

IN THE HIGH COURT OF LESOTHO

In the matter between:

MALIPOLELO LYLLIAN MAHANETSA

Applicant

vs

KOMELLO MAHANETSA
ATTORNEY GENERAL
THE COMMISSIONER (R.L.D.F.)

1st Respondent
2nd Respondent
3rd Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 28th day of June 1994

The First Respondent is the only one who opposes the prayers for declaring the Applicant the sole widow of the late Pali Paul Mahanetsa, that all terminal benefits of the estate of the late Pali Paul Mahanetsa be paid to the Applicant and directing the First Respondent to desist forthwith from interfering in any way with the estate of the late Pali Paul Mahanetsa. One clear indication of what would exercise the mind of the Court is this statement contained in paragraph four of the Applicant's Replying Affidavit which goes:

" It is significant that the 1st Respondent does not want to acknowledge me even as he sees a copy of the official marriage certificate. 1st Respondent has not obtained the affidavit of the said MOTSELISI nor has he annexed any marriage certificate in support of his allegations which I submit are false and 1st respondent is put to the proof thereof." (my underlining)

It is important to note that in support of the existence and the validity of the Applicant's marriage to the late Pali Paul Mahanetsa the Applicant has obtained the affidavit of G. Tseetsa who was present and a witness to the said marriage of the Applicant and the deceased.

On the 6th June 1994 when the matter was placed before me Mr. Molete for the First Respondent indicated that perhaps the matter could not be dealt with on the papers without the aid of *viva voce* evidence. Mr. Mathafeng for the Applicant also agreed with Mr. Molete's observation. No aspect or issue of the dispute was spelled out as requiring ventilation by way of *viva voce* evidence. It was on that note that the matter was postponed to the 8th June, 1994.

On the 8th June 1994 Counsels appeared as before. The matter could not proceed for the reason of being crowded out by

other matters. But then it was clear that the parties were not ready to bring in evidence as agreed previously. I there and then indicated to the Counsels that question of the Applicant's marriage to the deceased PALI PAUL MAHANETSA was the central issue to the resolution of the dispute. It did not matter at that stage, in my judgment, what the probabilities were on the other issues but the First Respondent had to satisfy me that the marriage of the Applicant to the deceased by civil rites on 13th September 1982 (as born out by an annexed copy of the marriage certificate) did not exist or was a nullity. (see section 35 of Marriage Act No.10 of 1974 and the comments of the learned author D. Zeffert in the 4th edition of South African Law of Evidence at page 620 under section 2 (a) proof of marriage generally). I also ordered that Mr. Molete (if he so wished) should file additional affidavits on any question, including these ones that came out in the First Respondent's Affidavit. The questions were firstly, that the deceased had been married to one Motsetlisi Mahanetsa (born Koeshe) and secondly that "to the best of my knowledge and belief the Applicant is Madaniel Shata and daughter-in-law of Daniel Shata of Qacha's Nek whom he knew personally." as stated by the First Respondent. The First Respondent is the deceased's father.

It is important to note that at no time was the evidence of Motsetlisi Mahanetsa (the alleged other wife of the deceased) made

available. Furthermore, nothing was brought forward of the Applicant's relationship with the Shata family except what was later revealed in an Order of Court to be referred to later in the judgment. This is important because the suggestion had been made of the possibility of the Applicant being married to the Shata family and the Mahanetsa family probably at the same time. Equally important would have been an answer as to when was the Applicant married to this member of the Shata family whose name had not been mentioned in the First Respondent's affidavit. If the Applicant was indeed married to a member of the Shata family and if such marriage preceded this one to the deceased Paul Pali Mahanetsa it meant that the Applicant has been engaged in polyandry and that this marriage to Pali Paul Mahanetsa would be null and void. (See section 29(1) of Marriage Act No. 10 of 1974 and learned author (section 29 (1) of Marriage Act No. 10 of 1974 and learned author (as he then was) W.C.M. Maqutu in contemporary Family law of Lesotho on pages 94-95 under 9.4 polyandry) But then the Court Order in case number CIV/T/206/80 eventually answered most of the questions.

It was in the above circumstances that on the morning of the 27th June 1994 despite the protestation of Mr. Mathafeng for the Applicant, I again adjourned the matter to the afternoon. I had hoped, in all fairness, that there would be some evidence in support of the other aspects or issues which would amount to a

defence in favour of the First Respondent. It is significant to note that at that juncture Mr. Molete had already conceded that he had failed to find anything that could invalidate the Applicant's said civil marriage. Anything that came near to being a matter of interest was an order of Court in case number CIV/T/206/80 being in the matter between Morongoe Albertina Shata (born Mohapi) against Victor Felleng Shata. The order was issued by the Chief Justice Mr. T. S. Cotran (as he then was) that:

"1. An order condoning Plaintiff's adultery, be and is hereby condoned.

2. (a) That (a) and (b) is hereby granted;

(b) Plaintiff is awarded custody of the minor children of the marriage;

(c) Defendant is ordered to maintain children of the marriage at the rate of R15.00 per child per month;

(d) Defendant forfeits all benefits arising out of the marriage;

(e) Costs of suit awarded to Plaintiff."

This Order of Court was exhibited later in the afternoon. One of the prayers granted had been for the dissolution of the parties' marriage. It is clear that the order was made quite before the 13th September 1982, when on the mentioned date the Applicant and the late Paul Pali Mahanetsa contracted their marriage. The dissolved marriage could not have any effect on the Applicant's marriage with Paul Pali Mahanetsa. This is even assuming that the Applicant is in fact MORONGOE ALBERTINA SHATA.

In the absence of any evidence to disprove the salient facts entitling the Applicant to the relief sought, the First Respondent's Counsel conceded, most wisely, that he could not carry the matter any further. I therefore found for the Applicant on the balance of probabilities. In this decision I have considered this array of uncontroverted facts and all the circumstances of the case, which show in a way that leaves no doubt, that the deceased was Applicant's husband by law. (see *Selamolele vs Makhado* 1988(2) SA 372 at 375D-E)

I made the orders that:

- (a) The Applicant is declared the sole widow of the late Pali Paul Mahanetsa.
- (b) The Third Respondent is directed to pay all the

terminal benefits of the late Paul Pali Mahanetsa to the Applicant.

(c) The First Respondent is directed forthwith to desist in anyway from interfering with the estate of the late PALI PAUL MAHANETSA.

(d) Each party shall pay its own costs.

T. MONAPATHI
JUDGE
28th June, 1994

For the Applicant : Mr. Mathafeng

For the 1st Respondent : Mr. Molete