CIV/APN/477/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:-

LEBOHANG VALERIA SEILTLHEKO(LEBAKA) **APPLICANT**

and

MAKOAILE SEITLHEKO **1ST RESPONDENT**
MATHIBETSANE SEITLHEKO **2ND RESPONDENT**
MKM BURIAL SOCIETY **3RD RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 15th December, 2000

Due to the exigent circumstances of this case I delivered an **ex tempore** judgment very late on Friday 15th December and indicated that my reasons would soon be filed and these follow:

On the 1st December 2000 I granted an interim order on an **ex parte** application made by **Mrs Kotelo** couched in the following terms:

"1. The Rules of Court be dispensed with on account of the urgency of the matter.

2. A Rule Nisi is hereby issued returnable on the 6th December 2000 calling upon Respondents to show cause why

(a) Applicant shall not be declared as the rightful person entitled to bury the deceased KOAILE SEITLHEKO.

(b) First and Second Respondents and/or any person other than Applicant shall not be restrained from burying the deceased KOAILE SEITLHEKO pending this Application.

(c) First and Second Respondent shall not be restrained from removing the deceased KOAILE SEITLHEKO from MKM BURIAL SOCIETY pending this Application.

(d) Third Respondent shall not be restrained from releasing to Respondents or any other person other than Applicant the body of the deceased KOAILE SEITLHEKO.

(e) Officer Commanding Lithoteng Police Station shall not provide security to ensure enforcement of this Order.

(f) First and Second Respondents shall not pay costs of suit.

(g) Applicant shall not be granted further and/or alternative relief.

3. That prayers 1,2 (b) (c) (d) and (e) operate as Interim Court Order with immediate effect."

Notice of intention to oppose and opposing affidavits of the 1st and 2nd respondents and other supporting affidavits were filed on the 5th December 2000.

This case involves an intriguing question of customary law namely: Whether a son can stand **in loco parentis** if his parents are dilatory in the negotiation of the marriage and pay bohali without consent or authority of his parents.

In her founding affidavit the applicant avers that she is the widow of one Koaile Seitlheko, the late son of the first respondent. She states that in May or June 1998 the representatives went to Popopo - St Monicas in Leribe there to ask for the hand of applicant in marriage **(mohope oa metsi)** for their son, the deceased. I should mention here that when the application was finally argued, I directed that **viva voce** evidence be heard under Rule 8 (14) of the High Court Rules on the issue whether the parents of the deceased Koaile Seitlheko participated in the negotiation of the marriage and in the agreement on bohali. This was and is purely a question of fact.

It was also common cause that on May/June 1998 the respective parties on both sides agreed on betrothal and did not enter into the issue of bohali but only promised to return later; it is further not in dispute that on the 8th September 1999 the applicant gave birth to a child who had been fathered by the deceased Koaile Seitlheko. It appeared the parents of the deceased were never informed by the applicant's parents that she was pregnant and the first respondent was informed by letter that the betrothed lady applicant had given birth to a baby fathered by the deceased. This greatly annoyed and hurt the first respondent who seems to have decided to stay the progress towards marriage negotiation.

It was common cause that on the 22nd December 1999, the deceased Koaile Seitlheko proceeded alone to Popopo St Monicas without the knowledge or mandate of his parents and negotiated the bohali agreement with the parents of the applicant and paid M6,000.00. A fair translation of the agreement reads thus:

"FAIR TRANSLATION

Popopo
St Monica's
Joala-Boholo Ha Matsoete

22 - 12 - 99

This is to certify that the daughter of PHILLIPA LEBAKA and 'MAKAMELA LEBAKA who is LEBOHANG VALERIA LEBAKA has been married with ten cattle by KOAILE TIMOTHY SEITLEKO the son of MOLELEKOA SEITLHEKO and 'MAKOAILE SEITLHEKO who have built at LITHOTENG HA KEISO, MASERU.

WITNESSES

1. MOOJANE LEBAKA
2. MALOPENYANE LEBAKA
3. SEBILI LEBAKA

THE PARTIES (Banyallani)

1. MAKAMELA LEBAKA
2. (Signature of Deceased)
3. Chiefs Stamp

dated 23.12.99

'MAMOHAPI RAMOHANOE"

The deceased did not subsequently tell his mother that he had paid bohali on his own. Matters stood thus when he died on the 18th November 1999 at Matikoane Hospital in Nelspruit Mpumalanga in the Republic of South Africa.

The applicant states that she had visited her ailing husband on the 15th November 2000 and upon his death, she immediately informed the second respondent who arrived in Mpumalanga on the 20th November 2000. She also states that she produced MDI as proof that she was married to the deceased by custom. She received M3,284.96 being the deceased's monthly salary, bonus and leave pay.

She tells the court that when she proceeded to the deceased's home on the 24th November 2000 to sit, as puts it, "on the mattress and also to make arrangements with the family for the burial" of the deceased, she was expelled by the second respondent and the rest of the family who claimed that she was not the wife of the deceased but was only a girlfriend. She claims that she is married to the deceased and has a right to bury the deceased.

It was common cause that after the 22nd December 1999 the deceased did not bring the applicant to his home but merely continued visiting her at her rented premises at Ha Mabote in Maseru.

In response to applicant's averments the first respondent states in her opposing affidavit that-

2.

"My deceased son died unmarried. He may have fathered an illegitimate child to Applicant but was not married to her. I have never put my late son in his house with "his family" and called it his matrimonial home.

3.

... I have never, either on my own or upon delegating someone on my behalf, negotiated marriage of my deceased son to the applicant with Applicant's family. Nor has any one done that ostensibly on my behalf, yet unknown to me.

4.1

Beyond this point of engagement, I have never held or delegated someone to hold talks with Applicant's people relating to marrying her into my family. I have never paid ten head of cattle for her bohali. I have never received her into my family and accepted her as my daughter-in-law."

The supporting affidavit confirmed the fact that beyond betrothal the Seitlheko family did not participate in the marriage and bohali negotiations.

The most pertinent question therefore is whether it can be said that when the deceased died, there existed in law a valid customary marriage between the deceased and the applicant. Section 34 (1) of Part II of the Laws of Lerotholi states:

"A marriage .... shall be deemed completed when

(a) there is agreement between the parties to the marriage;

(b) there is 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**; and

(c) there is payment of the part of the **bohali**"

It is a trite principle that the institution of marriage under customary law is underpinned by parental agreements and consent. Marriage, it has been said, is a union of families and not merely between the two spouses. Besides their own personal agreement to marry, the spouses need the agreement between their respective parents as to the marriage and as to the amount of bohali to be paid. They

have capacity in law to conclude such an agreement or they can mandate representatives for that purpose. This right cannot be usurped by anyone without their authority. It is not a matter of choice or convenience.

It should be born in mind "that in the case where a man is marrying for the first time both he and his fiancee are, in legal theory at any rate, minors and the general freedom from personal liability and lack of capacity to make a binding contract apply" - **Poulter - Family Law and Litigation in Basotho Society** (1976) -p.77. It stands to reason that when he proceeded on his own to Popopo in St. Monica and paid M6,000.00, the deceased had no legal capacity, being a minor, to engage in the negotiation of bohali; to have clothed himself with that capacity sought to render his parents' right nugatory. The amount of bohali as envisaged by section 34 of the Laws of Lerotholi (supra) depends upon agreement between parents of respective parties; in my view this is their right and prerogative.

Faced with a stalemate the eager son who wishes to expedite his marriage has other options of forcing the hand of his parents in order that marriage negotiations proceed. He can, according to **Poulter** (supra at 83) elope with his intended bride if they feel they need to speed up the process of marriage and their parents are being unduly dilatory. In the present case the deceased elected to impregnate the applicant! Being both above the age of twenty one, they could have easily married civilly with consent of their respective parents.

In the present case, it seems to me that the crucial factor in determining the validity of the applicant's marriage is the capacity of the deceased Koaile Seitlheko to have

stood in, so to say, **in loco parentis** and negotiated and paid the bohali on his own. Having requested his parents to ask for applicant's hand in marriage as a matter of customary practice, he had to go the whole hog! **Poulter** (supra at p.90) says:-

> "The amount of the bohali payable in respect of a marriage is determined by negotiation and agreement between the families of the bride and the groom."

It is, in my view, the groom's parents who have the capacity to negotiate and make a bohali settlement. This right or prerogative can never be usurped by the groom, no matter how eager he may be to enjoy the fruits of marriage. This view is buttressed by the fact that it is the parents of the groom and not the groom who is usually sued for any balance of bohali due.

NB: **Maqutu J.** in his book "**Contemporary Family Law in Lesotho**" at page 110 opines that-

> "When the Laws of Lerotholi Part II are followed strange results might follow. It is true (in the above cases) that from the outset that the boy and girl agreed to marry but the boy's parents never formally agreed to a marriage. All that is manifest is that both the girl's and the boy's parents were willing and prepared to negotiate a marriage. Secondly there was never any agreement as to **bohali** that ought to be given in marriage for the girl. Strictly speaking there has been no clear compliance with the **Deke vs Qhoai** (CIV/APN/125/88 -unreported) situation, then boy's father should be estopped from repudiating the marriage or claiming it does not exist."

As long as the validity of a customary law marriage is to-day still governed by the Section 34 of the Part II of the Laws of Lerotholi, it seems to me that despite certain injustices that may be apparent in the process, the courts of law have to apply the customary law as it stands. I am not sure principles of estoppel can be applied in a customary law scenario. In the present case, my decision would however take a different complexion if the two families had actually agreed as to marriage of their children and as to the amount of bohali. Unfortunately this crucial stage had not been reached in the circumstances of this case. This is a case where the boy's parents were breaking off the engagement. Engagement under customary law has two facets:

(a) agreement between boy and girl to marry customarily.

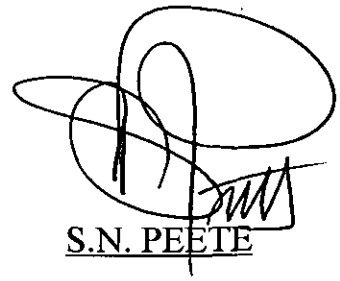
(b) agreement between the boy's and girl's parents to the marriage of their children (**mohope oa metsi**) - see **Poulter** (supra) - p.77 who states that if the boy's parents renege - for whatever cause - on their promise to negotiate marriage, a beast known as "**sesila**" may be claimed from the boy's parents by the girl's parents.

According to the facts of the instant case, the apparent cause to the reneging was the concealment of applicant's pregnancy after the betrothal and bombshell announcement of her having given birth to a baby-boy and that the deceased was the father. The first respondent told the court that these hurt her deeply and she was no longer anxious to proceed with the marriage negotiation. The intriguing question that may arise is whether having secured the applicant's hand to marry her son, the first applicant was henceforth <u>bound</u> to proceed into marriage negotiation despite unpleasant occurrences as alleged. In my view, she was not bound and to hold otherwise would be contrary to public policy. In other words, where a marriage

agreement has not yet been concluded, the respective parties cannot be forced to conclude one!

In the present case I came to a conclusion that no valid Sesotho customary law marriage existed between the deceased and the applicant because beyond betrothal agreement in May or June 1998, there was no agreement between the deceased's and the applicant's parents as to marriage and as to amount of bohali. I have also concluded that despite the **bona fides** or genuineness of his intentions, the deceased lacked the vital capacity to stand **in loco parentis** to negotiate marriage and bohali.

In the circumstances the rule is discharged and the application is dismissed.
Mr Lenono having gallantly offered to forgo his costs, it is ordered that each party bear its own costs.



S.N. PEETE
JUDGE

For Applicant : **Mrs Kotelo**
For Respondents : **Mr Lenono**