

IN THE HIGH COURT OF LESOTHO

In the matter between:

HEBEBE CHABALALA

Applicant

and

|                                  |                |
|----------------------------------|----------------|
| SAMUEL SEKOTLO                   | 1st Respondent |
| DISTRICT SECRETARY - BUTHA BUTHE | 2nd Respondent |
| O\C R.L.M.P. - BUTHA BUTHE       | 3rd Respondent |
| BUTHA BUTHE HOSPITAL             | 4th Respondent |
| ATTORNEY GENERAL                 | 5th Respondent |

J U D G M E N T

Delivered by the Honourable Chief Justice Mr. Justice  
J.L. Kheola on the 6th day of June, 1994

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

1. That the Rules of this Honourable Court relating to notice and service be dispensed with and the matter be heard as of urgency.
2. That a Rule Nisi be issued returnable on a date and time to be determined by this Honourable Court calling upon the Respondents to show cause if any why:
  - (a) First, Second and Third Respondents shall not be interdicted from unlawfully interfering with the Applicant in

making necessary preparations for the proper re burial of the corpse of the Late Boy Sekotlo pending the determination of this application.

(b) First, Second and Third Respondents shall not be directed to exhume the corpse of the late Boy Sekotlo presently buried by the First Respondent on the 6th April 1993 and hand it over to the applicant for re burial of the corpse.

(d) Respondents shall not be ordered to pay the costs of this application save that the Second, Third and Fourth and Fifth be so ordered only in the event of opposing the orders sought herein.

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

It became very clear when this matter started that there was a serious dispute of fact regarding the marriage of the applicant to one Masipho Tsotleho Sekotlo. I made an order that viva voce evidence should be led. The intention was that all the people who had made affidavits should give viva voce evidence and be cross-examined in order to enable the Court to observe their demeanour and decide their credibility.

The applicant decided not to call one Tseko Chabalala who alleges in her affidavit that he was one of the people who drove the cattle for "bohali" to the home of the parents of Tsotleho 'Masipho Sekotlo. Such evidence is now of very little evidential value in the light of the viva voce evidence of people who deny that the applicant ever married Tsotleho in accordance with Sesotho customary rites.

The applicant testified that Tsotleho is his wife. He married her in accordance with customary law but he does not remember the date of his marriage to her. He abducted her from her presents' home at Linakeng ha Selomo. He took her to Khukhune where his mother was living at that time. She was living there because she was nursing her sick mother. His father continued to live at his home at Litlhatsaneng in Leribe. He lived with his mother at Khukhune until his grandmother died. They returned to Litlhatsaneng with Tsotleho. About three years after he had abducted Tsotleho his father paid eight (8) head of cattle as "bohali" for her.

The parents of Tsotleho had already passed away when the applicant abducted her. In his evidence the

applicant gave two versions which conflict with each other. He first said that when he abducted Tsotleho she was living alone at her parents' home at Linakeng because her parents had already died. It was shown to him that a young girl could not live alone in a house after her parents had died. He later changed his first statement and said that he knew that Tsotleho grew up at her uncle's place at Kololong after her parents had passed away. The name of her uncle is Johane Dhlamini who is the husband of the younger sister of Tsotleho's mother.

The cattle for "bohali" were paid to Johane Dhlamini. The applicant said that they were paid to Johane Dhlamini because that is where Tsotleho grew up. He does not know what ultimately happened to the cattle. He said that he and Tsotleho went to live at Kololong at Johane Dhlamini's place because he did not live harmoniously with the wife of his elder brother. At that time they already had one child named Boshanku or 'Nyane or Phillimon. Some time after the birth of Boshanku, Tsotleho again became pregnant. He went to the mines in the Republic of South Africa leaving her already pregnant. She gave birth to a son who was named Boy or Lecheko whose body is the subject matter

of these proceedings. He last saw Lecheko Boy Sekotlo when he was still very young and beginning to walk.

In cross-examination it was put to the applicant that Boy was born in 1956. He said he did not know.

P.W.2 is Mofethe Dhlamini. He testified that he is the son of Johane Dhlamini. He was born in 1936. His evidence is to the effect that he was a young man when Tsotleho was married. Eight head of cattle were paid by the parents of the applicant to his own father Johane Dhlamini. He alleges that he knows this because he used to herd those cattle which were later transferred to one Piet Masilo who is the paternal uncle of Tsotleho. He denied that when the applicant abducted Tsotleho he was too young or not yet born.

The first defendant testified that when he first met Tsotleho she was living at Kololong at the home of Johane Dhlamini. She already had her first child. He asked her to marry him and she accepted his proposal. Her guardian allowed him to marry her. He took her to his place at Mabothise where they lived as man and wife. He paid ten head of cattle for "bohali" much later. Those head of cattle were paid to one Emely

Letsela who is the stepmother of Tsotleho. When he married Tsotleho her two children were given to him together with their mother. He brought them up until Boy passed away in 1993. He buried him in his (1st respondent's) yard after the corpse was released to him by the District Secretary.

Tsotleho testified that the applicant abducted her but she stayed with him for only a short time. The applicant soon became mentally deranged before any "bohali" cattle were paid. The parents of the applicant took her back to her maiden home. When the first respondent later proposed marriage to her, her parents asked the parents of the applicant whether they wanted to marry her for their son. They indicated that because their son was still ill they were not going ahead with any marriage.

She started living with the first respondent in 1957 and some cattle for "bohali" were paid at that time.

The applicant alleges that there is a valid marriage between him and Tsotleho. The burden of proof is on him to prove on a balance of probabilities

that there is such a valid marriage. His evidence is very unconvincing because for many years he did not have anything to do with Tsotleho who is supposed to be his lawful wife. For about thirty-eight years he did not have any meaningful contact with Tsotleho and her children. The two children - Phillimon and Boy - were brought up by the first respondent. He gave them names as well as his surname. They obtained passports in the names and surname given to them by the first respondent. Exhibit "1" is a passport of Boy. In it he uses the name Zakea 'Muso Sekotlo. According to it Boy was born in 1956.

The applicant alleges that the two children used to visit him at Bethlehem where he worked. He must have been aware that they are using the first respondent's surname. It is most improbable that he would have allowed this state of affairs to remain unchallenged for a period of well over thirty years. It seems to me that he did not challenge this state of affairs because he know very well that there was no valid marriage between him and Tsotleho. No man can allow his own children to use another man's surname. The applicant alleges that his children i.e. the deceased and Phillimon used to visit him at his place

of work in the Republic of South Africa. He was aware that they were using the first respondent's surname but he never objected and never took any steps to correct the situation. It seems to me that it is not true that the children ever visited him.

This brings me to the evidence of Phillimon Sekotlo. Like the applicant Phillimon was the most unreliable witness. He says that his mother told him that his father was the applicant. That was correct because it is common cause that the applicant abducted Tsotleho and made her pregnant. Phillimon was the product of that pregnancy. Because there was no valid marriage that followed that abduction, Phillimon ought to have retained the maiden surname of his mother. I think that is what happened. When Tsotleho subsequently got married to the first respondent it was decided that Phillimon should be "married" along with his mother. Normally extra cattle are paid for the child, but it is not necessary for cattle to be transferred. It is enough if the child is publicly associated with the child in the marriage arrangements (Duncan: Sotho Laws and Customs at page 30).

In her evidence before this Court Tsotleho said



that when the first respondent married her, her parents arranged that her children must be "married" along with her (A nkelloe le thoto ea hae - literally - she must be taken with her luggage). This arrangement that the children should be "married" along with their mother explains why these children belong to and acquired the surname of the first respondent. Phillimon who is now an adult is still using the first respondent's surname. It cannot be true that the first respondent disowned him and ditched him. If that were true why is he retaining the surname of the first respondent? In any case Tsotleho denies this allegation.

It is trite law that according to Sesotho customary law marriage is not just an ordinary contract between the parties who are marrying each other, it involves the two families. In the present case it is common cause that after the abduction of Tsotleho by the applicant the latter became mentally deranged and could therefore not be in a position to manage his own affairs. Then the members of the applicant's family ought to have intervened to keep Phillimon and his mother if there had been any valid marriage between their son and Tsotleho. Even if his

father had already died at the relevant time, his elder brother and other members of the family would have intervened because "Mosali" ea nyetsoeng ha a tsoale sekhaupane" (a married woman begets no bastard); "ngoana o tsoaloe ke khomo) cattle beget a child) and "ngoana ke oa khomo (the child belongs to the cattle). The applicant wants this Court to believe that for well over thirty years he abandoned his legitimate children and only emerged when one of them died at the age of thirty-eight years. I do not believe his evidence and that of his witnesses.

I believed the evidence of Tsotleho that the applicant never paid any cattle for her "bohali" and that there was no valid marriage between her and the applicant. I believed her evidence that cattle for "bohali" were paid to her stepmother Emily Letsela who unfortunately did not give evidence because she works in the Republic of South Africa. I am told that on several occasions when the case was postponed she was present in Court. It is a well-known fact that employers in the Republic of South Africa sometimes get fed up when their employees absent themselves from work to attend court proceedings which cannot be finalised.

As far as the certificate produced by the first respondent as evidence of an agreement of marriage between himself and Emily Letsela is concerned I came to the conclusion that it was probably written in a clumsy way. It does not show who its author was and furthermore none of the people who were witnesses to the agreement gave evidence before this Court. Be that as it may the onus was on the applicant to prove that there was a valid marriage between him and Tsotleho.

I came to the conclusion that the applicant has failed to discharge that onus on a balance of probabilities.

In the result the rule is discharged with costs.

(J.L. KHEOLA)  
CHIEF JUSTICE

6th June, 1994

For Applicant - Mr. Mahlakeng  
For Respondent - Mr. Fantsi.