to one Daniel Mpiti by civil rites. That marriage was, however, dissolved by this court before she entered into another civil marriage with the deceased. According to the 3rd applicant she instituted the divorce proceedings against Daniel Mpiti in January, 1986. The written divorce order was granted and handed to the Legal Aid who were her lawyers of record and from whom she received

it in 1988. She had given the order to her present attorney of record in whose possession it was. She was positive that when she entered into a civil marriage with the deceased in 1986 her previous civil marriage with Daniel Mpiti had already been dissolved. She was, therefore, lawfully married to the deceased at the time of his death.

The Respondents did not dispute the story that in 1986 the 3rd applicant concluded a purported civil marriage with the deceased. They, however, denied that her civil marriage with Daniel Mpiti had been dissolved by this court at the time the 3rd applicant concluded the purported civil marriage with the deceased in 1986. That being so, the purported marriage entered into between the 3rd applicant and the deceased in 1986 was a nullity. Therefore, the 3rd applicant could not in law, be lawfully married to the deceased.

It is significant that although the 3rd applicant is adamant that her civil marriage to Daniel Mpiti was dissolved by this court's written order which is in the possession of her attorney of record the order was not produced as proof of the dissolution of her previous marriage. As the applicant was the one who alleged that her previous marriage with Daniel Mpiti had been dissolved before she entered into a civil marriage with the deceased, it seems to me she bore the onus of proof on the well known principle of he who avers bears the

onus of proof. By failing to produce the divorce order, I am not convinced that the 3rd applicant has satisfactorily discharged the onus that clearly vests on her.

In any event, I have looked for the divorce case referred to by the 3rd applicant and found that it is CIV/T/600/87 'Masebabatso Mpiti v. Daniel Mpiti. According to the proceedings in this case the divorce order was granted by my Brother Lehohla A.J. (as he then was) on 1st August, 1988. It is clear from the record of proceedings in CIV/T/600/87 that 3rd applicant (who has admitted that she was then called 'Masebabatso Mpiti) instituted summons commencing the divorce action in 1987 and not 1986 as she wanted this court to believe. The divorce order dissolving her civil marriage with Daniel Mpiti was granted in 1988 and not in 1986 as she wished to impress this court.

As it has already been stated earlier, the evidence of the applicants that the 3rd applicant entered into a civil marriage with the deceased in 1986 is not disputed. Assuming the correctness of the proceedings in CIV/T/600/87 that her previous civil marriage with Daniel Mpiti was dissolved in 1988 there is not the slightest doubt in my mind that when she concluded the civil marriage with the deceased in 1986 the 3rd applicant was still lawfully married to Daniel Mpiti. That being so, she could not have entered into a valid civil

marriage with the deceased. To hold the contrary would mean that the 3rd applicant could have been lawfully married to numerous husbands at the same time. That would, in my opinion, amount to polyandry which is unheard of in our society.

In support of their contention that the 4th Respondent was lawfully married to the deceased in accordance with the Sesotho Law and Custom the evidence adduced on behalf of the 1st, 2nd and 4th Respondents was to the effect that in 1965 negotiations for the marriage between the 4th Respondent and the deceased were conducted by their parents or those who stood in loco parentis. An agreement was reached that the 4th Respondent and the deceased should marry. According to the 1st Respondent, who actually participated in the negotiation 15 herd of cattle were paid as "bohali" for the marriage of the 4th Respondent to the deceased. He produced as proof of payment of the "bohali" cattle exhibit "A" (a document, dated 3rd October, 1965, purporting to be a written agreement on the quantum of "bohali" and acknowledgement that 15 cattle were actually paid).

It is worth mentioning that this document was subjected to criticism on the ground that it did not indicate who the parties to the marriage were. I also observed that, in our society, the practice is that a document of this nature is

taken before the local chief who normally authenticates it by putting his date stamp impression thereon. Exh A bears no such authenticity. To that extent it is, in my finding, a dubious document.

In her evidence the 4th Respondent told the court that following the negotiations for her marriage to the deceased she was shown 10 herd of cattle which were paid as "bohali". There is, therefore, contradiction between her evidence and that of the 1st Respondent as regards the number of cattle actually paid as bohali for her marriage to the deceased.

Be that as it may, it seems to be common cause that in 1966 the deceased abducted the 4th Respondent. They lived together as husband and wife until 1980 when the 4th Respondent "ngalaed" to her maiden home following a domestic quarrel she had with the deceased. According to the 4th Respondent's evidence corroborated by the 1st Respondent and D.W.3 Dyke Thaele the quarrel was over money, a fact which is denied by P.W.1, 'Makali Thaele, and P.W.2, Banyane Thaele according to both of whom the cause of the quarrel was because the 4th Respondent had given birth to two children who had not been fathered by the deceased.

It is, however, significant that both P.W.1 and P.W.2 were at the time not staying with the deceased and 4th

Respondent. P.W.1 had in fact left her matrimonial home and returned to her maiden home at Ha Matala whilst P.W.2 had his separate home where he was living with his own family. In their own words P.W.1 and P.W.2 came to know about the cause of the quarrel between the 4th Respondent and the deceased from what they were told by the latter. That, in my view seems to be hearsay and of no evidential value.

According to the evidence of P.W.2 and P.W.1 following the abduction of the 4th Respondent by the deceased only two cattle and a horse were paid to the parents of the 4th Respondent as compensation for abduction and not "bohali". They, however, conceded that after she had been abducted by the deceased the 4th Respondent lived with the deceased until 1980 and they had at least three (3) children who were fathered by the latter. They conceded that the three children are regarded as belonging to the family of Thaele.

Assuming the correctness of the evidence of P.W.1 and P.W.2 that only two cattle and a horse were paid as compensation for the abduction of the 4th Respondent and there was no agreement to marry her I find it inapprehensible that the 4th Respondent was not returned to her maiden home. She in fact stayed with the deceased from 1966 to 1980 and gave birth to at least three children who were admittedly fathered by the deceased and regarded as belonging to the family of

thaele. Such evidence is not, in my view, consistent with the contention of P.W.1 and P.W.2 that there was no agreement let alone intention to marry the 4th Respondent following her abduction by the deceased.

Considering the evidence as a whole I am inclined to accept that the 4th respondent and the deceased did agree to marry each other. The parents or those who stood in loco parentis did agree that their children viz. the 4th Respondent and the deceased should marry. They also agreed on the quantum of "bohali" part of which was paid, whether it was in the form of two cattle and a horse or more it does not really matter. That granted, it must be accepted that the essential ingredients of a Sesotho Customary Marriage were completed. The 4th Respondent and the Deceased were, in my finding, legally married to each other.

It is common cause that the 4th Respondent and the deceased never appeared before a court of law to have their customary law marriage dissolved in accordance with the provisions of S.34(4(and (5) of Part II of the Laws of Lerotholi. The fact that, in 1980, the 4th Respondent had "ngalaed" and the deceased never followed or fetched her, in accordance with Sesotho practice, does not per se amount to a dissolution of their marriage.

From the foregoing, it is obvious that the view that I take is that at the time of his death the deceased, Motsiri Seth Thaele, was still lawfully married to the 4th Respondent who alone is, in law, her widow. Having said that, it is trite law that where a man dies leaving no male issue as his heir the widow has the right to bury him. Assuming the correctness of my finding that the 4th Respondent is, in law, the only widow of the late Motsiri Seth Thaele, it logically follows that she is the rightful person to have the last word as to where and when the remains of her late husband must be put to rest.

In the circumstances, I have no alternative but to come to the conclusion that this application ought not to succeed.

I accordingly discharge the rule. This being a family dispute I make no order as to costs.

B.K. MOLAI

JUDGE

18th October, 1991.

For Applicant : Mr. Monyako

For Respondent : Mr. Monaphathi.