

CIV\APN\195\95

IN THE HIGH COURT OF LESOTHO

In the matter between :

'MAPITSO CECILIA THAKI

Applicant

and

'MAPUTI THAKI  
LEBAKENG THAKI  
CHIEF OF MOKHOKHONG

1st Respondent  
2nd Respondent  
3rd Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi  
on the 7th day of August 1995

I have received the 1st Respondent's Answering Affidavit. Mr. Khaue for Applicant, correctly pointed out that the affidavit really called for no reply. I have myself looked into this affidavit which was supported by that of the 2nd Respondent. I was instantly driven to invite the Respondent's Counsel Mr. Seotsanyana whether he could consider asking for an adjournment, to find out if the Respondents would not give viva voce evidence, to clarify certain things which would at least form mitigation, in the event that this Court found the Applicant guilty of contempt of Court: This was not favourably received by the

Counsel.

On the 13th June 1995 I issued the following Order :

- "1. That the Rule Nisi is hereby issued and returnable on the 14th day of June 1995 calling upon the Respondents to show cause if any why;
  - (a) The Respondents shall not be ordered not to bury the corpse of one MELATO PETROS THAKI at Mokhokhong without consent of the Applicant.
  - (b) Respondents shall not be ordered to release the corpse of MELATO PETROS THAKI to the Applicant for save keeping at the mortuary of her choice pending the outcome of this application.
  - (c) Third Respondent shall not be ordered to give the Applicant all necessary protection for the save transportation of the corpse to a place as prayed in prayer 1(b) above and that the corpse be not buried as prayed in prayer (a) above.
  - (d) That the First and Second Respondent ordered to release all the property and all documents of the

deceased to the Applicant pending the outcome of this application.

(e) That the First and Second Respondents be ordered to pay the costs of this application.

(f) The Applicant be granted such further and/or alternative relief.

2. That prayers 1(a), (b) and (c) is hereby made an interim immediate order pending the outcome of this application."

On the day of hearing I was convinced that not only was the defence glib but the Answering Affidavit was clearly a disguised retreat or a withdrawal with grace by the Respondents. In other words while the Respondents could have easily asked for mitigation they were advised to clutch at what clearly were brittle straws which were easily breakable at the least touch.

The Answering Affidavits starts by saying at paragraphs 2 and 3:

"2

I have read both the original\initial applications as well as the court-orders attached thereto, which I now

understand after extended discussion of the same with my legal adviser.

3.

I wish to state at the outset that this is not an answering affidavit in the usual sense but merely a sworn statement whose whole intent and purpose will be made plain as one read on." (my underlining)

In paragraph 2 the First Respondent attempts to make a point that she never understood the import of the Court Order until she was given an explanation by her legal Counsel. Not only were the Respondents served with the Rule Nisi, the contents were clearly explained. The family refused to discuss the Court Order at the time. The corpse was not yet buried. The First Respondent, in the presence of the Second and Third Respondent, replied that the family agreed that they will not abide by the Court Order. She said she was continuing with the burial as planned. Mr. Khaue's affidavits goes on at paragraph 7 and 8 :

" 7

I again pointed out the consequences of the decision more particularly First and Second Respondent. I went

as far as showing First and Second Respondents that they may be held contemptuous but she insisted with the burial.

8.

I left and informed the Applicant of the reply that I have received from First and Second Respondent and further that the Third Respondent has said there was nothing he could do if the Respondents defy the Order." (My underlining)

The Third Respondent is the Other Respondents' chief and this Court was told at a previous hearing that no Order was sought against him. Against this background and having indicated that the affidavit was not an answering affidavit I was sought to be persuaded that the affidavit's contents would reveal what I would discover to be the "mens rea" and an innocent state of mind at that. But the answering affidavit does not attempt to answer the founding affidavit of the Applicant nor the supporting affidavit of Mr. Khaue.

By way of summary the fourth paragraph of the affidavit admits service of the papers of Court before the deceased's burial. In paragraph 5 the First Respondent says that as a

Mosotho living almost wholly under Sesotho law and used to the procedure of Basotho Courts, she "did not believe the Attorney for Applicant when he said the Honourable High Court had already ordered stoppage of the burial even before giving me and the family of the deceased any hearing at all." (my underlining) The underlined portion can only be an afterthought. A lot of effort and consultation was involved to try to persuade the Respondents to no avail. That they were intent on defying the Court Order is clearly shown by the refusal and unwillingness to comply with the Court Order. The Order itself spoke of a date the 14th June 1995 as a date of hearing "in order to show cause." Surely the Courts cannot be expected to do more than that. Paragraph 6 speaks of the mistrust of the partisan lawyer having caused the attitude of disbelief and the consequent unwillingness to comply with the Court Order. It may be true that on the day of the service of the Court Order the Respondents did not believe that the Applicant was entitled to bury the deceased but that would not be a reason for defiance of a Court Order which even allowed the Respondents a hearing in due course. This was to enable Respondents to indicate why the Applicant was not so entitled.

The First Respondent at paragraph 8 of the Answering Affidavit acknowledges her gratefulness "to the said Attorney that he attempted to explain what to me, even after professional

advice and counselling, a most unjust and incomprehensible system of justice and a sure way to separate and antagonize thousands of Basotho families." (my underlining) Even though the First Respondent had gone through the painful and distressing period of the preparation for her son's burial, the exhumation of her son's body and burial of her son against her (Respondent's) wishes, I found it difficult to associate the First Respondent with the unfavourable way our law, rules of Court and the way the whole system worked, was characterized in that paragraph. If anything this was intended to have a go at the very dignity and the authority of the Court, the very things the contempt proceedings are seeking to protect and buttress. Alternatively it was carelessness on the part of Counsel to have penned a statement which clearly gave a wrong signal. In most, if not all, areas of the affidavit the Respondent speaks of matters that are mitigatory other than exculpatory. I found it difficult to find anything that showed anything other than wilful disobedience of the Court Order.

The Courts do not take lightly to the fact of intentional disobedience of their Orders." The Applicant must show that an Order was granted against the Respondent and that the Respondent was either served with the Order or informed of its contents and could have no reasonable grounds for disbelieving the information and further, that he either disobeyed or neglected to comply with

it. Once this is shown, wilfulness is normally inferred and the onus will be on the Respondent to rebut the inference on a balance of probabilities. There is authority for the view that the Respondent's disobedience must have been mala fide as well as wilful. If the Respondent can show bona fide or reasonable mistake there will be good defence". (LAWSA Vol.3 paragraph 392 page 217) I do not think that the unpleasantness of the Order (as alluded to in paragraphs 9 and 10 of First Respondent's Affidavit) was a good enough reason to disobey the Order. On the other hand it is that perception of unpleasantness which caused the First Respondent to wilfully disobey the Court Order. It also became *mala fide* to the extent that the Respondents did so with their eyes open and in full appreciation of things. This I say in the light of explanation made and the deliberation the Respondents took in ultimately reaching a decision to proceed with the burial of the deceased despite the Court Order. I accordingly found the two Respondents guilty of contempt.

I have considered the pain and distress that the Respondents have gone through in the whole proceedings and even before. They have been ordered to pay the costs of the proceedings. Mr. Khaue stated that he would not press for payment of costs. Despite all the Respondents are ordinary folk whose lack of sophistication will result in incalculable confusion if things are overdone. While the Court's displeasure should clearly be

demonstrated it should be tampered with compassion. It should be shown that the Courts shall punish where necessary without seeming to be vengeful. Contempt of Court is nevertheless a serious offence.

On the 27th June 1995 I decided that it was appropriate that the Respondents be sentenced to a term of imprisonment for 30 days with an alternative of payment of M100.00 but the whole sentence was suspended for 3 years on condition that the Respondents shall not commit a similar offence.

Y. MONAPATHI  
JUDGE

7th August, 1995

For the Applicant : Mr. Khauoe

For the Respondents : Mr. Seotsanyana