

IN THE HIGH COURT OF LESOTHO

In the Application of:

'MASENATE PEETE

APPLICANT

AND

LIRAHALIBONOE PEETE

1ST RESPONDENT

MINISTRY OF HEALTH

2ND RESPONDENT

ATTORNEY GENERAL

3RD RESPONDENT

RULING

Delivered by the Honourable Acting Justice Mrs K.J. Guni
on the 17th day of July, 1995

The applicant is the widow of the deceased whose body this applicant seeks to have exhumed from where it is buried and handed over to her for re-burial at a place of her choice.

On 28th February, 1995 an interim order was granted to the applicant in the following terms:

- (1) The Rules of Court as regards normal periods of service are hereby dispensed with due to urgency of this matter.
- (2) A Rule Nisi is hereby issued returnable on the 20th day of March, 1995 calling upon respondents to show cause if any, why:-
 - (a) The body of KELEBONE PEETE shall not be exhumed from the place where 1st Respondent has buried it

and be properly buried at a place where applicant herein will designate.

- (b) First respondent shall not return all property belonging to the KELEBONE PEETE, including the marriage certificate of the said late KELEBONE PEETE and applicant herein.
 - (c) The 1st respondent shall not be ordered to stop interfering with the applicant herein in her peaceful running of the affairs of her family any-more than its allowed by Basotho custom.
- (3) Prayers 1,2 (a), (b) and (c) operate with immediate effect as an interim order.
 - (4) The respondents shall not pay costs of suit in the event that they oppose this application.

On 22nd March 1995 opposing papers were filed. On 1st June, 1995 replying affidavit to the 1st respondent's affidavit was filed. On the same date the rule was discharged. Perhaps on the same day again, 1st June, 1995 an urgent ex parte application was made for the reinstatement of that rule. It was after this reinstatement of the rule that the counsels for the parties appeared and argued this application before me.

Having outlined the history of this application I shall now proceed to give a brief outline of the facts which have been established. The applicant is the widow of the deceased. The couple has a son who is still a minor. The couple was married in accordance with Basotho custom and civil rites. The deceased worked as a miner in the Western Deep Levels Goldmine in the Republic of South Africa. He died in a car accident. His body was brought to Lesotho for burial on 17th February, 1995. He was buried the same day or the next day.

The deceased was buried at Liqhobong. Liqhobong is a place of residence of 1st Respondent. According to the applicant in her founding affidavit, there was a family meeting in which the place of burial was discussed and determined. This is not the place where the deceased's body was laid to rest. Hence this application. It appears that in that family meeting according to the founding affidavit of the applicant the suggestion by the respondent that the deceased should be buried at the place where he is presently resting was totally rejected by "the whole family".

The family seems to have decided two issues according to the applicant. Firstly, that the body of the deceased should come out of his own house presumably when proceeding to the grave.

Secondly, that he should be buried where his parents were buried. It is the practice of the Basotho to have family meetings when there is death in the family. It is expected that the family will decide when and where the deceased will be buried. This is exactly what appears to have been done in this family. The two participants in that meeting have two different versions of what exactly took place in that meeting.

Applicant's version is that the 1st respondent made a suggestion that the deceased be buried at the respondent's home. This suggestion was rejected by the whole family. (my underling) Thereafter the "family council" dispersed without any indication of ill-feeling from the respondent. (My underlining) The

underlined words give the impression that a general consensus was arrived at.

The 1st respondent's version is to the effect that there was an informal meeting between some members of the extended family (my underlining) in which the suggestion was made, that the deceased be buried at Khalamajoe in the Leribe district. "It was not during the family meeting". I have underlined these words in order to highlight their significance. An "informal meeting" that could not have the weight of the formal meeting. "Between some members of extended family." This also shows the lack of family unity. The 1st respondent seems to distance himself from this meeting. It was some members of extended family, not the whole family as the applicant claims. As far as the 1st respondent is concerned "a decision was not reached." Paragraph 5 (c) opposing affidavit. The homestead referred to at Khalamajoe according to the 1st respondent is also his own. He inherited it from his late parents. Since the death of his parents nobody lives in that homestead. He had already been moved to Liqhobong where he assumed chieftainship duties. The deceased did not live there either. Having remain uninhabited, the homestead was derelict and squalid.

The applicant's concern was appreciated by those members of extended family. At the same time the 1st respondent is at pains to try and emphasise that the suggestions made by the very same members of the extended family, were never adopted as decisions. There is therefore a dispute as to whether or not there was a

whole family meeting. If there was such a meeting there is a dispute as to whether or not such a meeting made a decision. If then there was no family decision someone has to make such a decision. Who has the right to decide when and where the deceased is to be buried? There has been a number of cases decided by our courts on this point. There are two different legal systems running parallel in this country. This issue may be determined in accordance with the Roman Dutch Law or Basotho customs depending on which of the two systems applies in any particular case. Fortunately both systems appear to uphold the same principle, that, it is the heir of the deceased who has the right and duty to bury the deceased Voet X11.7.7 sited at page 12 by Justice W.C.M. Maqutu in CIV\APN\4\95 Malithlare Abrahams and Khojane Abrahams, and Laws of Lerotholi Part I.

The deceased in this application is survived by a widow and a minor son. The 1st respondent is the elder brother of the deceased. He regards himself as the guardian of both the widow and the deceased's minor son.

The parties appear to have agreed that the issues in this application must be determined in accordance with Basotho custom. This is apparent from their arguments as they both relied on the Basotho custom to support their claims.

In Basotho custom there is only one heir, and that is the deceased's son. If the deceased has no children, the deceased's widow becomes the heiress. Malithlare Abrahams vs Khojane

Abrahams CIV\AFN\4\95. It is therefore clear that the widow becomes heiress where there is no son. In our present application the deceased has a son although that son is still a minor.

The minor has no locus standi in judicio. There must be someone to represent that minor. The Legal guardian of the minor is a proper person to represent that minor in court. ALINA MABATAUNG MOFOLO vs HENRY FRANCIS TSEKO NTSANE & OTHERS C OF A (CIV) NO.5 OF 1991.

Neither of the parties in this application claims to be acting on behalf of the deceased's minor son. The applicant made this application in her own right as the widow of the deceased and not in any representative capacity as the legal guardian of the deceased's minor son.

Apart from the question of applicant's lack of locus standi, the 1st respondent prays that this application be dismissed on the grounds that applicant although seeking to have the body of the deceased exhumed after having been buried for approximately four months, produced no certificate from the Ministry of Health, to show that exhumation at this stage is not going to be a health hazard.

The courts are no experts on the questions of health. Without satisfactory evidence that the deceased's body may be exhumed at this late stage without risking to expose the people

to any health hazards, the court is unable to make an order for exhumation. The failure for the Ministry of Health to oppose when sited as a respondent in this matter, by itself is not sufficient authority to entitle the court to make such an order in this circumstances of present application.

The application is dismissed. Each party to pay its own costs.

K.J. GUNI

(ACTING JUDGE)

For Applicant : Mr. Makotoko

For Respondent : Mr. Teele