

CIV/APN/4/4/99**IN THE HIGH COURT OF LESOTHO**

In the matter between : -

SEMPE ELIAS RAMOTLAU**APPLICANT**

and

'MASEKHARUME MAKHELE**(duly assisted by her husband)****1st RESPONDENT****LETHUSANG RAMOTLAU****(duly assisted by her husband)****2nd RESPONDENT****M. K. M. BURIAL SOCIETY (PTY) LTD****3rd RESPONDENT****REASONS FOR JUDGMENT**For Applicant : Mr. S. PhafaneFor Respondents : Mr. H. PutsoaneFor 3rd Respondent : No appearance**Delivered by the Honourable Mr. Justice T. Monapathi**
on the 17th day of March 2000

I have already given my decision in the matter in which I allowed the application with costs on the ordinary scale. I now give my reasons for that decision. The application sought for a rule nisi and asked that:

- “(a) The first and second Respondents “be restrained and/or interdicted from removing the body of the late 'Maletusang Lisbeth Ramotlau from the third Respondent's mortuary for burial or any other cause pending the finalization hereof;”

- (b) The third Respondent “ be restrained and interdicted from releasing the body of the late 'Malethusang Lisbeth Ramotlau to the first and/or second Respondents or anybody pending the finalization hereof;”
- (c) The first and second Respondents “be ordered and directed to release the Deceased’s household property including the Deceased’s insurance books, her bank books and passport to the Applicant;”
- (d) The Applicant “be allowed to remove the body of the late 'Malethusang Lisbeth Ramotlau from the third Respondent’s mortuary for burial on a date and at a place of his choice;”
- (e) The Rules as to forms and notices “be dispensed with on account of urgency;”
- (f) The first and second Respondents “pay the costs hereof and the third Respondent only in the event of its opposing this application.”

2. That prayers 1(a), (b) and (e) operate with immediate effect as an Interim Court Orders pending the finalization hereof”.

The brief background to the application had been that the Applicant was husband of the deceased. The parties were married by civil rites on the 6th January 1977. When the deceased (the wife) died on or about the 10th December 1998, the marriage still subsisted. The deceased had been an office assistant in the Ministry of Agriculture, during her lifetime.

At the time when deceased passed away there had been differences between her and her husband which had led to her leaving the matrimonial home. She had been staying with her parents for a while before coming to Maseru where she lived in a rented flat. The Applicant said when the deceased passed away she was still living away from the matrimonial home and while he was busy persuading her to go back by way of seeking to reconcile. Those witnesses on the side of the Respondent testified that deceased had left instructions as to her burial contained in

annexure "MM 1" dated 2nd September 1994.

I strongly suspected that the separation of the parties had been a considerably long one and that the prospects of reconciliation could be safely said to have been very slim. The picture of the Applicant as shown by Respondents was of an irresponsible husband and father who failed to maintain his wife and children and who neglected a burial of one of his children. And furthermore that the Applicant had not even attended at the marriage ceremony of one of his daughters. He had not involved himself in the preparations. The Second Respondent, one of his daughters (the eldest), painted a picture of a big gulf between the parties and, the deceased's family being naturally on the side of deceased.

What was important in my view, was that it had been almost a month since the death of the deceased and her burial having not taken place because her body was being claimed by the parties. This had resulted in a number of meetings and negotiations which brought no resolution nor satisfaction at least to the Applicant. He contended that as lawfully married husband to the deceased during her lifetime he had the right to bury as against anybody else and most specifically none of the Respondents.

The Applicant claimed that he had not been able to bury his wife for that long period of time due to interferences by the First and Second Respondents who were deceased's mother and the Applicant's daughter respectively. These Respondents claimed that they were entitled and/or obliged to bury the deceased at a place and on a date of their choice. Several meetings had been held before their local chief on the issue but the Respondents still insisted that they were going to bury the deceased at Ha 'Masana, in the district of Maseru.

The Applicant had intended to bury the deceased at Semonkong on the 9th January 1999 as he had felt he had that right while the Respondents had no right. The Applicant had been to the place where the deceased lived and had discovered that the entire household property including the deceased's insurance books, her bank books, and passport had been removed and were allegedly in custody of the First Respondent. As he contended the First Respondent had no colour of right to the property and yet she insisted and held on to the property. As the

Applicant contended further the Respondents were so determined to bury the deceased against the Applicant's wishes that he had a grave apprehension that there would be bloodshed inasmuch as he had not been prepared to give in to their allegedly groundless demands to bury the deceased and their persistence to hold on to the property of the deceased.

The First Respondent alluded to those matters which showed the Applicant as an impossible father and that as a result the deceased left instructions that the Respondent should bury the deceased with the assistance of the Second Respondent, the deceased's daughter. They relied on the alleged instructions for their right to bury the deceased. Whatever minor details in the intricate relationship between the parties I thought all in all the Respondents insisted that they had to bury the deceased as against the Applicant because the deceased had left the said written instructions. That was why the First Respondent said "she derived such a right from his daughter's instructions which was marked an annexure "MM1" to the proceedings. She also referred to Chief Mohlakana Lerotholi who allegedly was present and endorsed the said written instructions. The First Respondent furthermore denied removal or possession of any of the deceased's property.

The two Counsel for the parties most wisely agreed that the resolution of the dispute would revolve around whether Annexure "MM1" was a true document and not a fake or otherwise. All other conclusions would revolve around the finding hence the need to call *viva voce* evidence either to support or to seek to discredit the document. Witnesses were therefore called after argument as to who had to begin. The parties however agreed that the Respondents would begin. I was not therefore able to decide which side had the onus to begin on the issue of the validity of "MM1" on the issue of onus. See also the remarks of Schutz JP in RAMAHATA (also known as PHEPHETHO) vs RAMAHATA 1985 - 1989 LAC 184 at 185 E - G. And indeed Andrew Paizes has remarked about the incidence of onus of proof to say that:

"At times one feels that he is chasing shadows and that no attempt to come to grips with the subject can ever deliver anything of subsistence." See SOUTH AFRICAN LAW JOURNAL. Vol. 116 Part III page 531: Chasing shadows: Exploring the meaning, function and incidence of THE ONUS OF PROOF IN

THE SOUTH AFRICAN LAW.”

Respondents called in the following witnesses Chief Mohlakana Lerotholi, Motšoane Makhele and the Applicant called Rameno Ramotlau. Having heard the two sides I confirmed that the issues had to be decided on a balance of probabilities. The first thing that weighed on my mind was that the deceased was said to be a literate office assistant who could sign her name as borne out by Exhibit “A”. The latter was a leave application from filled by the deceased herself on the 15th May 1998, that was about six months before her death.

There were several factors which undoubtedly pointed to the probability that “MM1” was a fake. I included as negative one of the elements the evasiveness of the two witness of the Respondents and I approved the forthrightness of the witness Rameno on the other hand. The latter as aforesaid had been called by the Applicant. Mr. Phafane’s cross examination severely dented and embarrassed Chief Lerotholi whose demeanour left much to be desired. He allegedly authenticated “MM1” In the first place he was not acting as a chief at the material time but had merely stepped in while there was still a substantive holder of office.

I had to comment further about the testimony of the Chief Lerotholi. It was not clearly explained why he came to attend to the matter while he was usually resident in Maseru. He did not see Lethusang Ramotlau (Second Respondent) one of the witnesses to the letter. He did not recall if Mapalesa Makakole one of the witnesses to the letter was present. He said Masebopoho Lerotholi one of the witnesses to the letter was not present. Significantly he did not recall if Lethusang Ramotlau one of the witnesses was present. He did not recall if Tsela Khoase one of the witnesses was present. To sum it all the circumstances of the signing and witnessing of the letter were extremely more than doubtful.

The deceased had been a literate Civil Servant in the Ministry of Agriculture. She had been able to read and write. It could not be explained why the letter could not have been signed by the deceased herself. The most damning thing was that it ended up being revealed during cross examination that the letter was in the handwriting of Lethusang Ramotlau, the deceased’s daughter. I was not convinced that the deceased would have delegated anybody to deal with a

thing as important and sensitive as her burial and distribution of her property after her death. I had noted that in paragraph 4 of his supporting affidavit of Chief Lerotholi had said that the deceased had handed him a letter addressed to him and "signed by herself and some four people whom she said were witnesses to her decision." During cross examination it was clear that this statement was too good to be true.

I found it unnecessary to go about the remainder of the blemishes in the Respondents' witnesses' testimonies. Suffice it to say that at and despite the lengthy negotiations between the parties and furthermore even before Respondent's chief the existence of the letter "MM 1" was never revealed. It became common cause that the existence of the letter "MM 1", was notified to the Applicant, for the very first time, in the answering affidavit. It was not a very amusing state of affairs to a Court which was after the truth and credibility of evidence. I would conclude that the letter seeking to show that the deceased had left direction as to her burial was clearly a fake. In all probabilities no such directions had been left. The kindest to be said would be that there had been an abject failure on the Respondents to prove the existence of such alleged directions.

I allowed the application and confirmed the prayers with costs on the ordinary scale. It meant that the Applicant had the right to decide the burial of the deceased who was his lawfully wedded wife. Their marriage having not been dissolved at the time of the deceased's death.


T. MONAPATHI
JUDGE

17th March 2000

Judgment noted by : Mr. B. Sooknanan