CIV/APN/95/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

SEFAKO MOFUTISI	APPLICANT
vs	
'MABOKANG MOFUTHU (born KOBEFO)	1ST RESPONDENT
TS'ELISO KOBEFO	2ND RESPONDENT
'MATHABANG KOBEFO	3RD RESPONDENT
'MAMPHO KOBEFO	4TH RESPONDENT
THE PROPRIETOR MANGWANE FUNERAL PARLOUR/MORTUARY	5TH RESPONDENT

REASONS FOR JUDGMENT

Delivered on the 11th April, 1994, by the Honourable Mr. Justice W.C.M. Maqutu, Acting Judge

---

On the 11th April, 1994, I discharged the ***Rule Nisi*** with costs.

This application had been brought ***ex parte*** because of its urgency. On the 30th March, 1994 this Court made the following interim order:

> "The ***Rule Nisi*** is discharged and applicant's application is dismissed with costs."

In this application the subject of the dispute was

/...

the body of the deceased. Applicant claimed he was the father of the deceased and by law entitled to bury deceased. First Respondent, as the mother of deceased, claimed she was not married. In this she was supported by her father, the Second Respondent.

Applicant claimed deceased was a Minor in his custody. Deceased suffered from a head-ache, and Applicant took him to St. Joseph's hospital at Roma because, the head-ache would not respond to treatment. Deceased was admitted to hospital on the 20th March, 1994 but died the same day. On the 24th March, 1994 he found Second and Fifth Respondents had taken the body of deceased away.

Strictly speaking hospital authorities ought not to have released the body to Second and Fifth Respondents. To take a body away from a mortuary in that way was ground enough for Applicant to approach court.

At the time the child died, Applicant and First Respondent had not lived together since 1992 when, due to some disagreement that is the rough and tumble of marriage, they parted. Their cohabitation had begun in about 1983 or thereabout. There were three children born to them between 1983 and 1988. The youngest child Mosala

is with the First Respondent while Bokang, the eldest and deceased Khutlang, had been with Applicant.

First and Second Respondents were going to bury Khutlang on the 1st April, 1994. Hence this urgent application.

Applicant claimed he had given the ***bohali*** of 7 cattle for the marriage of First Respondent. The first 4 in December 1984 and another 3 in March 1993. If that was so, there was clear proof that he had begun the process of marriage. If he married via abduction, he had first to pay six head of cattle for abduction and then give ***bohali*** for marriage after that. It is now a tradition (because this practice is commonly followed) for the 6 head of cattle for abduction to be counted conditionally as ***bohali***. The condition being that if the marriage does become a reality, then those 6 head of cattle will be included as ***bohali***. If the marriage does not take off then those cattle will be treated as damages. Many such provisional marriages fail within first five years.

It is trite law that in ***ex parte*** applications, the court expects parties to act in good faith. In Spilg v Walter 1947 (3) SA 495 Lewis J 499 said:

/...

> "It is necessary to deal with one only ground of opposition raised on this point - that the applicant failed to comply with the rule that in ***ex parte*** applications, the applicant must observe the utmost good faith and make disclosure of all material facts. This rule was laid as long ago as in 1903 in ***in re*** Leydsdorp and Pietersburg Estates 1903 (TS 254) where it was said if any material facts, which would (the headnote says 'might') ... in the opinion of the Court, have influenced its decision is kept back, either wilfully or negligently, the Court will not consider itself bound by such decision, but will set it aside."

In this case the Second Respondent disclosed that on the 19th March, 1993 the Simeone Local Court in CC.11/93 entertained a claim of 6 head of cattle against Applicant. In the judgment produced by Second Respondent, Applicant stated in Court that he admitted liability. According to that judgment Applicant admitted he had given only 3 head of cattle. He was therefore ordered to give 3 more head of cattle.

A warrant of execution, which Applicant admits, was issued against him in April 1993. Applicant says he paid the 3 head of cattle before judgment was delivered. Applicant does not suggest that he paid the 3 head of cattle before summons were issued.

/...

We have here an urgent applicant on very incomplete information. Everything is hurriedly done. Out of respect for the dead, I have to decide this application. I was not told that 3 head of cattle were given after summons had been issued. The Simeone Local Court had enough time and was under no pressure nor were the parties. There is a judgment which was given under ideal conditions with all parties having prepared and therefore in a position to put their cases properly, which is not the case here. There is a Notice of Appeal against the judgment which is undated and unnumbered which Applicant claims it is in respect of CC.11/93 of the Simione Local Court. It was never filed before that Court, because there is no rubber-stamp of that Court acknowledging receipt. After twelve months it ought to have been disposed of. This attempt to supplement Applicant's case would have been prejudicial to Respondent. Nevertheless I might have been inclined to take it seriously if it was not so completely suspect.

I have therefore no option but to follow Margo J in Cometal-Mometal v Corlana Enterprises 1981 (2) SA 412 at 414 H where he said:

> "It seems to me that, among the factors which the court will take into account in the exercise of its

> discretion to grant or deny any relief to a litigant who has breached the ***uberrima fides*** rule, are the extent to which the rule has been breached..."

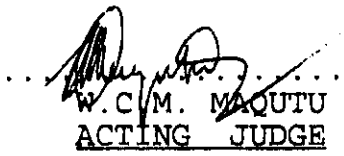
Withholding evidence from the court is something that cannot be lightly overlooked especially when it is on the question of marriage, which is the point on which the entire case revolves.

I cannot therefore, in the face of CC.11/93 of the Simione Local Court which is binding on this Court until competently set aside, order ***viva voce*** evidence. The Court has no option but to hold that only 6 head of cattle have been given and there is no marriage as was held in CC.11/93. There is nothing to stop Applicant from entering into fresh negotiations with Second Respondent with a view to proceeding with marriage if First Respondent will have him.

Having regard to what is before me I rule that First and Second Respondents have a right and duty to bury.

The ***Rule Nisi*** is discharged and Applicant's application is dismissed with costs.

/...



W.C.M. MAQUTU
ACTING JUDGE

For Applicant : Mr. J.M. Mashinini
For Respondents: Mr. N.E. Putsoane