

C OF A (CIV) NO.31 OF 1994

IN THE LESOTHO COURT OF APPEAL

In the matter between

KOMELLO MAHANETSA

Appellant

and

MALIPOLELO LYLIAN MAHANETSA

Respondent

HELD AT:

MASERU

CORAM:

Mahomed F.  
Steyn J.A.  
Browde J.A.

J U D G M E N T

Mahomed P.

The respondent in this appeal was the successful applicant in the Court a quo, in which she sought an order declaring that she was the sole widow of the late PALI PAUL MAHANETSA ("the deceased") and directing the Commissioner R.L.D.F. (the employer of the deceased) to pay all the "terminal benefits" of the deceased, to her as the sole widow.

Neither the Commissioner (R.L.D., F) nor the Attorney General who were cited as respondents opposed the relief prayed for by

the applicant in the Court a quo. Only the appellant in this appeal, (who was the first respondent in the Court a quo) opposed the application. His ground of opposition was that the deceased (his son), was not married to the respondent but to one Motselisi Mahanetsa (MOTSELISI). He also alleged that the applicant was not Malipolelo Mahanetsa but MADANIEL SHATA and that she was the daughter-in-law of one DANIEL SHATA. These allegations were denied by the respondent.

In support of her claim that she was married to the deceased the respondent produced some formidable evidence. This included a marriage certificate signed by the District Commissioner and issued in terms of Section 16 of Proclamation No.7 of 1911. This certificate reflects a marriage solemnized on the 13th of September 1982 between the deceased and MORONGOE LYLIAN MASIKE which the respondent said was her name before the marriage. The certificate was correctly treated by the Court a quo as prima facie proof of the marriage. The only attack that was made on this certificate on behalf of the appellant was that the writing thereon which referred to the deceased was not the signature of the deceased and was different from the signature of the deceased on his passport. This attack is based, however, on a fallacy. It assumes that the writing which incorporates the name of the deceased on the certificate purports to be his signature. It does not.

The prima facie case produced by the certificate is supported not only by the respondent's own evidence, but also by

one G. TSEETSA who deposes under oath that he was present when the marriage was contracted and that he appeared before the marriage officer at Leribe as a witness to the marriage between the deceased and the respondent.

The respondent also supported her claim by other documentary and circumstantial evidence. This included an insurance policy in which the deceased is reflected as the assured and the respondent as co-assured. The respondent is reflected, as having the surname of her husband and her maiden name as MASIKE. Reliance is also placed on a savings' account opened by the deceased on behalf of FLORINA, who is, according to the respondent, the daughter of the deceased and the respondent.

The answer of the appellant to the strong prima facie established by the respondent on this evidence, is very weak and speculative. He produces no document to support his claim that the respondent was married to any person other than the deceased, or that the deceased was married to any person other than the respondent, or that if any such other marriages existed they were not dissolved before the marriage entered into between the respondent and the deceased on the 13th of September 1982. Nor does he produce any affidavit from MOTSELISI who he says was married to the deceased or from DANIEL SHATA who he says is the real father-in-law of respondent or from any other member of the SHATA family to support the averment that the respondent was married to a SHATA.

The stubborn denial by the appellant that the respondent is who she says that she is, that she was indeed married to the deceased, that the parties appeared before a marriage officer to solemnize the marriage on the 13th of September 1982, that this marriage was witnessed by a person who knew the parties, that there was a child born of this marriage called FLORINA and that the deceased helped in the support of this child, is unsupported by any cogent evidence or circumstances. I am not persuaded that the "dispute" manifested by these denials is a bona fide dispute at all.

If there was indeed a bona fide dispute on the relevant issues, I would have expected the appellant to tender viva voce evidence in support of his averments and to ask for an opportunity to test the averments made by the respondent in cross-examination. Notwithstanding an invitation from the Court a quo, the appellant's legal representative made no such application to lead viva voce evidence and he indicated that he could take the matter no further. The Court a quo was, in these circumstances, entitled to grant to the respondent the relief she claimed.

Counsel for the appellant, quite properly and understandably conceded that he had difficulty in attacking the judgment of the Court a quo, on these facts.

In my view the appeal is without merit. I order that the appeal be dismissed with costs.

*I. Mahomed*  
..... 5  
I. MAHOMED  
PRESIDENT OF COURT  
OF APPEAL

I agree

*J. H. Steyn*  
.....  
J. H. STEYN  
JUDGE OF APPEAL

I agree

*J. Browde*  
.....  
J. BROWDE  
JUDGE OF APPEAL

Dated at Maseru this *13<sup>th</sup>* day of January, 1995.