CIV\APN\206\95

IN THE HIGH COURT OF LESOTHO

In the matter between :

THABO MATIBI KHOJANE	Applicant
and	
SEBOKA MOKATSANYANE	1st Respondent
MANGWANE FUNERAL PARLOUR	2nd Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 26th day of June 1995

The application is about the burial of MANTHETHE KHOJANE (deceased). The Applicant approached me on an urgent basis on the 17th June 1995 and a *rule nisi* was issued returnable on 21st June 1995. After a considerable lapse of time concerned with delay in filing replying papers the matter was eventually heard on the afternoon of the 21st June 1995, on which day and due to the obvious urgency of the matter I ordered that the matter be heard.

While the Applicant had referred in his founding affidavit

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of the fact that the affidavits of Mathabo Khojane, Rankhala Tenei and Lebabo Tsejane in support of the founding affidavit, it was only on reply that the Applicant in fact annexed the three affidavits. The issue whether the affidavits be rejected was resolved by the Order that I made namely that the application be turned into a trial and the papers be turned into pleadings. I would not disregard these affidavits for the sake of justice and fairness and because their veracity would be tested under cross examination and when the Applicant's prima facie case also had already been made out as I did resolve.

I decided that in view of the nature of the proceedings (on affidavit) there were certain issues over which there were serious disputes of fact which could not be decided on affidavit. I ordered therefore that *viva voce* evidence on the matter be heard. The dispute centered around whether the Applicant and deceased were validly married according to customary law in 1987. There had been no dispute that since about 1993 the parties had been staying apart the deceased having "ngalaed" or deserted. That the parties have been living apart in is born out by the proceedings of Majara Local Court (Exhibit A) under case number CC 82\93 in which the Applicant sought for an Order for return of the deceased and the children. The Applicant did not succeed in the matter the Court apparently ordering the Applicant to

approach the deceased in order to bringing about an amicable settlement. It is correct that the validity of the marriage was not brought into issue in this proceedings. Indeed P.W.1 Mathabo Khojane spoke of the matter having been raised only after the death of the deceased.

When the matters proceeded, in argument, the issues revolved around whether the Applicant and deceased had eloped and whether the five and half cattle were in fact paid for bohali cattle or for compensation for elopement (chobeliso). The Applicant's witnesses testified that it was only after the deceased had been residing at Applicant's home with the Applicant, as man and wife that arrangements were made and negotiation for the payment of bohali were made.

The matter concerns the burial of a deceased who had for over two years been living with her parents. Her parents had already set in motion preparations for burial of the deceased. The fact that the deceased's body and dead bodies are nowadays kept in mortuaries which are effective cold storage does not lessen the urgency of the matter. The burials of the bodies continue to be sensitive and emotional issue touching both the parents of the deceased on both sides where the deceased is a married woman and her husband. Most importantly it is the

respect to the dead that is enshrined in all cultures. This calls for a speedy and decent burial. This aspect is demonstrate by different communities in different ways for different cultural reasons. For example some societies bury their deceased the same day of their death before midnight. That sometimes the dead body is more often than not a pawn between the two contending parties is a truism.

The duty and their right to bury has been said to be founded on marriage and the right of an heir to bury. That is why the inquiry about validity of the Applicant and deceased's marriage was proper. While accepting that the principle of our customary law are fluid, these are the following other features : (a) marriage according to customary law has no definite date; (b) there is a tendency not to adhere to principles; (c) there is a tendency to simplify customary law principles and to seek to crystallize them (see RAMAKHALEMA NTSOANA and MONYATSI LEBINA CIV\APN\77\94 - 11\04\94 per Maqutu J pages 7 - 9). The learned judge adds at page 9 of the judgment:

> "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 cases not properly prepared and

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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."

The Applicant seeks to persuade me that this is a case in which I should declare that a marriage exists, in order to enable Applicant (who has handed over five and half head of cattle which did not even cover the six head of cattle) to take the deceased's body and bury it. The parties no longer lived together. The Respondent contends that the five cattle were for compensation for elopment.

One thing is said to have happened according to the testimony of MATHABO KHOJANE P.W.1 (Applicant's mother). That is having asked for the hand of the girl (which is separate from bohali negotiations) the deceased's mother is alleged to have written to P.W.1 to ask that the girl be brought over or taken by the Applicant immediately and soon to avoid the trouble or the problems that the deceased was said to be causing. This was said to have been in the form of boys and suitors converging on the deceased with the resulting confusion and the likelihood of the deceased being taken away for purposes of marriage. The Applicant is said to have taken the deceased to his home as a

result of that request. It was only thereafter that negotiations over bohali are said to have commenced.

Before I come to the conclusion as to the nature of the marriage negotiation I am concerned now as to whether or not the Applicant and deceased eloped or not. P.W.1 felt that there was no elopement (chobeliso) but a mutual handing over by agreement of the deceased between the deceased's mother and P.W.1. P.W.2 (Rankhala Tenei) even went on to say that elopement (properly speaking) needs to be accompanied by threats, force or violence. Indeed in some instances there is even forced sexual intercourse along the way. These witnesses cannot be correct that merely because there was no violence in the removal of the deceased from her home it can only mean that there was no elopement. I was not told that there was an agreed day on which the Applicant's parents (came in terms of a ceremony) for handing over of the bride. In terms of this ceremony certain gifts or food or parts of a slaughtered animal accompanying the bride to her marital home. From her home she is accompanied by a major married woman and a girl or girls to deliver her to her husband's parents. They are received in a certain ceremony and sent back in accordance with certain practices. I do not accept as having been in order that the Applicant was accompanied by her friend one Malefetsane in taking away the deceased from her home. This

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was the evidence of P.W.2. As the Respondent's counsel submitted the Applicant's witnesses accords more with the inference that there was elopement than that there was not. The alleged letter written by deceased's mother therefore pales into insignificance. This now leads to the important aspect as to whether the negotiation by parents resulted in an agreement for bohali or compensation (based on elopement). That the payment of five and half cattle could have been for payment of part of bohali not compensation (based on elopement).

It is perhaps necessary, at this stage, to comment about this Exhibit B. It is a letter written on a yellowish pad. It is dated the 22nd August 1987, that being the date of the meeting the parents. It is useful to give out a translated text of the letter:

> " On this day which is written above, I Mathabo Khojane I was present at the home of TSEPO MOKATSANYANE, to pay for my son THABO KHOJANE who has eloped a daughter of TSEPO who is TIISETSO MOKATSANYANE. Payment is six cattle and then I paid five cattle the sixth cow is R40.00 to complete R160.00. This is evidence of the agreement between TSEPO MOKATSANYANE and MATHABO KHOJANE.

Witnesses

1. RANKARA TENEI
2. MOKONE KHOJANE
3. KOPANO MOKATSANYANE."

There are certain features of this letter. The letter is written as if it is the P.W.1 who is the writer or maker of the statement of agreement. The letter is written by one person, (the whole of it) who is not identified nor has that person signed. Furthermore no one has attached his signature. Nor have the witnesses done so. Only two of the six people allegedly present are shown as witnesses in the Exhibit B. Neither is it shown that D.W.2 Majanki Mokatsanyane was present. There is no date stamp impression of the Respondent's chief. D.W.2 could not have been present as one of the negotiating parties.

The Applicant's witnesses testified that not only was there an agreement for payment of bohali but there was in fact a written agreement (as a result) which was signed by the people representing the girl's parents namely TSEPO MOKATSANYANE (the girl's father) KOPANO MOKATSANYANE and LEBABO TSEJANE and on the other part representing the boy's parents RANKHALA TENEI, MATHABO KHOJANE (Applicant's mother) CHEBISO KHOJANE and MAANA-KOENA CHABELI SEELA. They go on to add this agreement was sent

over to the deceased's father's chief at Ha Tsosane where it was given a rubber date stamp impression of the office of that chief. Two copies of the agreement was issued one was given to the Applicant's parents and the other to the deceased's parents.

The witness LEBABO TSEJANE (P.W.3) gave evidence on behalf of the Applicant. He said he is illiterate and remembers quite well that when others signed their names he only made a cross mark. He was shown Exhibit B which he denied knowledge thereof and pointed out it did not bear a cross mark. It is this witness who testified that originally he had been called to testify on behalf of the Respondent (in preparation of papers) but was rejected after consultation with Respondent's Attorneys. He knows fully well that there was no agreement about damages for compensation for elopement. He is a fellow villager with the First Respondent. He was also a relative of the Applicant's mother P.W.1 by marriage of their relatives. Like all other witnesses this witness appeared to be confused as to other terms of the agreement with regard to the scale (sekepele) but was in agreement with others that negotiations for payment of bohali cattle resulted in payment of five and half head of cattle which he stated categorically as being for marriage but not damages. There may be minor aspects which he did not answer well to. For example what the balance was agreed to be and what "thlabiso"

(head) consists of. He said the latter consisted of 10 cattle and sometimes 12 cattle "depending on understanding between the parents." But he did testify that the scale consists of 20 head of cattle according to law. I found the witness a credible witness who had no reason to tell lies. I would say the same with P.W.2 Rankhala Tenei. He was present at the negotiations on the 22nd August 1987 which he testified categorically that it was for marriage and not for damages. When shown Exhibit B he stated that while he could forget events taking place 8 years ago, he remembers quite well that the letter of agreement which was executed was signed, bore signatures and he could not forget his own signature. This witness was credible, very impressive and was not shaken in cross-examination. Indeed he spoke of the colour of the letter was being yellowish like Exhibit B. He said Exhibit B was not the letter of agreement.

P.W.1 Mathabo Khojane says that the copy letter of agreement of marriage disappeared in her possession. She was not shown Exhibit B. It is that letter which appears to be authored by her. She remembered quite well that the correct letter had signatures of the people who attended and rubber stamp impression of the Chief of Ha Tsosane. This witness could have been very naive as to what elopement entails in the same way as the girl's mother MAJANKI MOKATSANYANE (D.W.2). She could also have been

mistaken in assuming that by reason of the letter allegedly written to her by deceased's mother (D.W.2) a good release of a bride was given to bridegroom's family but she seemed honest and truthful. It may even be that this aspect of the letter which D.W.2 denies is not true and a fabrication but generally P.W.1 seemed honest. I need not make a specific finding that there was in fact no such a letter. I would accept that what this letter constituted was a strange and unusual agreement. The deceased seemed to have gone to the home of Applicant by way of elopement other than anything else.

I have agonized over the main problem that while the Applicant seems most probably to have abducted the deceased there are more probabilities also that the parents of the Applicant and deceased did agree on marriage and over part of bohali, I cannot see why in law I should find fault with the validity of the marriage merely because none of the Applicant's witnesses was astute enough to state most elegantly and with precision that it was agreed what the total bohali, payment would be.

It would be useful to accept the view also that long ago the number of cattle payable for bohali was small, perhaps only three. George Moshoeshoe said in 1873 Report "There is no fixed rule laid down to the number of cattle (p.44). Now however it

is as a general rule agreed upon by the two families but in the great majority of cases in Basutoland today dowry consists of : Twenty head of cattle, ten head of sheep or goats (setsiba - the trousers) one horse (molisana - the herdboy) one ox (moqhoba - the driver). Rich families often give more, a usual dowry for a son of Moshoeshoe being : thirty head of cattle, and the rest as above - MOLAPO vs JONATHAN JC 18\45."

I have been referred to the case of BOY ANTONE vs TABOLETI MOKHOTHU & 2 OTHERS CIV/APN/392/87 of 11th December 1987 per Mr. Justice J. L. Kheola (as he then was). There are few things that I understand very clearly about the judgment. One of them is that :

> "There is no doubt in my mind that there was no agreement as to the amount of bohali and that there cannot be a valid Sesotho customary law marriage without agreement on the amount of bohali." (See BOY ANTONE vs TABOLETI MOKHOTHU'S case at page 7.)

That may have been so in that case. But here I have believed that the parties agreed on bohali that is why there was part payment. It can only be presumed, through common sense that there was a balance outstanding. It was however not stated in

any written document.

Indeed the Sesotho version of the Laws of Lesotho in section 34 seems to suggest that there must be agreement about the total bohali that ought to be paid. This cannot always be so for the following reasons : Firstly there is a view that the question of twenty head of cattle is a matter of law and common acceptance that it can and must always be presumed (Refer to the evidence of RANKARA TENEI). This same attitude can be gleaned from the statement in the work CONTEMPORARY FAMILY LAW OF LESOTHO by W.C.M. Maqutu 1st edition where at page 106, the learned author says:

> "Furthermore many parents to facilitate marriage, put a low price for each animal where money is used in lieu of cattle. Today not many people ever receive even half of the bohali cattle despite their leniency on the price of cattle that are given as money for their bohali. The question has never been answered why modern Basotho insist on bohali of twenty head of cattle when they know they will not get them. The answer will naturally be that this has become traditional." (my underlining).

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This view is corroborated by the statement of George Moshoeshoe quoted earlier in this judgment.

There is a second view. It is that the payment of twenty head of cattle which nowadays is converted into money payment, (while it is a matter of common acceptance or tradition always to be presumed) is separate from the payment of additional setsiba, molisana and moqhoba. The additional animals have to be negotiated separately. The third view is that the scale or sekepele does not refer to the twenty head of cattle but refers to assessment of the value of each individual animal judging from the first one which set a standard in value or the highest value or ceiling all the other nineteen remaining being judged on that scale or a sliding scale. The means that :

(a) The price of each individual animal cannot be known or agreed to in advance except the first or the first few.

(b) The total amount of value of bohali cannot be known in advance and has to be agreed in a piecemeal fashion.

(c) In the nature of negotiation or "thetheso"

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> there may be two or more sessions in which the parents sit to negotiate. At no time therefore would the total amount of bohali be known except at the very last session.

That is why where a portion of bohali has been paid the balance became a debt. It would therefore no lie in the mouth of the boy's parents to deny that a debt exist merely because there is no specific statement of twenty head of cattle and so forth.

The last session of bohali negotiations which concludes the full payment is a rare occurrence according to the author of Contemporary Family Law of Lesotho. Therefore to ask for compliance with the aspect of agreement of total bohali is not only carrying formality too far. It is to ask for literal interpretation of section 34(b) as to contemplate that there will be agreement as to total amount of money to be paid in advance or indeed to expect that every agreement shall contain a statement that : "the total amount of bohali shall be twenty head of cattle is unrealistic."

Customary law by its very nature is subject to modifications. That is why parents can even agree that no bohali be paid. The marriage is still deemed to exist. In that case

it is different from where the parents have not met to negotiate anything. Customary is a body of growing law which expands its parameters as civil society develops and expands. I am unable to accept the rather strained interpretation given to the sec. 34(b) of the Laws of Lerotholi. I have not accepted that the absence of a written agreement of bohali lends itself to the probability that there was no bohali agreement but that of compensation. I have believed the Applicant's witness. The additional attack by Respondents that there is no evidence that the Applicant and the deceased had agreed to marry has no foundation. The deceased was abducted and lived with Applicant at his home as man and wife over a considerable period of time. It can be safely said that there was that agreement of marriage.

There would therefore be no need to debate the question that cohabitation does not constitute marriage as submitted by Respondents and as sought to be supported by reference to SECHABA MOKHOTHU v 'MALEBUSA MOTLOHA AND 3 OTHERS CIV/APN.22/93 by Lehohla J, 21st May 1993 (unreported). While I accept the probability that the Applicant abducted the deceased I have found it difficult to accept that there is always a presumption that when there has been an abduction before marriage any cattle paid which are less than seven still constitute payment for abduction. This is not so. It is a matter of agreement between the parties.

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There is no presumption of law to that effect. As a matter of choice or agreement the girl's parents can elect either (a) to insist on payment of the six head of cattle or (b) to condone the payment of six cattle for abduction either deliberately so or by conduct or acquiescence or (c) agreement that once the six head of cattle are paid they be merged with those or one of the first of them paid for bohali meaning that the seventh cow now forms bohali. That is they are merged with bohali or it is sometimes expressed the boy's father is lent the six head of cattle. So that the effect of this statement is that "In the present case the First Respondent never prayed or asked parents of the deceased to lend him the six head of cattle to be incorporated into bohali Even if there had been convincing evidence that they were paid they would still be regarded as compensation for abduction because they have not been merged with the bohali cattle" as found in Boy Antone and Taboleti Mokhothu's case at page 8 cannot be always correct. This would amount to elevating a question of what is normally a term of agreement to a presumption of law. It can only be a presumption of fact.

There are essential difference between presumption of fact and presumption of law." There are two essential points on which a presumption of fact differs from a presumption of law. First a presumption of fact has no effect on the incidence of burden

of proof, it is only part of the reasoning by which the Court may decide that a party who bears the onus has discharged it. A presumption of fact can only affect the evidentiary burden. Secondly there is no rule of law which obliges a Court to give more than their ordinary probative value the facts which give rise to the presumption. If or all the evidence the inference cannot be drawn as a matter of common sense, it cannot be drawn at all. (See page 551 South African Law of Evidence LH Hoffman DT Zeffert 4th edition) (my underlining). It is a matter of fact whether the parties agreed whether to merge the compensation and bohali. It is a matter of fact whether or not compensation was spoken about. If there is no compensation spoken about it does not mean that a party has failed to proved that a marriage was agreed upon. Even if a party seeking to prove a marriage does not state that a comment was made about the compensation cattle, it cannot mean that he has failed. That duty is on the party seeking to disprove a marriage. Even then it is still a matter of fact like other facts. That is why the Respondents sought to put in evidence of agreement of compensation. In that they failed. It could not be said they did that because there is a presumption of law that in all cases of an abduction preceding negotiations for marriage it is to be presumed as matter of law that there will be comment about the question of compensation. It is not a presumption of law. Nor is it a

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presumption of law which the learned authors Sir Roupert Cross and Colin Taper in Cross on Evidence, 6th edition, speak of as being that which :

> "In other cases the presumed fact must be inferred unless the triers of fact is persuaded to the contrary. So here a legal burden is cast upon its opponent, and a presumption having such effect can be described as a legal presumption." (see page 131)

There is no doubt that a legal presumption is indeed much more elevated to a rule of law. That is why WIGMORE ON EVIDENCE 3rd Edition in commenting about the difference between the two presumptions has this to say in Volume IX at paragraph 2491 on page 289 at 2 :

> "Nonetheless, it must be kept in mind that the peculiar effect of a presumption of law (that is the real presumption) is merely to invoke a rule of law compelling of the jury to reach the conclusion <u>in the absence of evidence to the contrary</u> from the opponent. If this opponent <u>does</u> offer evidence to the contrary (sufficient to satisfy the requirements of some evidence) the presumption disappears as a rule of law,

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and in case is in the jury's hands free from any rule."

This is in the event that the requirement is a presumption of law. In no way therefore would the absence of comment about compensation when a girl has been abducted create a presumption that there could not have been an agreement about bohali as a matter of fact nor would the result be that the agreement is invalid. There is no such rule of customary law.

I have come to the conclusion that the application ought to succeed with costs.

T. MONAPATHI
JUDGE

26th June, 1995

Mr. Putsoane : For the Applicant

Mr. Ramodibedi : For the 1st Respondent