CIV/APN/27/2000
IN THE HIGH COURT OF LESOTHO

In the matter between:

GEORGINA LEBONA	1st APPLICANT
MALEBANYE LEBONA	2nd APPLICANT
v	
TAELE PHAKISO LEBONA	1st RESPONDENT
MAPHAHLOANE LEBONA	2nd RESPONDENT
NEO LEBONA	3rd RESPONDENT
LESOTHO FUNERAL SERVICES (MOHALE'S HOEK)	4th RESPONDENT

JUDGMENT

Delivered by the Honourable Mr Justice WCM Maqutu on the 14th day of February, 2000

Judgment was given on the 1st February, 2000, and I said written reasons will be given later.

On the 20th January, 2000, an ex parte application was brought before this Honourable Court on an urgent basis. This court granted a rule nisi in terms of which respondents were to show cause on the 25th January 2000 at an unspecified time.

At about 11 a.m. on the 25th January, 2000, applicants asked for confirmation of the

rule nisi. This the court did, after satisfying itself that respondents had been served.
At about 3 p.m. the respondents appeared before court and asked for the rescission of the Order making the rule absolute. Their reason was that the Order was granted by mistake which applicant ought to have noticed had applicant read his own papers and the court order carefully.

It became clear to the court that it had granted the final order without realising that the time for the appearance of respondents was not specified. Prayer (e) of the rule actually ordered respondents "to file opposing affidavits on the 25th January, 2000 and the matter would be heard on the 27th January, 2000. The respondents had also duly filed their opposing affidavits on the 25th January 2000 thereby complying with Prayer (e) of the rule. I was advised that applicants had refused to accept respondents' opposing papers, despite the fact that respondents had acted in terms of the court Orders contained in the rule nisi.

This court has the power in terms of Rule 45(1)(a) of the High Court Rules to rescind mero motu or upon application of any affected party "an order or judgment erroneously granted in the absence of any party affected thereby". This confirmation of the rule had been made in the absence of the respondents. Furthermore the order had been clearly granted erroneously. Therefore the court had no option but to rescind its final Order. It further ordered that the matter be heard on the 27th January 2000 in terms of the Prayer (e) of the rule.

The real applicant was the first applicant. Her son was the second applicant, although he was not claiming anything for himself. First applicant is the widow of the late Jarefanteng

Clement Lebona who had just died. The crux of this application was the dispute over the right to bury the body of first applicant's husband. She was claiming against the first three respondents (who are members of the Lebona family) the following:

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a) That they should be restrained from claiming the body of her husband (Jarefanteng Clement Lebona) for burial.

b) That first applicant be declared the sole heiress of her said husband with the duty to bury him.

c) That third respondent release the banking accounts and insurance documents of her late husband to second applicant.

On the 27th January and the 28th January, 2000, the parties took a long time trying to neogtiate a settlement. They eventually came before court and told the court that they could not agree on where the deceased should be buried. I felt the parties should try to negotiate again and with greater seriousness as I felt the burial of the deceased should not be allowed to be a bone of contention in the family. In giving the parties an opportunity to reconcile and unite over the burial of the deceased, I made the following Order:

> "Matter postponed to 31st January 2000 at 2.30 p.m. Both counsel are directed to bring the parties together and explain the case of Mafereka v Mafereka 1993-1994 LLR 445 to them. If they cannot agree a list of reasons should be supplied together with full heads of argument."

On the 31st January, 2000, I waited for litigants but they did not appear before the court until a little before 4 p.m. when the court was supposed to close at 4.30 p.m. They said there was no agreement. They had neither filed in court the reasons for disagreement and heads of argument. The matter was postponed to the 1st February 2000 at 2.30 p.m. with the direction that full heads of argument should be prepared.

On the 1st February, 2000, the matter was heard. Both parties had filed heads of

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argument. Applicant had filed a Notice in terms of Rule 37(2) on the 27th January, 2000, in which she put issues for determination as follows:

1) Whether 1st applicant was a widow of the deceased does or does not have a prior duty to bury the deceased.

   And whether 1st respondent has such a duty in law.

2) Whether any recognition at all has to be given to "LMA" to the opposing affidavit of 1st respondent. (LMA was a letter that according to first respondent) was from deceased authorising him to bury deceased.

3) Whether this application should not be granted purely on the determination of the above issues.

There was no dispute that both parties as relatives of deceased had a right and duty to bury the deceased. What was in issue was who had the right to prevail, in the event of a dispute. It is the heir who by law has the main duty to bury the deceased.

It became clear that since the 27th January, 2000, first applicant stuck to their view that she should bury her deceased husband at the place of her choice Boinyatso Mapeleng in the district of Maseru. The respondents on their side insisted on bury deceased at Nkhukhu Thaba Tsoeu in the district of Mohale's Hoek. Neither side was prepared to yield.

Second applicant was really not a party in that he was not asking for anything for himself, nor was he claiming any title to sue in respect of the right or main duty to bury his father. He was merely verifying the contents of first applicant's affidavit in the following words:

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I confirm the contents contained in 1st applicants affidavit to be correct. I have been always a party to the meetings held between applicant herein and the Lebona family.

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I pray that she be granted prayers as set out in the Notice of Motion."

In the case of Apaphia Mabona v Khiba Mabona CIV/APN/280/86 (un reported) following the case of Khatala v Khatala 1963-66 HCTLR 97 Molai J said:

> "The question whether the deceased's marriage had been concluded according to Sesotho law and custom or by civil rites plays no part...."

This is because all deceased estates of the Basotho have to be administered by Basotho law and custom unless it is shown to the satisfaction of the Master of the High Court that they have abandoned the African mode of life and adopted a European way of life. Since nothing has been said about the European mode of life by any of the litigants, the Administration of Estates Proclamation 1935 and the received Roman-Dutch law have no application. Every issue will be viewed from the vantage point of Basotho law and custom.

It is generally accepted that the Laws of Lerotholi (brief as they are) are regarded as by most people in Lesotho as a good statement of Basotho custom. Consequently they are the first point of reference in dealing with their custom. Consequently where they are not followed, reasons must be given.

There are four issues on which this matter revolved. These were

a) Whether first applicant was the sole heir of deceased with principal duty to bury the deceased.

b) Whether deceased had left instructions as to burial.

c) Whether the heir should consider the rights of others with a duty to bury.

d) How far should the living go before they are deemed to be showing disrespect to the deceased.

I will deal with these issues a seriatim.

a) Whether in this case the widow is sole heir

The Laws of Lerotholi I at Section 11 provide:-

a) The heir in Basutoland shall be the first male child of the first married wife...
b) If there is no male issue in any house the senior widow shall be heir..."

Clearly as there was a son in first applicant's marriage with deceased, applicant is not the heir. Her son Malebanye is. She could only be the "sole heir" if she had no son. In the received Roman Dutch law (which does not apply in this case) she could not be the sole heiress in intestacy as she has a son.

Furthermore first applicant has no locus standi to come before this court and claim she is the sole heiress with the principal right and duty to bury deceased because there is Malebanye Lebona who is her son and is "a Mosotho male adult". See paragraph 2 of first applicant's founding affidavit. In the case of Apaphia Mabona v Khiba Mabona CIV/APN/280/86 Molai J dealing with a burial dispute said:

> "The widow's wishes prevail where she is the heiress and not where the deceased has died leaving an heir. It is trite law that in Lesotho the eldest son of the deceased person is his heir.... The applicant must of necessity fail in her prayer that

> the deceased's body be exhumed and be buried in a place of her choice."

b) Whether deceased left instructions as to burial

It is a historical fact that in Basotho society literacy is a recent development. Indeed at least twenty per cent (20%) may still be illiterate. Consequently the deceased used to distribute his property verbally. In the early part of the twentieth century as literacy began to spread it was recognised that the deceased might leave written instruction as to how his property should be allocated to his descendants after death. Ven when this happened, the Basotho had not adopted the practice of making wills into their customs. This is not surprising because even today no marriage certificates are issued when the Basotho marry, but that does not bar the writing of some transactions during the marriage process. It is therefore not surprising that Section 14(1) on allocation of property during lifetime provides:-

> "If a man...dies leaving written instructions regarding the allotment of property, his wishes must be carried out, provided the heir according to Basotho custom has not been deprived of the greater part of his father's estate."

It follows in my view that the deceased need not make a will concerning his burial. All he might do is to leave written instructions. A letter to this effect might suffice.

> First respondent at paragraph 6 of his answering affidavit says deceased had left "written instructions which inter alia relate to the disposal and or burial of his corpse. Fair copy of the said instructions is hereto annexed and marked "LMA".

In her replying affidavit first applicant at paragraph 4 said:-

> "I have been advised by my counsel and verily believe same to

> be true and correct that the contents of paragraph 6 are hearsay. Thus I am unable to respond thereto issuably "LMA" is hearsay. It is not a will."

All I can say is that the advice given by first applicant's counsel was an oversimplification of the legal position, in the light of what had been said above. At paragraph 5 of her replying affidavit first applicant glibly dismissed as an "abuse of court process" the statement from first respondent that at a meeting of the family (at which first applicant was present) it was stated that the deceased wished to be buried at Thaba-Tsoeu. It was a mistake for first applicant to do so; the reason being that even if the instructions of the deceased had been given verbally, if this could be proved by credible evidence, effect would have to be given to the deceased's wishes.

It seems first applicant considered the deceased's wishes to be irrelevant merely because she had not made a will. First applicant does not challenge the fact that this fact of deceased's wishes was drawn to her attention together with deceased's written instructions. Her view was that despite what deceased might have said authorising the first respondent and others to bury him, "they really have no right, whatsoever to bury my husband as long as I live"—see paragraph 7 of her replying affidavit. I have already said even if she was the heiress (which she is not) she was bound to respect the deceased's wishes.

c) Whether heir has to consider rights of others

While I agree that in matters of burial, it is the males who by custom have to dig the grave, symbolically put soil in the grave according to seniority in the family tree, I do not agree with first respondent's assertion that women are entirely excluded. They have to cut hair and wear mourning cloth as well. They have to be consulted and to make

their views known and considered in the decision making as to place and time of burial.

The fact that the widow as the chief mourner who has to wear mourning cloth for up to a year (when others only wear it for a month) is particularly important. Her concurrence has to be sought, although she does not have to prevail if she is not the heir in the event of a dispute. Even so, as much as possible an attempt is made to reach a consensus in family matters.

The heir as head of the family ultimately makes a ruling for the benefit of all where opposing views cannot be reconciled. It should be noted that any dispute among the deceased's family was supposed to be "referred for arbitration) to the brothers of the deceased and any other persons whose right it is under Basotho custom to be consulted. If no agreement is arrived at by such persons, or if either party wishes to contest their decision, the dispute shall be taken to the appropriate court by the dissatisfied party" .—Laws of Lerotholi I Section 14(4). The family might over-rule the heir, but the heir or any dissatisfied party might seek redress in an appropriate court. Every family is expected to do its utmost to settle its disputes equitably in matters of succession. It was therefore not very helpful for first applicant to say in paragraph 3 of her replying affidavit:-

> "Thus, the issue like who deserted, and the kind of marriage adopted by the parties becomes irrelevant. I reiterate that I have a right over the corpse of the late Clement by virtue of being his widow and only widow."

In the case of Matsotang Mafereka v Tjomelane Mafereka & Ors 1991-1996 LLR 445 this court at page 451 faced with a similar attitude from a widow who was the heiress said:

> "In African society most rights are collective not individual. The sacred aspect

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> of burial is collective. It seems to me the widow was wrongly advised."

In classical Roman law burial was recognised to have some religious significance. See B Nicholas Roman Law(1962) at page 236 to 237 who says the deceased "ensured that there would be someone on whom the duty of maintaining the family sacra would devolve".

In the custom of the Basotho the obligation to bury (though it is one of the duties of the heir) is not always part and parcel of the deceased estate. This moral and religious duty is shared with other members of the family who has no rights to inherit from theve deceased. Even in Roman law Zuletta in Part II Commentary to the Institutes of Gains (1953) at page 83 says:

> "It is doubtful how far obligations owed to or by the deceased originally descended along with his corporeal property; the obligation of keeping the family worship (sacra) emphatically did descend, but it may be that purely patrimonial obligations were not part of the hereditas, though there is evidence that they were attached to it by the Twelve Tables."

The cult of the family (sacra) which surrounds burial appears to have been tied together with succession because it could involve expenditure. If that is so then in Lesotho it became a patrimonial obligation of the heir for the same reasons as it did in classical Roman law although it need not have been. In Basotho custom where the cult of the family manifests itself in the extended family structure, it is all the more important to respect and accommodate the rights of others who are obliged by custom to bury the deceased and to participate in the burial of the deceased for no gain except except honouring the dead in the family tradition. It has become an unsettling practice to use burials as skirmishes in battles that are later fought over the estates of deceased persons.

d) Respect for the dead

The use of the deceased and their burial as pawns to gain access to assets of deceased estates in a developing succession dispute has led to the insistence of this court that there should be respect for the dead. This principle was first expressed in Chemane Mokoatle v Senatsi Senatsi & Ano. CIV/APN/163/91 where the greed of litigants who were fighting over the corpse of the deceased led Cullinan CJ to say:

> "This is a question of public policy...I consider this application an unhappy one, bordering on the morbid, if not ghoulish at places, and contrary to a custom, common to all mankind...namely respect for the dead."

There has been over the years a growing need that "this court ought to protect the dead and their dignity from being used as a pawn by the living".—See Ramahloli v Ramahloli CIV/APN/479/93 (unreported). The court in considering the merits of applications of this nature now find themselves increasingly compelled to consider the deceased when the living used the deceased's corpse as a means of proving they are heirs to the property of the deceased. This practice has become so bad in Lesotho that virtually every week there are cases in which the right to bury the deceased is in issue. Behind these applications are greed or revenge on the deceased or the family that gave some offence or failed to give enough bohali or lobola for the marriage of the deceased. Our custom in terms of which marriage is not an event but a process promotes these disputes because there is often uncertainty on whether a Basotho customary marriage can be deemed to have taken place and when.

In an emotionally charged burial case of a woman T Metsing v S Nkao & Ors. CIV/APN/328/99 (unreported) Peete J found that evidence of marriage was equivocal. He avoided making a finding on the issue of marriage in order to enable one of the

litigants who was in possession of the deceased's body to bury it. He added:-

> "In view of the acutely contradicting versions regarding the existence of the marriage, the order which this court intends to make will not finally determine whether or not there is a marriage. ...this is a sad case in which the most important document evidencing agreement has been lost by both sides and it is quite clear that witnesses for one or both sides were not telling the truth."

In short, the court allowed the deceased to be buried while permitting the litigants to ventillate their grievance some other time under appropriate conditions. By so doing the deceased corpse ceased to be a pawn for the living.

On the 1st February 2000 after hearing Mrs Majeng Mpopo I therefore made the following order: -

Rule discharged. There is no order as to costs. First applicant has no locus standi to sue. Second applicant who is the heir is not claiming anything save to support his mother's averments as to facts. As deceased left an uncontested letter containing instruction as to place of burial, deceased is to be buried at Thaba-Tsoeu in the Mohale's Hoek district.

WCM MAQUTU
JUDGE

For applicants : Mrs S Majeng-Mpopo
For respondents : Mr GG Nthethe