CIV/APN/134/97

IN THE HIGH COURT OF LESOTHO

In the matter between

'MAPALI PHAKOE	Applicant
and	
TEBOHO PHAKOE	1st Respondent
KHOASE PHAKOE	2nd Respondent
BOHLALE PHAKOE	3rd Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
on the 10th day of June 1998.

The main issue which arises for determination by this Court is whether the Applicant was legally married to the brother of the Respondents, namely the late Charles Tefo Phakoe (hereinafter referred to as the deceased) who admittedly passed away on the 11th December 1993.

It is Applicant's case that, based on her alleged marriage to the deceased, she is entitled to an order couched in the following terms in the Notice of Motion:-

"1. Dispensing with the Rules of Court pertaining to modes and periods of service.

2. A Rule Nisi be and is hereby issued returnable on the date and time to be determined by this Honourable Court for an order calling upon the respondents to show cause (if any) why:-

(a) The respondents shall not be interdicted from disturbing applicant in any way and/or threatening to evict her from her matrimonial home at NALEDI otherwise than in accordance with an order of court.

(b) Interdicting the respondents from in anyway interfering with the applicant in respect of any of her property.

(c) Respondents shall not be ordered to pay costs hereof.

(d) Granting applicant such further and/or alternative relief.

3. Prayers 1, 2(a) and (b) operate with immediate effect as interim court orders."

On the 25th April, 1997 I duly granted a Rule Nisi as prayed and after several postponements and extensions of the Rule the matter was finally argued before me on the 20th May 1998.

At the outset I am bound to say that although the Respondents deny the

marriage in question their denial in my view amounts to a bare denial as will be demonstrated shortly. In particular I should like to say that the Court had to determine whether there was a serious or genuine, *bona fide* dispute of fact as to the existence or otherwise of the marriage in question. In this regard the Court was guided by the principle contained in the following remarks of Corbett JA in Plascon Evans Paints v Van Riebeeck Paints 1984 (3) S.A. 623 (A) at 634-635:

> "....It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co. (Pty) Ltd. V Jeppe Street Mansions (Pty) Ltd. 1949 (3) S.A. 1155 (T) at 1163-5; Da Mata v Otto NO 1972 (3) S.A. 858 (A) at 882 D-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co. Ltd. 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent

credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see e.g. Rikhoto v East Rand Administration Board and Another 1983 (4) S.A. 278 (W) at 283 E-H). Moreover, there may be exceptions to this general rule, as, for example, where the allegation or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the Associated South African Bakeries case, supra at 924A)."

I turn now to the facts of the case. It is not seriously disputed that the Applicant and the deceased lived together since 1983 until his death on the 11th December 1993.

It is again common cause that the deceased was previously married to one 'Masepheo Phakoe by customary rites before living with the Applicant. The said 'Masepheo Phakoe passed away in 1992. She is survived by only two (2) girls namely Tšireletso and Rorisang. She had no male heir other than the deceased.

Regarding her own marriage to the deceased the Applicant avers as follows in paragraph 4(d) of her founding affidavit:

"The deceased married me in 1983 at the age of twenty-one (21). We agreed to get married with the deceased at the Soil Conservation

Workshop offices at the said age."

As earlier stated the Respondents' answer to this paragraph is a bare denial contained in paragraph 4 "in re (d)" of the opposing affidavit of Teboho Phakoe in the following terms:-

> "The content of this paragraph is denied and I doubt that a customary marriage could be consummated at the soil conservation works offices. Apart from that the customary marriage needs involvement of the parents as provided for by section 34 of the Laws of Lerotholi."

I observe in particular that the Applicant's allegation that the deceased and herself agreed to marry remain uncontroverted.

In highlighting her marriage to the deceased the Applicant makes the following essential averments in paragraph 4 (e) of her founding affidavit:

> "(e) His (the deceased's) relatives went to ask for my hand in marriage from my parents, they were, first respondent, Mrs. IDA PHAKOE and Mr. MOHAU MOKOMA. They agreed that we should get married and as to the *quantum* of bohali. A week thereafter, we eloped with the deceased. After that the deceased family took some cattle as bohali to my maiden home. One of the members of the PHAKOE family who was present when I was married is fouth (sic) respondent as clearly appears in his affidavit hereunto attached and marked "A"."

Instead of dealing issuably with the Applicant's allegations as contained in paragraph 4(e) the Respondents contend themselves with the following statement in paragraph 4 "In re (e)" of the opposing affidavit of Teboho Phakoe:

> "In re (e)
> Mrs. Ida Phakoe is our mother and she is late but Mr. Mohau Mokema (sic) is still alive and I do not understand why he could not make a Supporting Affidavit to confirm these serious allegation (sic) made by the Applicant. Normally there should be a document which proves the agreement of marriage and the Applicant has none. The Applicant does not state the names of her parents, she does not say whether it only (sic) both of her parents or were these (sic) any other relatives on her part who were present. She does not even attach any Affidavit in support of this wild allegation which is devoid of truth."

It is thus clear, in my view, therefore, that the respondents have not denied the Applicant's allegation that the relatives of both Applicant and the deceased agreed to the marriage in question and that the deceased's family actually paid bohali for the marriage. Applicant's allegations in that regard remain uncontroverted.

In Steven Mokone Chobokoane v Solicitor General 1985-89 Lesotho Appeal Cases (LAC) 64 at 65 Aaron JA expressed the following principles with which I respectfully agree:

"In motion proceedings, the affidavit made by the Applicant contains not only his allegations but also his evidence, and if this evidence is not controverted or explained, it will usually be accepted by the Court. The affidavit itself constitutes proof, and no further proof is necessary. It is not an adequate answer for the respondent to say that he has no knowledge of the Applicant's allegations and that he puts him to the proof thereof. There being no denial in such an instance, the matter will be approached on the basis that the allegations by the Applicant have been proved."

It is my considered view that in determining the existence or otherwise of the marriage in question it is also necessary and indeed decisive to have regard to Annexture "B" which is a letter admittedly emanating from the respondents themselves addressed to the Chief of Ha Tšosane. This letter comprises the decision of the family in the estate of the deceased *viz a viz* the Applicant. It is thus a very important document obviously written with the serious and *bona fide* intention of officially recording the true legal position of the Applicant in the deceased's estate. In my view it is certainly not a letter in jest. It was meant to be binding upon the respondents as to its contents.

It reads as follows:

"P.O. BOX 7030
MASERU
31 March, 1997

THE CHIEF OF HA TŠOSANE,
HA TŠOSANE,
MASERU.

Chief,

With humble respect, we introduce before you the family of Phakoe, to let you know the conclusion made by the family.

Rex Teboho Phakoe being the head of the called the (sic) meeting on the 29th March, 1997 to discuss the division of the inheritence (sic) of the deceased Charles Tefo Phakoe. The reason of calling the meeting was that the person who was given the permission to look after the inheritence, (sic) December, 1993 is not fit to look after that, and she is the second wife of the deceased, 'Mapali Phakoe. The completion of the meeting of the 29th March, 1997 repeal what was arrived at by the family in December, 1993 which amongh (sic) them was to leave inheretence (sic) of the deceased in the hands of 'Mapali.

The deceased Charles Tefo Phakoe died on the 11th December, 1993, the sites and property are as follows :

1. Three sites at Naledi Ha Tšosane
2. One site at Koalabata
3. One site at Thabong
4. One site at Sekamaneng Ha Rasethuntša
5. One site at Sehlabeng

The decision is that :

The head of the family, Rex Teboho Phakoe will take care to look after these sites, and will pass them to the children by the time they reached the age of 21 in conjuction (sic) with the family, the children are TŠIRELETSO, RORISANG, PALI AND LEHLOHONOLO respectively, this responsibility will for (sic) each one as long as he is the head of the family.

The second wife 'Mapali who at the moment is staying at Naledi will be given the site and house at Thabong. 'Mapali will have to vacate the house and premises at Naledi or (sic) or before 1st May, 1997.

All moneys collected on the sites will be put on the responsibility of the head of the family who will distribute to the children equally to allow them livelihood.

Thank you chief, yours,

SIGNED :
REX TEBOHO PHAKOE
KHOASE PHAKOE
PHETSANG PHAKOE
BOHLALE PHAKOE

DATE STAMP
CHIEF OF MAJOE A LITŠOENE
01/04/1997
P.O. BOX 2010
MASERU - LESOTHO. (my underlining) "

As is plainly evident from Annexure "B" the Respondents consistently acknowledge that the Applicant is the "second wife" of the deceased. I hold therefore that they are estopped from denying this fact. Conversely I hold that their denial of the fact that the Applicant was married to the deceased is not real, genuine and *bona fide*.

It is also significant that in terms of Annexure "B" as fully reproduced above the respondents placed the Applicant in charge of the deceased's estate in 1993. I consider that in all probabilities they would not have done so if the Applicant was not in fact the deceased's wife. Nor does this Court believe that Respondents could have "given" the deceased's site and house at Thabong to the Applicant if she was not his wife.

There is yet another factor that belies the Respondent's version in this

matter. It is this. In terms of Annexure "B" the Respondents attempted to place the Applicant's sons Pali and Lehlohonolo (indeed Mr. Mphalane has admitted that these are her sons) under the guardianship of the 1st Respondent. I consider that this is an indirect admission that these boys are the legitimate sons of the deceased and that therefore there can be no genuine dispute to the marriage between the deceased and the Applicant. The question must be asked, if the Respondents are serious about their claim that the Applicant was not married to the deceased why recognise her sons in the family of the deceased? I have no doubt in my mind that the Respondents are not being honest with the Court.

Nor is this Court amused by the fact that the 4th Respondent has now perjured himself. This is so because in terms of Annexure "A" to Applicant's founding affidavit he swore to an affidavit on the 13th December 1993 to the effect that the Applicant and the deceased were married to each other at Ha Foso on the 26th February 1984. He significantly gives his age as 24 years as at 13th December 1993. In my calculation that means he was allegedly born in 1969. The whole affidavit reads as follows:

"*Affidavit as to Marriage*

BETWEEN *CHARLES TEFO PHAKOE* AND *'MAPALI PHAKOE (nee Thamae)*

I, *BOHLALE PHAKOE* aged 24 years of *Naleli Ha Tšosane - MASERU* do hereby solemnly and sincerely declare that:-

CHARLES TEFO PHAKOE AND *'MAPALI PHAKOE* were married at *HA FOSO* on or about, so far as I can recall *1984-02-26.*

My means of knowing this is that:

CHARLES TEFO PHAKOE IS MY UNCLE AND I WAS INVOLVED IN BOHALI ACTIVITIES.

SIGNED:

WITNESS

J. TŠOSANE (signed)

INTERPRETER

The deponent acknowledges that he/she knows and understands the contents of this affidavit which was sworn to before me at *DISTRICT SECRETARY* Lesotho 1993

..... (Signed)
COMMISSIONER OF OATHS."

It is significant that the 4th Respondent's affidavit Annexure "A" is actually "witnessed" by one J. Tšosane.

Yet amazingly the Respondents have now attached the opposing affidavit of the 4th Respondent in which he now perjures himself in paragraph 3 thereof in the following terms:-

"3.

I confirm the content of the Opposing Affidavit of the first Respondent and I incorporate the averments therein made as if herein made and averred. I wish to state that I could not witness the marriage of the Applicant which was purported to have (sic) entered into in 1983 as I was a minor of 15 years old. I only did annexure "A" for the convenience of the Applicant so that she could look after the children of the late **CHARLES TEFO PHAKOE** but she has failed to do so."

I consider that the 4th Respondent's evidence is suspect and that it would be unsafe to place any reliance upon it.

What is more the Respondents have now attached a "Birth Certificate" of the 4th Respondent which is Annexture "A" to the opposing affidavit of the 1st Respondent Teboho Phakoe alleging that he (the 4th Respondent) was born in 1969. This "Birth Certificate" was however only obtained on the 30th May 1997 after the Respondents had already been served with the papers in the instant matter. This is indeed common cause.

Mr. Mosito for the Applicant submits therefore that this "Birth Certificate" was no more than an attempt by the Respondents to "manufacture" evidence in order to fight Applicant's case. Although this Court disapproves of "manufactured" evidence I observe however that as far as the 4th Respondent's alleged birth day is concerned it is the same on either version of the two affidavits in question namely 1969. The bottom line therefore is that if the 4th Respondent is to be believed he was 15 years old in

therefore is that if the 4th Respondent is to be believed he was 15 years old in 1984 when he was involved in the bohali negotiations in question. As earlier stated however it would be unsafe to rely on the perjured evidence of this deponent.

Nor does this Court think it is impossible (it is certainly not illegal) for a 15 year old boy to get involved in bohali negotiations. That must be a matter for the discretion of individual families depending on how mature the boy is or whether he has already been to a circumcision school in which case in terms of Sesotho custom he is regarded as a man notwithstanding his age.

In all probabilities therefore and having regard to the fact that the Respondents did not avail themselves of their right to apply for the cross examination of the Applicant in terms of Rule 8(14) of the High Court Rules, I am satisfied as to the inherent credibility of the Applicant's factual averments relating to the marriage in question and I proceed on the correctness thereof. Moreover I am satisfied that the Respondents' denials as to the existence of the marriage are so far fetched and untenable that the Court is entitled to reject them merely on the papers.

See Plascon Evans Paints v Van Riebeeck Paints (supra) at p.635.

Accordingly I hold that the Applicant was legally married to the deceased and that the essential elements of a Sesotho marriage in terms of Section 34 of the Laws of Lerotholi were clearly fulfilled namely :

(a) Agreement between the parties to the marriage;

(b) Agreement between the parents of the parties or between those who stand in *loco parentis* to the parties as to the marriage and as to the amount of the bohali;

(c) payment of part or all of the bohali.

I turn then to determine the prayers sought in the Notice of Motion.

As earlier stated the Applicant's claim is for interdict. The principles involved in such a claim were stated in the leading case of Setlogelo v Setlogelo 1914 A.D. 21 to be a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy.

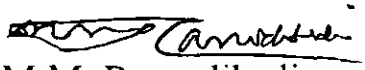
Now Section 5(2) of the Land (Amendment) Order 1992 gives a widow the same land rights as her deceased husband in the following terms :-

"(2) Notwithstanding subsection (1), where an allottee of land dies, the interest of that allottee passes to,

(a) where there is a widow - the widow is given the same rights in relation to the land as her deceased husband but in the case of re-marriage the land shall not form part of any community property and, where a widow re-marries, on the widow's death, title shall pass to the person referred to in paragraph (c)."

It is not disputed that the Respondents are threatening the Applicant with eviction from the properties in question. I consider therefore that the Applicant has succeeded to make out a case for the relief sought.

In the result the Rule is confirmed and the application granted in terms of prayers 2(a) and (b) of the Notice of Motion with costs.



M.M. Ramodibedi
JUDGE
10th June 1998

For Applicant : Mr. Mosito
For Respondents : Mr. Mphalane