CIV/APN/4/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

MALITHLARE ABRAHAMS	APPELLANT
VS	
KHOJANE ABRAHAMS	1ST RESPONDENT
MATRON - MAFETENG	2ND RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu, on the 9th day of January, 1995

On the 5th January, 1995 Mr. Phoofolo for Applicant brought the following application (framed in the following terms) as a matter of urgency:

"1. That a *Rule Nisi*, returnable on a date and

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time to be determined by this Honorable Court, be issued calling upon the Respondents to show cause, if any, why

(a) the periods of notice and forms of service of processes presented by the Court rules shall not be dispensed with on the ground of the urgency of this application

(b) Declaring the Applicant the sole heiress of the deceased and the only person entitled to determine the deceased's burial place

(c) Interdicting the 1st Respondent from removing and burying the deceased at any place other than the one determined by the Applicant herein

(d) Interdicting the 2nd Respondent from releasing the body of the deceased to any other person other than Applicant pending finalisation of this

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application

(e) Granting Applicant further and/ or alternative relief

(f) Directing the 1st Respondent to pay costs of this application

2. That prayer 1 (b) and (c) operate with immediate effect as interim orders."

This application was refused and I promised to file my reasons later.

The facts as stated by the Applicant are as follows:-

(a) The Applicant is claiming the right to bury her late husband whose names are not stated, but according to annexure "MA1" the deceased's name was Albert Abrahams.

(b) There is no marriage certificate except the affidavit of Harebatho Musa to the effect he

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recalls Angelina Moholobela and Albert Abrahams married at Teyateyaneng in 1953. Harebatho Musa's means of knowing is that Albert Abrahams is his uncle (his mother's younger brother).

(c) The marriage by Basotho custom is alleged to have taken place in 1953. The marriage is said to have been solemnized at the AME Church, TY in 1976. Applicant claims Harebatho 'Musa's affidavit is a marriage certificate. We have already seen that this affidavit is not a marriage certificate. Harebatho 'Musa's affidavit only refers to a marriage entered into in 1953 and does not deposed to the solemnisation of the marriage in 1976.

(d) Applicant states that her deceased husband married one Makhojane by custom around 1943. First Respondent Khojane a male child was born of that marriage. Deceased divorced Makhojane and was awarded custody of their child Khojane.

(e) There are two children born of the marriage

between Deceased and Applicant namely:

Mokhantsi - a girl born in 1955, and
Sophy - a girl born in 1955.

(f) Deceased died on the 24th December, 1994 in Mafeteng where he was a herbalist. Their cohabitation was never interrupted, therefore Applicant and Deceased remain husband and wife.

(g) Applicant (as the widow of the Deceased) wants to bury Deceased at Ha Nkalimeng in the Berea district. First Respondent as the first male issue of the Deceased wants to bury the Deceased at Lithakong in the Berea district. Lithakong is the parental home of Deceased.

(h) Both applicant and First Respondent want to bury Deceased on 7th January, 1995 but at different places.

When it comes to the burial of a deceased person it is not unusual to have competing claims of the right to bury.

The deceased may have friends and relatives in differing degrees of relationship all wanting to bury the deceased. When these people cannot agree, then a dispute arises which has to be settled by the courts.

In the case of *Winnie Mutua v Martin H. Matholoane & Another* CIV/APN/183/94 (unreported) Monapathi J. at page 11 said:-

> "It is against public policy that there should have been no one to take care of the interests of the deceased (including burial) ..."

Monapathi J. in this is supported by Voet XI·7·7 Gane's Translation where the learned author says:

> "If the deceased did not impose the duty of burial on any one, the matter would affect those (the latin word is *continget*) who have been named in the last will as heirs. If no one has been so named, it affects his legitimate children or the blood relations, each in order of succession. If they are also wanting, it is the duty of the magistracy to take care that the deceased is buried with his own money or property."

In the *Winnie Mutua* case the body was handed to deceased's sister (a blood relation) in preference to deceased's

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divorced husband. In Basotho society according to the *Laws of Lerotholi II Section 30* (where there is no one with such a duty) the duty to bury falls on the chief or headman and every adult male person residing in the village.

In this case two relatives are having a dispute over who should have the deceased's body in order to bury it wherever he or she pleases. Monapathi J. in *Winnie Mutua v Martin H. Matholoane and Another* (supra) at page 5 dealing with title to sue for deceased's body says:

> "It is correct that capacity to sue normally depends on and follows the specific interest that one has in the matter that one seeks to protect. Being an heir and or a potential heir is one of the interests. The relationship of a person and deceased relative is of a sentimental nature giving one a specific interest. Being an heir to a deceased person casts a duty on the heir to bury."

I must emphasise that Voet XI·7·7 emphasises the blood relationship. The precedence of the heir only comes where there is a dispute. In that event some one has to have a right and duty that is superior to others. The heir has a superior right over blood relations. Therefore the heir has to prevail. The right to bury of blood relations

follows "each in order of succession".

In Basotho custom blood relationship is the criterion. Husband and wife have always been regarded as being related so long as the marriage subsists. Blood relationship has never had the emphasis it has in the "received law" Roman Dutch Law.

In the received Roman Dutch Law a surviving spouse was not regarded as being related to the deceased for purposes of succession. The surviving spouse was only recently (that is in 1953) made one of the heirs *ab intestatum* of the deceased to rank along with the children as if the spouse was one of the deceased's children. See the *Intestate Succession Proclamation No. 2* of 1953. The South African case of *Tseola v Maqutu* 1976(2) SA 418 which has been cited with approval in *T. Motlohi v E. Lenono* CIV/APN/208/79 reported 1978 LLR 391, *M. Mathibeli v T. Chabalala CIV/APN/76/85* (unreported and that of *Apaphia Mabona v Khiba Mabona* CIV/APN/289/86. Yet the case of *Winnie Mutua v Martin H. Matholoane & Another* CIV/APN/183/94 (unreported) before Monapathi J. has just shown how easily relationship through marriage can be

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terminated. The husband (Martin H. Matholoane) was alleging he did not even know there had been a divorce. Something the trial court found hard to accept. Until 1953 a spouse according to Roman Dutch law (as received in Lesotho) would not have been the deceased's heir because the spouse lacked the "blood relationship" that is the primary criterion on which the right and duty to bury that Voet XI·7·7 had in mind.

In this case the heir of body of the Deceased and the widow of the Deceased are having a dispute over the right to bury the Deceased. In family matters it is always better if the parties could talk over a matter such as this one. If they cannot agree the courts have long decided that the law provides that there must always be one of the parties who must prevail where the deceased has not given directions as to the burial. The courts have decided that as Voet XI·7·7 has stated, the right and duty to bury falls on the heir or the "legitimate children of the deceased or the blood relations, each in their order of succession."

In Basotho custom there is only one heir, that is the deceased's eldest son. The male children rank according to

the seniority in the order of succession. If the deceased had no children, the deceased's widow becomes the heiress. If there is no widow succession goes to next male relatives in the family tree. Even though there is an order of precedence, in matters of where, when and how to bury the deceased, the Basotho have a custom of consultation. Assertion of rights is only embarked upon only in the last resort.

Applicant bases her right to determine the palace of burial of the Deceased on paragraph 10 of her founding affidavit where she says:

> "I aver that I am the sole heiress of the deceased and hence I am entitled to determine the place of burial and time with the endorsement of a family head/decision."

In support of her application, Applicant has annexed a letter "MA2" whose signature is obscured by four revenue stamps affixed over it. To this short letter is attached a list of 29 names, 28 of which are written in one hand writing. Opposite 26 of these names there are signatures.

In front of two of the names there are blanks, a sign that two people did not sign. On top of this letter is written the words:

> "THOSE WHO SAY HE SHOULD BE BURIED ON SUNDAY 1994"

below this opposite this words who support him or her in brackets are the words (Ka 'm'e Malitlare).

Annexure "MA2" in my view cannot be evidence that a family meeting was held. It only discloses a circular was passed around for people whose names were already written to sign. I do not think it helps applicant in any way. Even if there was a family meeting, the answer to the question (of who is the heir and therefore with a right and duty to bury) is a matter of law.

Before I granted the *Rule Nisi* Applicant must have made a *prima facie* case on the basis of which he would be entitled to the interim order he seeks. It is therefore on the basis of Applicant's averments and papers that I have to deal with this application.

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First of all the principle that the heir has a right and duty to bury which Voet XI·7·7 stated as the one that governs Roman Dutch Law is accepted as governing Basotho custom on the point. Therefore in order to decide whether applicant is entitled to an interim order we have to decide whether she has (on the face of her papers) established that she is the heiress. If deceased has given directions as to burial, this problem that we have would not be there because the deceased's wishes would be binding on his executor and heirs or beneficiaries.

In order to determine who is the heir we have to know the law of succession that governs the deceased's estate. For those who have abandoned the Basotho way of life and adopted a European mode of life, their estates are governed by the "received" Roman Dutch Law. See Section 3(b) of the *Administration of Estates Proclamation* of 1935. But for those who have not abandoned the African way of life their estates continue to be administered according to Basotho customary law.

In this particular case we do not have to go into the Deceased's way of life at length. The reason being that

(according to Applicant) Deceased married both of his wives by custom. Deceased does not seem (on the face of the evidence before me) to have ever entered into a marriage by civil or christian rites. Section 3(b) of the *Administration of Estates Proclamation* of 1935 dealing with African estates like this one provides that:

> "they shall continue to be administered in accordance with the prevailing African law and custom of the territory: Provided that such law and custom shall not apply to estates of Africans who have shown to the satisfaction of the Master to have abandoned tribal custom and adopted a European mode of life, and who if married, have married under European law."

I have underlined the words "and who if married, have married under European law." The reason for this is that these words seem to show that the Deceased's estate might not qualify for administration under the received Roman Dutch Law even if he had abandoned the Basotho way of life because he has not married under European law.

It could well be that in future an appropriate case might arise in which the question of form of marriage and the way of life test might be revisited. See *Khatala* v

Khatala 1963-66 LLR 97 where Schreiner JA showed that the question whether deceased is married by Basotho custom or by civil rites in matters of succession will be considered as important, depends on circumstances of a particular case.

In this case before me it seems even the Deceased's occupation of herbalist corresponds more with the Basotho way of life than the European mode of life. In any event nothing at all has been said in the Applicant's affidavit that shows Deceased had abandoned the Basotho way of life and adopted a European mode of life. The onus is on applicant to show that she has abandoned the Basotho way of life if she wants benefits under the "received" law of succession. In this case I am of the view that all facts point in the direction of the Deceased's estate being governed by Basotho customary law.

According to Basotho law and custom,

> "The heir in Lesotho shall be the first male child of the first married wife..."—*Laws of Lerotholi I* Section 11(1).

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This undoubtedly points to the First Respondent as being the heir under Basotho customary law.

To take the matter further Applicant and First Respondent belong to the same house. See *Maseela v Maseela* 1954 HCTLR 48. In *Maseela*'s case a man married another woman after the first one had deserted him. The Court held the husband had rebuilt his fallen house with another woman. Therefore deceased's son by the first divorced wife and the replacement second wife belong to the same house. In Basotho custom when a man's wife dies, the house of that man's is said to have fallen. The reason being that each of the wives in the potentially polygamous hierarchy constitutes a house. Therefore because the mother of the First Respondent was divorced, she was regarded as dead, therefore the deceased was obliged to marry Applicant in order to rebuilt that house. Even assuming Applicant had borne a son, First Respondent would have still been Applicant's eldest son.

First Respondent is Deceased's principal heir. Therefore even if there were several houses with their own heirs, First Respondent as the Deceased's principal heir,

would still have prevailed and would have had the right and the duty to bury Deceased.

Molai J. has after a careful review and analysis of all previous authorities decided a case which is almost identical to this one. This is the unreported case of *Apaphia Mabona v Khiba Mabona* CIV/APN/280/86. In that case there was a dispute over the right to bury deceased between the widow and the eldest son of the deceased by a different wife. That particular deceased's estate was governed by Basotho customary law. The deceased had left no written instructions as to burial. Molai J. dealing with the merits of the *Apaphia Mabona* case summarised the issues as follows:

> "It is not disputed from the evidence disclosed by the affidavits that Respondent is the eldest son of the deceased, Joseph TŠepo Mabona, and therefore he is the heir...the salient question is who is to have a final say in a dispute of this nature, the widow or the heir...
> "The widow's wishes prevail where she is the heiress and not where deceased has died leaving an heir. It is trite law in Lesotho that the eldest son of the deceased person is the heir..."

Molai J. basing his judgment on *Khatala v Khatala* (supra)

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added that the fact that the widow in *Apaphia Mabona* case had been married by civil rites makes no difference in the matter. Everything in this matter of right to bury revolves on who is the heir. There is only on heir by Basotho custom — and that heir is the eldest son of the deceased.

Applicant brought this application on the basis of the fact that she is the "sole heiress" of the deceased. It turns out that according to the averments in her own affidavit she is not and cannot be her Deceased husband's heiress because the Deceased has a son. And that son is Khojane the First Respondent. It is (in the light of the above facts) patently clearly that applicant misconstrued the law when she brought this application.

The order I was obliged to make on the 5th January, 1995 was the following:

> "Having referred to the decided case of *Mabona v Mabona* CIV/APN/280/86 (unreported) the application is refused and there is no order as to costs."

With those words applicant's application was refused.

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W.C.M. MAQUTU
JUDGE

For Applicant : Mr. *H. Phoofolo*
For Respondents: