CIV/APN/77/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

RAMAKHALEMA NTS'AOANA	APPLICANT
AND	
MONYATSI LEBINA	RESPONDENT

REASONS FOR JUDGMENT

Judgment was delivered on 31st March, 1994. Reasons are being filed 11th April, 1994 by the Honourable Mr. Justice W.C.M. Maqutu, Acting Judge.

On the 15th March, 1994 Lehohla J. granted and order that:

"1. A Rule Nisi is hereby issued calling upon the Respondent to show cause (if any) on the 22nd March, 1994 at 9.30 a.m. why the following Order should not be made absolute.

(a) The Respondent is hereby interdicted from burying the deceased, Sisi 'Mahlalosang nts'aoana (born Lebina) at

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Ha Mapotsane in the district of Mohale's Hoek.

(b) The Respondent is hereby ordered to release the deceased's corpse to the applicant for the Applicant to make burial arrangements.

(c) The Applicant is hereby declared the rightful person to bury the deceased.

2. That prayer 1 (a) and (b) should operate with immediate effect."

It is not clear why the Rule was not confirmed on the 22nd March, 1994. Respondent received the Court Order on the 22nd March, 1994. This could have been too late for Applicant and the Court to know. It appears on the 24th March, 1994 the Registrar issued another Order which contained a *Rule Nisi* returnable on the 28th March, 1994. This order was served on the 24th march, 1994.

On the 28th March, 1994 the matter came before me. I was informed the body was buried on the 27th march, 1994. I postponed the matter to the 31st March, 1994 to give both Apploicant and Respondent an opportunity to show cause why

the *Rule Nisi* should not be confirmed or discharged. I took the view that it was still possible to exhume the body without any danger to Public Health. I ascertained that the body had been kept at the mortuary and that it had not deteriorated at the time of burial. It had rained and the ground had been we which must have kept the body cool. Four days was not an unreasonable time to exhume the body if necessary.

On the 28th March, 1994 the Court made the following order:

> "Respondent is warned that on the 30th March 1994 at 2.30 p.m. he shall be expected to come and answer a case of contempt of court and to show cause why the *Rule Nisi* shall not be confirmed. He is to obtain the service of an attorney."

On the return day the Court first dealt with the contempt of Court that Respondent had committed in burying the deceased despite the Court Order. It was clear from what Respondent said that Respondent had taken the decision that the body had stayed too long in the mortuary. He said his intention was not malicious in not obeying the Court

Order.

Respondent was fined M300-00 or one month imprisonment for contempt of Court. He was given seven days to bring the M300.

The Court then dealt with the application. Applicant claimed he had married Respondent's daughter by Basotho Customs and had given 9 head of cattle as *bohali*. Respondent... Answering Affidavit acknowledged only three. There was written proof that only three cattle were given. During argument it emerged that Applicant claimed the other six head of cattle were given and no documents were issued. When I said if perhaps the documentary proof had been lost, it might be understandable, a bare allegation of that kind was suspect. Applicant's Counsel said in fact the documentary evidence was lost. This made me even more unimpressed with the fact that 6 more cattle had been given.

These cases in which the right to bury a deceased person is in issue are always brought as urgent applications. The deceased who is a pawn between the contending people cannot be heard. The body must be buried within two days where there is no mortuary. Where there is a mortuary burial must take place soon to enable the mourners to go on with their daily lives. The hearing takes

place under great pressure (and naturally it can be expected) evidence provided might be inadequate. It is very easy for a miscarriage of justice to occur because of the desperate hurry in which the hearing has to take place out of respect for the deceased. On this particular occasion the Court was not working under ideal conditions.

Everybody was hurrying for Easter. The Interpreters were gone. consequently proceedings were conducted in Sesotho. I had been prepared to hear *viva voce* evidence (such as I might have) in the circumstances. What I heard during argument convinced me that the evidence I would hear would be worthless and untrue. In application proceedings especially those brought *ex parte* utmost good faith is fundamental. There was no point to hear *viva voce* evidence when on the question of *bohali* cattle which form the basis of a Basotho customary marriage the court was already being deceived. Some people might say what comes from Counsel in argument is not evidence. Counsel in persuading me to hear *viva voce* evidence is presumed to be acting on instructions. If Applicant's Counsel straight away gives the impression that, client his going to give contradictory evidence, there is no point in hearing such evidence. The onus of proof is on Applicant.

When a person founds customary marriage on elopements

or abduction, he must first pay 6 head of cattle damages. The father of the girl then sometimes lends him the six head of cattle to found a marriage. If the marriage succeeds these cattle become permanently part of the *bohali* cattle given in marriage. If the marriage fails these cattle constitute a fine.

In this case Respondent in the customary way lent Applicant the three head of cattle that he gave as part of the fine and they were counted as part of *bohali*. As already stated these three cattle counted as part of *bohali* on condition that the marriage became a reality. Marrying via elopement or abduction is marriage through blackmail. The reason being that when the marriage is negotiated the girl has lost virginity and is probably already pregnant. The parents of parties are (so to speak) causing a marriage to take place to regularise a situation that might otherwise be untenable. It is for this reason that the six head for cattle payment of damages is conditionally made available to found a marriage. Many of these provisional marriages fail within two to three years.

There is no clear evidence *aliunde* except what applicant's affidavit discloses that a further six head of cattle have been added. I have already said Applicant's counsel made me to doubt this story. If indeed Respondent's

daughter stayed with Applicant from 1979 until 1986, no further cattle were given then the condition in terms of which the three cattle were advanced the marirage did not materialise. If in 1986 applicant's daughter parted with Respondent then the expectations of marriage never reached a stage of fulfilment.

Marriage according to the received law has a definite date. In Basotho custom marriage does not always have a definite date. Colin Murray in his Families Divided at page 119 quotes the following passage from Phillips and Morris Marriage Laws in Africa:

> "The marriage transaction is normally a long drawn out process and there is often some doubt, both as to the exact point in the process at which the parties become husband and wife, and also to which (if any) of the accompanying ceremonies and observances are strictly essential to the conclusion of a valid marriage."

There is nothing odd in finding that some customary marriages never really reach a point at which families of both husband and wife are definite that a marriage has taken place. If at least more than six head of cattle have been given (where a marriage was preceded by elopement or abduction) then there can be no doubt that a marriage exists. Where there never was an elopement or abduction,

the number of cattle is not important because a Basotho customary marriage rests on agreement. If husband and wife, continue to live together (abduction and elopement notwithstanding) the number of cattle handed over is not material, they are regarded as married.

What complicates this area of marriage is that there is no adherence to principles, such as there are. If parties disregard the failure of the other side to fulfil essentials then neighbours and the community go along with them. Where there are children and they claim rights of succession (the fact that there was what amounts to be a provisional marriage) is often ignored and the children are treated as legitimate. Even here too several factors are taken into account.

There is a tendency to simplify African customary marriage because most of its principles are not written. Section 34(1) of The Laws of Lerotholi Part II only give less than the bare bones of the essentials of a marriage by Basotho custom. Cotran C.J. dealing with the problems caused by the Laws of Lerotholi observed that Section 34(1) of the Laws of Lerotholi Part II were framed after decisions involving seniority of house where courts had been dealing with succession. In Ramaisa v Mphulenyane 1977 LLR (138 at page 15) he noted:

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> "But when sought to be applied to a completely different set of circumstances created a multitude of others never contemplated or intended by their draftsman."

I would add Section 34(1) of The Laws of Lerotholi II consists of less than one hundred words. Surely the law of marriage can not be captured in one hundred words however skilled a draftsman can be. It has to be remembered that the draftsmen were not even steeped in Basotho custom and culture. Cotran C.J. in Ramaisa v Mphulenyane at page 149 dealing with the problem of draftsmen added:

> "I think a large part of the difficulties encountered in these cases have arisen because of attempts to reduce some rules of custom but not all others, ... into ink and paper."

This distorts Basotho customary law and results in grave injustices to be done to parties affected by Basotho custom. The tendency of using decided cases as precedents even in case not properly prepared and argued because of urgency increases the danger of distortions of custom. Urgent cases involving corpses that have to be immediately buried cannot properly interpret Basotho custom. Bad cases make bad law.

In this case the daughter of Respondent parted with

Applicant in 1986. he says he made some attempts to secure her return immediately after her departure. He blames Respondent for preventing their reconciliation. He does not appear to have made any further attempts to get Respondent's daughter back. When a married woman has gone to her maiden home she has to be lawfully sent back to her marital home after both families have met and sorted out their problems.

Applicant claims they reconciled in 1990 or 1991 and resumed cohabitation. We have only applicant's word for this. Respondent says that it is not so and further states that he buried his late daughter's illegitimate child in 1991. Applicant says Respondent buried the child by stealth and adds the deceased child was legitimate. Applicant sought to fortify his allegations on marriage through affidavits that accompanied his Replying Affidavit. These were just as vague and unconvincing and in particular they supported the story that further cattle were given. I have already said what Applicant's counsel said showed in argument that this story is suspect.

Applicant should make his case in his founding affidavits. He should not try and build his case in his replying affidavit. In Bayat & Ors Hansa and Another 1955 (3) SA 547 at 553 Caney J. said:

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> "An applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits file) with the notice of Motion. ..... and is not permitted to supplement it in replying affidavits."

In an urgent application of this kind in which both parties were in a desperate hurry the Court had to be fair to both sides.

We have a problem here. The daughter of Respondent who could have put an end to my reservations about Applicant's allegations is dead. It is her corpse whose final destination is being determined. What applicant says happened between him and deceased must be scrutinised with care. Deceased cannot tell us if applicant really deserves to bury her. Applicant claims in his affidavit that the deceased said certain things that support his allegations. In Da Matta v Otto 1972(3) SA 858 at 868 said it is a rule of practice according to the policy of our courts to scan with suspicion such evidence. The reason is simply that the deceased is not there to answer for herself. Although no special onus rests, it has to be born that as Macdonald ACJ said in Johnston v Johnston and Another 1972(3) SA 104 at 106-107 there is need

> "for more than ordinary care, a need

> which arises from the fact that the other party ... is no longer alive to give his or her own version."

It does not alter the fact that a lot of what applicant imputes to the deceased is hearsay although as a dying declaration such hearsay sometimes treated as an exception in appropriate cases. It is not even a dying declaration. Therefore it is hardly admissible.

We do not know what the wishes of the deceased would have been. She made no will directing where or how she should be buried. It is doubtful or unsettled if she was expected to make such a will according to custom. Cullinan CJ in Chemane Mokoatle v Senatsi Senatsi CIV/APN/163/91 (unreported) spoke of a universal custom common to all mankind, namely respect for the dead. If I had had to confirm the Rule I would have had to deal with the question of exhumation of the deceased. The question of respect for the dead was always ticking in my mind.

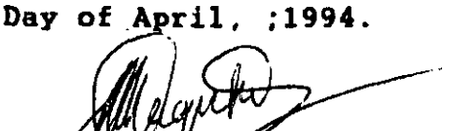
I have already decided that whether there was a marriage or not is an issue that is equivocal. This is so having regard to the fact that sometimes "marriage is a long drawn out process and there is often some doubt as to the exact point at which parties become husband and wife." *Vide* Phillips and Morris Marriage Laws in Africa. In this case

I was not persuaded that this is a case in which I should declare a marriage exists merely in order to enable Applicant (who had handed over three head of cattle which did not even cover the 6 head of cattle) to take the deceased's body and bury it. It is doubtful whether the parties still lived together.

The balance of convenience is in favour of discharging the *Rule Nisi* and directing Respondent to pay the costs of this application.

This order does not finally determine whether or not there was in fact a marriage. It merely disposes with the question of burial on this occasion. I need only add that cases such as M. Mathibeli v T. Chabalala CIV/APN/76/85 (unreported) and Chemane Mokoatle v Senatsi Senatsi (supra) show the problem women married by custom and who parted with their first "husbands" have to face if they should suddenly die. Public policy and a sense of what is right should never be lost sight of. See Motlohi v Lenono 1978 LLR 391.

Delivered at Maseru This 11th Day of April, ;1994.



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W.C.M. MAQUTU
ACTING JUDGE

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For the Applicant : Miss M. Tau
For the Respondent: In Person