CIV\APN\341\91

IN THE HIGH COURT OF LESOTHO

In the matter between:-

ADELINA MAHANYE — Applicant

and

THEKO MAHANYE — 1st Respondent
LESOTHO FUNERAL SERVICES — 2nd Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 30th day of October, 1991

This is an application for an order in the following terms:

1. That Rule Nisi issue, returnable on the date to be determined by the Honourable Court, calling upon the Respondents to show cause (if any) why:-

   (a) The First Respondent shall not be ordered to hand to the Applicant, Mantsoe Mahanye's death certificate;

   (b) The Applicant shall not be allowed to bury the body of her husband Mantsoe Mahanye at Ha Paki, Mazenod;

   (c) The First Respondent shall not be restrained from burying the body of Applicant's husband at Mokema;

   (d) The First Respondent shall not be restrained from interfering with Applicant's arrangements for burial of her husband at Ha Paki Mazenod or at all;

(e) The Second Respondent shall not be ordered to release the body of Applicant's husband Mantsoe Mahanye to the Applicant;

(f) The Second Respondent shall not be restrained from releasing the body of of Mantsoe Mahanye to the First Respondent;

(g) The forms of service as provided for in the Rules of Court shall not be dispensed with;

(h) The First Respondent shall not be ordered to pay costs hereof and the Second Respondent only in the event of opposition;

(i) The Applicant shall not be granted such further and or alternative relief.

2. That prayers 1 (a), (c) and (f) operate as an interim order with immediate effect.

Before the papers were served upon the respondents, the first respondent launched a counter-application in which he sought a number of reliefs. The two applications were heard at the same.

It is common cause that on the 4th July, 1985 the deceased Mantsoe Dominic Mahanye entered into a civil marriage with the applicant. He had been previously married to one Lerato Mahanye but a decree of divorce was granted on the 16th August, 1983 by this Court. There were two children born out of that marriage. One of the children is Mopeli Mahanye, a boy of 19 years of age who is the second applicant in the counter-application. It is alleged that he is duly assisted by the first applicant as his legal guardian. It seems that in the divorce proceedings the custody of the children was awarded to their mother and as usual the father

remained their legal guardian. On the 11th October, 1991 when he died his former wife automatically became legal guardian of their children. The first applicant in the counter-application can never be thelegal guardian of the children of the deceased while their mother is still alive.

It is common cause that at the time of the death of the deceased his former wife was in the Republic of South Africa and had left the child Mopeli with the first applicant. It is wrong to assume that the first applicant assumed legal guardianship over Mopeli because his mother left him with him (first applicant). The mother assumed the legal guardianship of the children immediately after the death of their father. It is irrelevant that at the relevant time she happened to be out of the country. She remained the legal guardian wherever she was when her former husband died.

At the commencement of the hearing of these two applications Mr. Mphutlane, attorney for the applicants in the counter-application, applied that the name of Lerato Mahanye, the mother of the children of the previous marriage, should be substituted for that of the first applicant as the legal guardian of Mopeli Mahanye. This application was opposed on the ground that no notice was given in terms of Rule 33 of the High Court Rules 1980. Moreover in the opposing affidavit the first respondent had already indicated that a point in limine would be raised that the first respondent is not the legal guardian of Mopeli Mahanye.

In terms of Rule 33 (9) the application for amendment is refused. If the first applicant wanted to protect the interests of the minor children, he ought to have made a formal application before this Court to be appointed a curator ad litem. He could do so only if the mother of the children was out of the country and unable to protect the interests of her children.

It is common cause that the first respondent in the main application is the father of the deceased. A post-mortem examination has now been performed on the body of the deceased and a death certificate has been issued. The first respondent has the said death certificate in his possession but refuses to release it to the applicant on the ground that as the legal guardian and\or custodian of the deceased's minor children, he is entitled to retain all documents relating to the death of the deceased.

I have already found above that the first respondent in the main application is not the legal guardian of the minor children of the marriage because their mother is still alive and is now here in Lesotho. She is the legal guardian and custodian of her children. He has no locus standi in judicio arising out of the misconceived belief that he was a legal guardian and custodian of such children.

Regarding the right to bury the deceased, the second respondent has deposed that the marriage between the deceased and the applicant is null and void inasmuch as the deceased had been

previously married to one Lerato Mahanye but that marriage was dissolved by this Court in 1983. The fact is that when he remarried in 1985 he was not a bachelor as reflected on the marriage certificate (Annexure "A" to the founding affidavit). He was a divorcee. Because of this wrong description of his status he failed to comply with the law. The only statutory law I am aware of is section 24 of the Marriage Act No.10 of 1974 which reads:

> "No banns shall be published and no special licence issued under any of the provisions of this Act with respect to or for the marriage of any widower or widow having minor of a former marriage, unless a certificate shall be produced signed by the Master of the High Court or an officer in the public service authorized thereto by him to the effect that the inheritances which have devolved upon such minors have been settled by payment to the Master, or secured by the common law bond or obligation commonly called a **kinderbewys** duly registered at the Deeds Registry, or to the effect that the value of such inheritances was less than two hundred rand:
>
> Provided that the provisions of this section shall not apply to the marriage of any widower or widow having minor children of a former marriage whose rights of inheritances are regulated according to Sesotho law and custom."

There was no evidence that the marriage between the applicant and the deceased did not comply with the provisions of the above section.

Another section of the above Act which deals with impediments to marriage is section 29 (1) and (2) which read as follows:

> "1. No person may marry who has previously been married to any other person still living unless such previous marriage has been dissolved or

annulled by the sentence of a competent court of law.

2. No insane person who is incapable of giving consent to a marriage may marry."

Again the marriage between the applicant and the deceased fully complies with the requirements of section 29.

I am of the view that the mere fact that the deceased or the marriage officer wrongly stated the status of the deceased at the time of marriage cannot make the marriage null and void. In the present case it should make no difference to the validity of the marriage because a bachelor and a divorcee can enter into a valid marriage without any impediment. It would be different matter if the deceased had described himself as a bachelor when he knew that his marriage with his former wife was still in subsistence. In that case his marriage to the applicant would be declared null and id ab initio. We know that the deceased was a divorcee and this status is admitted by the first respondent. I come to the conclusion that the marriage between the applicant and the deceased was valid.

It is now trite law that when a husband dies his wife has the right to decide where her husband is going to be buried. In exercising her right the wife must respect the wishes of her husband if he expressed his wishes before he died. In the present case the applicants in the counter-application aver that the

deceased expressed his wish that he should be buried at Mokema in the recently selected site in the yard of the first applicant. Their story is that on the 9th May, 1991 the Mahanye family convened a meeting at Mokema which was attended by ten (10) members of Mahanye family including the first applicant, the deceased and the first respondent in the counter-application Annexure "A" to the founding affidavit in the counter-application is the document allegedly produced at that family meeting. On the following day that document was stamped with the date stamp of Headman Nonyana Rampoetsi and signed by one 'Mamahlaha Rampoetsi for Nonyana Rampoetsi Annexure "A" reads as follows:

"09.05.91

Meeting of the family of Theko Mahanye.

Discussion about the family burial site.

We shall start a burial site at home in the yard in the plot below, with our first deceased from to-day.

Those present at to-day's meeting:

Theko Mahanye
Potso Mahanye
Mantsoe Mahanye
Pinyane Mahanye
Moahloli Mahanye
'M'amonica Mahanye
'M'apaseka Mahanye
Adelina Mahanye
'M'amoteka Mahanye
'M'alisema Mahanye

Sgd: 'M'amahlaha Rampoetsi for Nonyana Rampoetsi."

The authenticity of Annexure "A" leaves much to be desired. A party who tenders a document is ordinarily required to adduce evidence to satisfy the court of its authenticity. There must be evidence that the document was written or executed by the person who purports to have done so. In the instant case the author of this document has not been called. In any case it does not seem to have any author. The evidence before Court is that the document was written on the 9th May, 1991 and taken to the headman on the 10th to be stamped with his date stamp. However, no mention is made as to the writer of this document. The representative of the headman who signed it a day after it was made cannot be regarded as its author. The respondents have failed to prove the authenticity of this document, so its contents cannot be used either as evidence or for the purpose of cross-examination (See South African Law of Evidence, 2nd ed. pp, 282-283).

The evidence of the first applicant, Pinyane Mahanye and Mopeli Mahanye that the deceased expressed a wish to be buried at Mokema is unconvincing because they rely on Annexure "A" which indicates that he expressed such a wish on the 9th May, 1991. Annexure "A" is a very unreliable document I have ever seen. Most documents of this nature i.e. resolutions at family meeting the writer of the document signs as the writer. Even if the names are written by the writer\secretary without demanding that they must affix their signatures to the document, the writer\secretary must sign the document.

In the result the Rule in the main application (CIV\APN\341\91) is confirmed with costs. The counter-application (CIV\APN\344\91) is dismissed with costs.

J. L. KHEOLA
JUDGE

30th October, 1991.

For Applicant - Mr. Phafane
For Respondents - Mr. Mphutlane.