

IN THE HIGH COURT OF LESOTHO

In the matter between:-

'MANEO 'METSO

APPLICANT

and

**MOTSELISI LEKHEMA
M.K.M. BURIAL SOCIETY**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

Delivered by the honourable Mrs. Justice K.J. Guni
on the 17th day of March 2000

The deceased , 'MALEPHAKA 'MATEBOHO 'METSO died on 29/12/99. She is survived by only one of her three children. The surviving child is a girl named MOTSELISI LEKHEMA. All her children including this MOTSELISI LEKHEMA were married. MOTSELISI LEKHEMA's marriage failed and she returned to her maternal home where she lived with her mother - the deceased till she died. Both sons are late. The second son's wife is also late. The applicant herein is the wife of the first born son and heir of the deceased.

There have been squabbles between this applicant and her mother-in-law, the deceased. The 1st respondent joined the quarrels on her mother's side. According to the applicant the 1st respondent was in fact the instigator of such squabbles which existed between this applicant and her mother-in-law. 1st respondent is alleged to have gone to the chief of the village who agreed with her, to expel the applicant from the deceased's home where she had come to prepare for her burial. The applicant after the chief and 1st respondent had expelled her, she approached this court to seek an order of the court to enforce her right to bury the deceased.

The Rule issued on 6th January 2000 was confirmed on 8th February 2000. An indication was made then that the reasons will follow. These are the reasons.

The application is opposed by the deceased's daughter, MOTSELISI LEKHEMA. Although MOTSELISI LEKHEMA is unable to claim a superior right or any right at all for her to bury her mother, she opposes this application on the ground that there are others who have a prior right to this applicant's. Those others have not been joint and they do not wish to claim any right to bury the deceased. In recognition of the deceased's eldest son's right to be the heir of the deceased, 1st respondent denies that the applicant is the eldest daughter-in-law. 1st respondent

asserts that there is an heir. The deceased's eldest son had two wives according to the 1st respondent. There is a senior wife to this applicant. Furthermore that first wife has a son. It is this son by the first wife of the deceased's son Teboho, who is the deceased's heir according to Sesotho custom. **Malithare Abrahams v Khojane Abrahams and Another** LLR 1991 - 1996 Vol. 1 Page 1.

Teboho , allegedly entered into customary law marriage with both his wives. For any marriage to be recognised as a customary law marriage there are some essentials which must be established.

Firstly, there must be consent between the parties who intend to be married.

Secondly, there must be consent of their parents or those people in *loco parentis*.

Thirdly, there must be part or full payment of bohali [LAWS OF LEROTHOLI, PART II Section 34 (4)].

The applicant has attached to the Founding Affidavit a documentary proof [Annexure MM1] of her customary law marriage to the deceased's eldest son Teboho. The applicant is 'MANEO METSO [born Tseka]. Annexure MM1 shows that Tseka and Metso families agreed that their children who intended to be

married have the blessing of their families to do so. The agreed amount of “bohali” was stipulated. A greater part of that bohali was paid, leaving but a small outstanding balance. According to this applicant, she and her late husband lived together as husband and wife for over (40) forty years. All the characteristics of the marriage by Basotho custom are found completed in their marriage. It is therefore proper to be deemed as a recognised Sesotho customary marriage.

There is also alleged customary law marriage between this applicant’s late husband and one Maphinithi Metso. In her Supporting Affidavit, Maphinithi claims to be the senior wife to the deceased’s eldest son Teboho. There is a boy born of that couple. The only child of the alleged marriage between the deceased’s son Teboho and Maphinithi is called Phinithi Metso. This Phinithi Metso is according to the respondent the heir and the person entitled according to Sesotho customary law to determine the place and time of the burial of the deceased. Zuma vs Zuma CIV/APN/283/88 (unreported). Phinithi has not applied to be joint to oppose this application. Therefore he is not seeking any court order to enforce any right should he be found to have any.

Examination of the evidence before the court shows that a number of cattle were driven from the deceased’s home to Maphinithi’s family. There is no clear and firm

evidence to show this court for what purpose were the said cattle were driven there. Some witnesses claim to have seen four (4) herd of cattle driven to Maphinithi's family home. Some testified to the effect that, those cattle were for payment of damages since Maphinithi was abducted by the deceased's son. Apparently Maphinithi's father was so offended by that act of abduction of his daughter that he refused to accept those cattle. He is reported as expressly withholding his consent to the purported marriage between the deceased's son and his daughter, Maphinithi. There is another type of evidence to the effect that the number of cattle seen driven by the same named men from the deceased's village to Maphinithi's village, was thirteen. According to this witness, those cattle were for "bohali". One of which was slaughtered for "tlhabiso" ceremony. None of these witnesses who testified were part of the delegation either from the boy's or girl's family. None of these witnesses took part either in the driving of the cattle or negotiations for their acceptance. All they claim to have seen is a herd of cattle being driven. On seeing those cattle, they then speculated and came to the conclusions they told this court: that those cattle were for the payment of damages for abduction or that they were payment for bohali.

It is the finding of this court that the evidence led so far to prove that there was a Basotho customary marriage between Maphinithi and the deceased's eldest son, is

so unreliable it cannot be accepted. In this circumstances it is the finding of this court that there was no marriage between Teboho - deceased's eldest son and Maphinithi, that could be said to remotely comply with the requirements of the Sesotho customary law marriage. That being the case, Phinithi has correctly, in my view, stood aside because his mother is not Teboho's Basotho customary law wife. Teboho's wife has a right to succeed him in the absence of his male adult issue. She is the person with the right to determine, the place, date and time of the burial of the deceased. **Mabona v Mabona CIV/APN/60/88.**

This application must succeed. It is therefore granted as prayed. There is no order as to costs.



K. J. GUNI
JUDGE

17th March 2000.

For Applicant : Mr. Fosa

For 1st Respondent : Ms Chimombe