CIV/APN/163/91

IN THE HIGH COURT OF LESOTHO

In the matter between:

CHEMANE MOKOATLE	APPELLANT
V	
SENATSI SENATSI	1ST RESPONDENT
SUPERINTENDENT OF QUEEN ELIZABETH II HOSPITAL	2ND RESPONDENT

Before the Honourable Chief Justice Mr. Justice B.P. Cullinan on 13th and 14th June, 1991.

Sitting With Assessors	:	Mr. J.M. Makhera Mr. T.N. Khoboko
For the Appellant	:	Mr. W.C.M. Maqutu Mr. M.T. Matsau
For the First Respondent	:	Mr. L. Pheko

ORDER

On 9th June, 1991, the Court, sitting with Assessors, granted the first respondent ("the respondent") a declaration to the effect that he had the right to bury the body of the deceased 'M'anthabiseng Senatsi, otherwise known as Matseko Mokoatle. The appellant (whom I shall refer to as "the applicant") has filed a

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notice of appeal against that judgment. He now applies to this Court for a stay of execution.

The application is brought, presumably pursuant to Rule 8(22) of the High Court Rules, as an urgent application, praying *inter alia* for relaxation of the requirements of the rules of court regarding service of process. It was brought, on 12th June, on two days' notice. There is no provision under the High Court Rules however for a stay of execution. Such application can only be made under Rule 6 of the Court of Appeal Rules. Further, as the learned Attorney for the respondent, Mr. Pheko, points out, such application must be filed on seven days' notice. He submits that there is no power in a Judge of the High Court to condone the short notice involved. Indeed, in view of the fact that the respondent proposes to bury the deceased on 16th June, I brought forward the application to 13th June, without objection from Mr. Pheko, who has filed an opposing affidavit sworn by the respondent. The burial will have taken place before this application can be heard, that is, on seven days' notice. A single Judge of the Court of Appeal may under rule 8(4) grant condonation, by consent; were I to exercise such powers *ex officio*, I observe that such condonation could only be pursued by way of notice of motion delivered to the respondent on seven

days' notice.

Further, the application seeks two interdicts, one interdicting the respondent from burying the deceased, pending the finalisation of the appeal, and another interdicting the second respondent from releasing the body of the deceased to the respondent. It appears that the deceased's body is now in the possession of the Lesotho Funeral Services and I am asked to join that establishment as a respondent and ultimately to issue an interdict against it. That difficulty could be overcome, but there are other difficulties.

It was the applicant's case that he was not the heir, but that the brother-in-law of the deceased, one Lituka Mokoatle, was the heir. Indeed, it was on that basis, on the Court's invitation, that the applicant amended his pleadings, seeking a declaration in favour of Lituka Mokoatle. I held that the right of burial lies in the heir. The learned Attorney for the applicant Mr. Maqutu submits that the right to bury lies in the family, and not the heir. Mr. Maqutu pays tribute to the learned Assessors' knowledge of customary law. His submission however is contrary to their advice in the matter. It is contrary to a host

of authority submitted by Mr. Pheko at the original hearing. It is also contrary to the authorities contained in a learned article by Mr. Maqutu himself, entitled "Duty to Bury: A Case Commentary on Chabalala, Lenono, Mokolokolo and Mabona" (Lesotho Law Journal 1987 Vol.3 213).

The applicant is plainly not the heir. Though he may seek a declaration as an "interested person" under section 2(1)(c) of the High Court Act, 1978, he does not appear in any representative capacity and therefore has no ***locus standi in judicio*** in the matter of an interdict.

When it comes to an application for a stay of execution, the question arises as to whether there is any question at all of 'execution' as such. Rule 6(1) provides that,

> "... the noting of an appeal does not operate as a stay of execution of the judgment appealed from."

It will be seen that the reference there is not to a stay of judgment but a stay of 'execution' of judgment. The learned authors of Herbstein & Van Winsen on the Civil Practice of Superior Courts in South Africa 2 Ed. observe at p.530:

> "Having obtained a judgment in his favour,

> the judgment creditor will want to obtain satisfaction of the judgment from the debtor. The process which enables him to enforce a judgment is known as execution."

and further on at p.530:

> "A judgment ordering the debtor to do or to refrain from doing any act is enforceable against the person of the debtor by way of committal for contempt of court, and not by way of execution against his property."

and again at page 531:

> "When a judgment is one ***ad factum praestandum***, i.e. an order to do some act, e.g. pass transfer, remove an obstruction or vacate premises, the judgment creditor cannot seek its enforcement by the levy of a writ (in execution). His remedy is to apply for the committal of the debtor for contempt of court."

Further, I observe that the contents of Rule 6 would seem to be concerned with a judgment ***ad pecuniam solvendam***, wherein execution can be pursued. In the present case, the respondent has been granted a declaration as to an existing right. He may chose to exercise that right, if he wishes. If he does, he is not executing a judgment as such. He was granted a declaratory judgment and I cannot see that any question of 'execution' thereof arises. There is no doubt that the word 'execution' also has a wider sense, that is, that of giving effect to a judgment, and it can be said that in exercising the right of burial the respondent is giving effect to this Court's judgment. In that event the applicant seeks not a stay as such, but an interdict,

and he has no *locus standi* in the matter of an interdict.

In any event, as to the merits of an application for stay, I have no wish to enter into a debate on the merits of the judgment, or the prospects of success on appeal. I am ***functus officio*** in the matter. I leave the grounds of appeal to the Court of Appeal. I wish to add that due to the exigency of the situation, I delivered an abbreviated judgment in the early hours of the 9th June, reserving full reasons in the matter. Those reasons are yet to be delivered.

The parties are fully aware of the urgency in this matter. They were content to have the matter heard on Saturday 8th June stretching up to 1 a.m. on Sunday 9th June. The purpose of such late and extended hearing was to enable whomsoever was declared to have the right to bury the deceased's body, to exercise such right forthwith.

The applicant has investigated the question of refrigeration. In an affidavit he deposes that Lesotho Funeral Services can 'store' the body of a deceased person for any

period, even for a year. The applicant has costed such 'storage': it would cost M2 per day, which payment he is prepared to disburse. He points out that an appeal decided after burial might result in exhumation, which would constitute a health hazard.

Mr. Maqutu refers me, to a learned article written by one Arne Tostensen ("Nation And 'Tribe' in the Context of 'Nation Building'"), which contains an account of the Otieno 'Burial Case', ultimately decided by the Court of Appeal of Kenya on 15th May, 1987. The learned author indicates that the case was one of conflict of two systems of customary law, that of the Luo and the Kikuyu people in Kenya, and again conflict between custom and the common law or statutory law. In any event, some three judicial proceeedings were involved, over a period of 154 days, during which it seems (I cannot be sure), the deceased's body was not buried.

In the present case, the deceased's body has lain in a mortuary since 20th May. Mr. Maqutu points out that the Court of Appeal will sit from mid-July for two weeks and presumably this appeal would be heard on an urgent basis. In that event the body

would remain unburied for approximately two months only, in comparison to 154 days in the Otieno case.

Mr. Pheko submits that there is no guarantee that the Court of Appeal will hear the present appeal on an urgent basis: he suggests indeed that that Court might well in the circumstances allow the burial to take place forthwith, before the appeal is heard. He points to the urgency of the applicant's original application, which is to be contrasted with his present application, which suggests that there is no urgency whatever. He submits that the present application constitutes an abuse of the process of the Court. I am inclined to agree.

The respondent has deposed that there can be no question of exhumation, that where a second burial is necessary, the custom has always been to take soil from the first grave and transfer it to another grave. Mr. Pheko made such submission at the original hearing, without contradiction. Mr. Maqutu submits that that is not the case, that even if the remains are decomposed the deceased's bones must be transferred, and not just soil. He refers me to the learned Assessors in the matter. I have consulted the learned Assessors and they advise me that the

custom has always been to transfer no more than soil from one grave to another. In the matter of any proposed exhumation therefore, the balance of convenience lies with the first respondent. Further, as will be seen, I am satisfied that what is involved in this case is not the desire to lay the deceased to rest in her rightful resting place, but simply the desire to acquire the right *per se* to bury. As Mr. Maqutu himself observes *ibid* at p.213:

> "It is not unusual these days for the deceased body to be used as a pawn in the legal battle for rights of succession."

The deceased's mortal remains have lain unburied for 25 days. It cannot for a moment be said that that is in accordance with custom: custom preceded refrigeration by nigh on a century and a half. The respondent deposes, and the learned Assessors advise, that it is completely contrary to custom to delay burial. Indeed, the learned Assessors observe that they have never in their experience encountered the like of this application.

When it comes to the Otieno case, I observe that some 40 years ago there could be no question of any such delay in burial,

and I do not see that advancement in the technology of refrigeration should be allowed to affect the *mores* and indeed the conscience of society. The learned author Tostensen refers to the Otieno case at p.12 as a "court wrangle". He observes indeed at p.14:

> "Statements out of court added to the animosity and bitterness of the case to the effect that large crowds of people gathered outside the court house so that riot police were put on guard should violence erupt."

I cannot be sure from the account before me that the deceased's remains in the Otieno case remained unburied, and were not instead exhumed after the reversal of the High Court judgment. If the former was the case, then I regard the case as an unhappy precedent, in no way persuasive much less binding, and one which I would be slow to import into the Kingdom. To do so, I believe, would be to weaken the fabric of customary law, if not of society itself.

There is also the question of public policy and the national interest. Mr. Maqutu submits that this is a family affair, the family being the basic unit of society. I have no doubt however that the national interest must at times supervene in any question of the rights of the family. It is a notorious fact that the unfortunate deceased met a violent death on 20th May and

that her death sparked off riots throughout the length and breadth of the Kingdom, which resulted in the deaths of not less than 30 people. It is a notorious fact that such riots led to the amendment of the Internal Security Order, 1984 (under Order No.14 of 1991) and that thereafter the Commissioner of Police imposed a curfew, as he considered it necessary to do so to prevent danger or harm to public safety or public order. That curfew is still in existence. Quite clearly it is desireable in such circumstances, that the burial of the deceased, already twice postponed, should be effected without delay. The suggestion that the burial be delayed for another month, if not twelve months, is, I regret to say, made without any concern whatever for public safety or public order, or indeed the national interest.

My initial belief that the original application was prompted by an affection for the deceased, was somewhat shaken by the evidence that the applicant's relatives had remained in Mokhotlong for a full eleven days before coming to Maseru, and that not one of them, not even the applicant, resident in Maseru, had viewed the remains of the deceased. The present proposal to leave the remains in the antiseptic refrigeration of a funeral parlour, for anything up to a year shatters any belief I ever had that the application stems from altrustic motives. Frankly, I

consider the application to be an unhappy one, bordering on the morbid, if not ghoulish in places, and contrary to a custom which is common to all mankind, and which I have no doubt rules the hearts of all Basotho, namely respect for the dead and their mortal remains.

It is time that the mortal remains of the deceased were laid, in dignity, to rest in peace.

The application is dismissed with costs to the respondent.

The Assessors agree with my findings.

Delivered at Maseru This 14th Day of June, 1991.

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B.P. CULLINAN
CHIEF JUSTICE

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