

IN THE HIGH COURT OF LESOTHO

In the matter between:

LEHLOHONOLO RAPAPA	APPLICANT
AND	
MOIKETSI RAPAPA	1ST RESPONDENT
MATS'ELISO MOLISE (born Rapapa)	2ND RESPONDENT
MOHAPI RAPAPA	3RD RESPONDENT

REASONS FOR JUDGMENT

Delivered on the 8th day of April, 1994, by the
Honourable Mr. Justice W.C.M. Maqutu
Acting Judge

On the 31st March, 1994, Mr. Hlaoli brought an urgent application *ex parte*. At the root of the application was the intention to stop a burial from taking place on the appointed day:

The Court heard Mr. Hlaoli briefly and made the following order:

- *1. The Rule Nisi is issued returnable on the Wednesday 6th April, 1994 at 9.30 a.m. calling

/...

upon the Respondent why,

- (a) Respondents shall not be restrained from removing the corpse of the late Mamats'eliso Rapapa from the Teyateyaneng mortuary for burial.
- (b) applicant (as the heir of the late Mamats'eliso Rapapa by customary law) shall not bury the late Mamats'eliso Rapapa.
- (c) The Respondents shall not be restrained from interfering with the preparations that Applicant is making for the burial of the late Mamats'eliso Rapapa.
- (d) Respondents shall not be ordered to pay costs in the event of their opposing this application.

2. Prayer 1(a) of this Rule shall operate as an interim interdict pending the finalisation of this application."

On the 7th April, 1994 the Court found there was a dispute of fact that had to be resolved by hearing oral

/...

evidence. This was done on the 7th and 8th april, 1994.

Applicant claims the right to be the person in charge of the burial of the late Mamats'eliso Rapapa the widow of the late Mohai Rapapa. The late Mohai Rapapa had only a daughter Mats'eliso out of his marriage with Mamats'eliso. According to Applicant, Applicant's mother was married by the late Mohai to be his second wife. If that was so then Applicant as the heir in the house of Mohai would have the right and duty to bury Mamats'eliso.

The heir has a duty to bury Voet XI.7.7. This is what this Court has to determine in this case.

The first Respondent Moiketsi Rapapa aided by others was refusing to allow Applicant to participate in the burial, saying he does not know applicant. Applicant had brought an ox and a sheep for the burial but first Respondent was not permitting Applicant's contribution to be made towards the burial.

It was common cause that Applicant was invited by the late Mamats'eliso from her mother's maiden home to come and take over as heir to the estate of the late Mohai Rapapa. If that were so Applicant was the heir and was the one with the primary duty to bury Mamats'eliso. It

/...

was also clear that the late Mamats'eliso gave *bohali* for Applicant's wife.

First Respondent was the only one who consistently opposed the introduction of applicant into the Rapapa family. There was a family meeting in which he was heard. All members of the Rapapa family approved of Mamats'eliso's action of bringing applicant into the Rapapa family. Among those who agreed was Mats'eliso the daughter of Mamats'eliso, therefore Mamats'eliso had her way and Applicant was brought into the Rapapa family. At one stage First Respondent Moiketsi even took the *bohali* that Mamats'eliso was giving for the wife of Applicant. This action of First Respondent (Moiketsi) was treated as acquiescence, a fact First Respondent strongly denied.

According to First Respondent and his witness Malebeko Rapapa, Mohai abducted the mother of Applicant and later returned her to her maiden home putting the matter of abduction beyond doubt by giving six head of cattle damages. At that time the mother of Applicant was breastfeeding a young baby girl. They did not really have the true facts and they contradicted themselves because they claimed sometimes claimed Mohai had married the mother of Applicant and she was returned because she had cheated Mohai over the paternity of her child. Malebeko

/...

was so much under the influence of First Respondent that under cross-examination she changed her evidence to be consistent with whatever First Respondent was alleged to have said. I therefore accept that the mother of Applicant was married.

It is possible for a husband to terminate cohabitation and in effect a marriage by what is called *tlamelo*. In such an event he asks the woman to take her personal belongings and go back to her maiden home. This usually happens because that woman has committed some transgression. Sometimes she is even innocent but the husband has developed some antipathy or is making some unproved allegations against her. The *bohali* cattle are not returned. Therefore technically the marriage subsists though it is in fact dead. *Tlamelo* is always not free from controversy. It has not in this case been satisfactorily proved. Traditionally there is a saying that cattle not men beget children. This means (to most people) children even if not begotten by their mother's husband, if the parties reconcile, they can be acknowledged as legitimate by the husband of their mother.

The First Respondent's stand is that the mother of Applicant was never married. I have already said he contradicts himself on this point. Therefore I believe

/...

there was a marriage.

It emerged during Applicant's evidence that he was born in 1964 which was four years after the death of Mohai. It was common cause that Applicant's mother left at the time of Mohai's death in 1960 and that she went to her maiden home. Applicant's witnesses say she went there because Mamats'eliso told her to go away. First Respondent says she had left earlier than 1960 but returned for the funeral. According to First Respondent and Malebeko, her parents called her back before she could wear mourning cloth. This evidence of Respondent does not convince me as true and I reject it. Whatever the merits of both the Applicant and Respondent's evidence are on the point, the important thing is that since 1960 applicant's mother was not living the Rapapa's but was living at her maiden home among her maiden relatives.

In the light of the above-mentioned facts, Applicant was born four years after the death of Mohai Rapapa from whom he claims succession. In Basotho traditional society, so long as a woman lives among her in-laws (even if she is a widow) the children she bears are deemed legitimate or to use Jacob C.J's terminology, such children are deemed to be regularly born. In Malikhapha Mothebesoane v Malenka Mothebesoane and Another 1978 LLR

/...

384 (a 1971 case) Jacobs C.J at page 389 said:-

"The death of a husband does not dissolve a marriage and while bohali remains with the widow's own father or heir the marriage continues ... Kenelo is not universally practised and certainly never forced on the widow... After Kopi's death and until Lephoto junior was born Plaintiff was under the control of Lephoto senior, and it was he who had the right, if he wanted to, to charge a male member of the family, with the widow's consent to assume the rights and privileges of the late husband ... So long as a child born of a widow is begotten by a man approved by the man having control over her, the child is regarded as having been begotten regularly. ... In the present case all the indications are that Lephoto Jnr. was accepted into the family as having been born regularly all along. I therefore come to the conclusion that at the death of Lephoto Senior, Lephoto Junior became the heir of the first house."

It is therefore clear to me that had the mother of Applicant remained among the Rapapa's, the children born to her would be deemed legitimate because it is the duty of the Rapapa's to see that the widow is afforded conjugal rights. This presumption does not extend to children of women who are not living among the in-laws. In this case First Respondent as the younger brother of Mohai would have been duty bound to see that the mother of Applicant is afforded conjugal rights. For that reason I hold Applicant is not legitimate or regularly born. This area

/...

of the law and family relations is not free of controversy.

It is therefore clear that First Respondent who has consistently refused to acknowledge Applicant was entitled to challenge Applicant's participation in the funeral and to refuse to allow applicant to contribute an ox and a sheep. If he had allowed Applicant to do so, some people would taken that as acknowledging that Applicant is the legitimate heir of Mamats'eliso.

What remains is the question of costs. Applicant is not to blame for his present predicament. First Respondent and the other Respondents should not have denied a marriage which they themselves sometimes acknowledged. They lengthened proceedings unnecessarily. They were of the view that if Applicant's mother was married Applicant was entitled to succeed. Their success in this case was fortuitous. The Court in its discretion feels it should not award them costs.

The *Rule Nisi* is therefore discharged and each party is directed to pay its own costs.

Delivered at Maseru This 2nd Day of May, 1994.

/...



.....
W.C.J.M. MAOUTU
ACTING JUDGE