

**CIV/APN/164/2000**

**IN THE HIGH COURT OF LESOTHO**

In the Matter Between:

**'MATHABO FRANCINA RAFIRI**

**APPLICANT**

and

**'MANTHABISENG NTLOANA**

**1<sup>ST</sup> RESPONDENT**

**SETLABOCHA RAFIRI**

**2<sup>ND</sup> RESPONDENT**

**MOHALE'S HOEK GOVERNMENT**

**MORTUARY**

**3<sup>RD</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY**

**(Ministry of Health)**

**4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**5<sup>TH</sup> RESPONDENT**

**Applicant's Counsel (A.C.) Mr. N. Putsoane**

**Before the Honourable Mr. Justice T. Monapathi**  
**on the 17<sup>th</sup> day of November 2000**

**SUBMISSIONS AND RULING**

**On application for exhumation of the body of late**  
**Mahlomola Ananias Rafiri**

**PART 1**

A.C. The First Respondent and her witness support the fact that the Applicant was married though the only issue is that of the nature of marriage and we are

submitting that regardless of whether the marriage was by civil rites or by custom the Applicant would still be the only person entitled and with the prior right to bury the deceased.

H.L. So that substantially the Respondents do confirm that there was marriage between your client and the deceased?

A.C. They are confirming that.

H.L. The dispute is only about the nature of the marriage.

A.C. Yes, and which we are submitting would not make any difference as to Applicant's right in this matter.

H.L. You are saying according to you it has only been a civil marriage.

A.C. A civil marriage.

H.L. The consequences which would be to exclude another marriage. Even in the alternative even if there is a finding that there is a customary marriage you are saying your client would still reserve a prior right.

A.C. Because she is the first wife. It does not change anything.

H.L. Tell me, what about that evidence of paying of head of cattle what do they say about it?

A.C. Yes. At that My Lord the paragraph which I referred Your Lordship. Sub paragraph (a) at page 2 of the supporting affidavit.

H.L. Paragraph (a) not 1?

A.C. No. Even though it is entitled opposing affidavit also because he suggested that the Second Respondent

H.L. What? Who says what?

A.C. Setlabocha Rafiri My Lord. It is paragraph 1, 2, 3, 4

H.L. Setlabocha says what?

A.C. He says seven head of cattle were paid and delivered to the home of the Applicant.

H.L. What comment do you have against Setlabocha?

A.C. And then the father of this very person Setlabocha namely Tlontlollo Rafiri deposed to an affidavit in a reply

H.L. Tlontlollo Rafiri?

A.C. Is the father of Setlabocha Rafiri

H.L. Father of Setlabocha contradicts that?

A.C. He contradicts that stating that in fact he never sent this boy to deliver any head of cattle and that in fact he was aged thirteen at that time.

H.L. What would have been, he could have been thirteen

A.C. Yes. And that he did not sent him to deliver any cattle. And he confirms and endorsed that it cannot have been marriage cattle.

H.L. Had not?

A.C. He endorsed payment of abduction cattle.

H.L. Did not sent him, but he had sent who?

A.C. He ..... (inaudible)

H.L. Had sent someone to do what?

A.C. To deliver the six head of cattle.

H.L. For?

A.C. Abduction.

H.L. So that it is your case that those were cattle for abduction and not for bohali.  
What is this document dated 17<sup>th</sup> of November?

A.C. Which year is that?

H.L. Attached to the answering affidavit.

A.C. That one it relates to the marriage of the First Respondent.

H.L. Marriage of the First Respondent?

A.C. That is so My Lord.

H.L. You have no quarrel there?

A.C. We have no quarrel with that. We are saying if that the Respondents that is First and Second Respondents are alleging that there is any Sesotho marriage between the Applicant and the deceased they bear the burden of proof.

H.L. Respondents bear the burden of proof to do what?

A.C. To the allegation that there was a Sesotho marriage between the Applicant and the deceased.

H.L. That there was a Sesotho marriage?

A.C. That is so. And they would therefore have to prove three things.

H.L. And they would have to?

A.C. The three things which we consider to be the essential elements or requirements for the subsistence of a valid Sesotho marriage.

H.L. Yes.

H.L. Of this requirement

A.C. That is so.

H.L. I see. Is that all?

A.C. That is so. On the basis of this My Lord it is clear that the First Respondent and the Second Respondent were not entitled to bury the deceased. And that in fact the body should be exhumed. Then would request Your Lordship to make it an Order of Court that those requirements which are embodied in the letter of the Principal Secretary should be followed strictly in exhuming the body. And that in fact they should in fact assist because there are some surgical masks and gloves which are needed and the insecticides.

H.L. Is that all Sir?

A.C. That is so My Lord.

H.L. What about costs?

A.C. They should pay the cost for the application.

H.L. O. K.

A.C. As the Court pleases.

**PART II****RULING**

**Delivered by the Honourable Mr. Justice T. Monapathi**

**on the 17<sup>th</sup> day of November 2000**

This matter is an old matter. What I see is that the interim Court Order was issued by Maqutu J. as long ago as the 12<sup>th</sup> June 2000. I do not want to get very much into the reasons why there has been a delay in having this matter heard. But it suffices to say that some of the blame should be put at the door of this Counsel involved in this application. Both of them. We appreciate that there may have been problems. One of them could have been to do with certificates from the hospital about whether the body can be exhumed consistent with precautions against health hazards. That the exhumation of the body should not pose a public health hazard. This certificate was finally secured and it is dated the 9<sup>th</sup> October.

It suffices to note that during today I should have heard both Counsel before me. Mr. Mda was here this morning but I have been informed that he released his client and did himself go away from Court premises. He has not asked to be excused. He had not asked for alternative arrangements from the Court. Accordingly I asked that Mr. Putsoane must address me. His argument was recorded on tape and it was also my intention that I should make a short ruling which will be recorded.

In doing so I proceed as follows : I find that probabilities indicate that the marriage between the Applicant and the deceased could only have been a civil

marriage. Meaning that this Applicant ( who had no major male heir) was entitled to bury the deceased. I agree that there was no proof that there have been a customary marriage between the deceased and the Applicant. Since the Respondents asserted that there was such a marriage they had to bear the burden of proof. I found that they have failed. This I did in as much as I did not believe the evidence of that son of Rafire who said seven cattle were paid. I disbelieve that they could have been paid as cattle for marriage but took the view that that payment was for damages for abduction. Alternatively even if there had been such a marriage I would find that in the circumstances the Applicant still remains the first wife of the deceased meaning that she would have the prior right to burial.

I accordingly find that the First Respondent had no right to bury the deceased. In addition to that finding that I have already made about the absence of Sesotho customary marriage I have noted that the essentials of such a marriage were not proved by Respondents. The first one which is agreement between the parties that is the bride and bridegroom. The second one being the agreement between the parents or those in the place of the parents. The third one being agreement as to the amount of bohali. The last one being payment of that total bohali or part of a total. I could only find that if there was anything paid by way of cattle it was towards abduction.

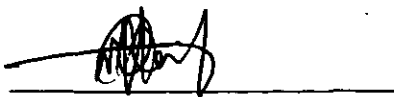
I accordingly allow the prayers as accordingly sought by the Applicant meaning that this application is allowed. My additional orders are that the Ministry of Health I suppose it will be the ministry in the Mafeteng district that the Third Respondent will see to it that the guideline in the certificate of the 9<sup>th</sup> October are followed.

There were about three of the above requirements or precautions mostly



which can only be executed by people who have the know how and people of the 4<sup>th</sup> Respondent's Ministry. For example provision of heavy duty gloves and insecticides for destruction of flies and other insects. All in all the Fourth Respondent must assist.

I make this order with an order for costs underlining that it was wrong for the First Respondent to bury the deceased. Underlining secondly that these are the kinds of disputes that are very unpleasant to this Court. They are surely uncalled for. Having a body buried and having it exhumed later is not a small task. It touches the Applicant in the same way almost as it touches the Respondents because is an emotional issue. That is all about this matter.

A handwritten signature in black ink, appearing to be 'T. Monapathi', written over a horizontal line.

**T. Monapathi**  
**Judge**