CIV/APN/228/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MASUPING GERARDINA TAU **APPLICANT**

and

'MATHABO TAU **1ST RESPONDENT**
M K M MORTUARY **2ND RESPONDENT**

For the Applicant : Mr. K. N. Lesutu

For the First Respondent : Mr. K. T. Khauoe

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 28th day of June 2000

This dispute is over the burial of one MASUKULU PASCALIS TAU. The deceased was said to have died on the 3rd June 2000. It was only on the 23rd June 2000 that the Applicant's Counsel moved this Court *ex parte* and obtained an interim interdict against the burial scheduled for the following day.

The Applicant said the deceased was her husband. It transpired and indeed it was common cause that the deceased was also married to the First Respondent. That is why the dispute concerned the declarations that the Applicant be declared the only lawful wife of the deceased, that the Applicant be declared the lawful heir to the estate of the deceased and that the First Respondent be ordered to bring back to this Applicant a savings book, passport, death certificate of the deceased and the mortuary document to the Applicant. In addition that the First Respondent be ordered hand over the gun of the deceased to police before the funeral took place. And that fifthly the Applicant be allowed to bury the deceased at the place and time of the Applicant's own choice. And last but not least that the Second Respondent shall be restrained from releasing the body of the deceased to nobody except by due process of law pending the outcome of the application. I noted that there had not been a prayer that the First Respondent be interdicted from burying the deceased. I thought this would be implied in prayer (e).

At the time that Mr. Lesutu for the Applicant came to apply for the interim order I anticipated that the application was going to be a problematic one. This was indicated in the most obvious way when one had regard to the time when the Applicant first knew of the death of the deceased that is, on the third of June this year. I had questioned Mr. Lesutu very closely about the aspect of when his client began to learn that the matter was unresolvable and she had to resort to the Courts. This was in the light of what the Applicant had said in paragraph 10 of her founding affidavit namely:

> "Then I approached the First Respondent to arrange the funeral together but she was very unco-operative. She then said she is burying her husband we will talk after the funeral.
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> I have learned from other relatives that the burial will be on the 24th

June 2000."

It was clear on the surface there had been a considerable delay to have launched the application considering that the burial was less than one full day when Counsel appeared before me. Inclined as the Courts are to investigate this sensitive question of the rights of burial of deceased persons I felt with hindsight that I had been unduly sympathetic to have given the order. Later events proved this. The application however turned out to be an interesting one.

The application was interesting even more by reason of the concessions that were made by Applicant's Counsel. The first concession was that the Applicant had always regarded the First Respondent as another wife of the deceased. And that she would not challenge the First Respondent's marriage which had come first, as against the impression originally given in argument that the deceased had "merely seduced or impregnated the First Respondent." That customary marriage of the First Respondent was evidenced by annexure "MT1" certifying payment of four cattle for bohali. Once Applicant's Counsel accepted that probabilities favoured the existence of the marriage the question was inevitably why the Applicant was before the Court with her application. Furthermore when the civil marriage between the deceased and the Applicant which came three (3) years later was registered or entered into it had been preceded by the customary one between the deceased and the First Respondent which was already in existence. It therefore meant that the marriage of the deceased and the Applicant was not a good marriage in terms of section 29(1) of the Marriage Act of 1974. It was null and void *ab initio*.

The other interesting issue was the point raised by the Applicant. It was about a letter dated the 27th May 1986. In that letter it was sought by Rantahli Seetane (for the bride) and Thabo Tau (for bridegroom) to dissolve that customary marriage between the First Respondent and the deceased. This was even more

interesting when the letter was read with the fact that the deceased and First Respondent had in addition to the customary marriage entered into a civil marriage albeit ten (10) years later. And then it brought a serious question as to what these people were doing in purporting to "privately" dissolve the customary marriage. They virtually "closed themselves in a hut" in an attempt to dissolve the marriage. The question that I put to the Applicant's Counsel was where they would have had any legal powers to cancel the agreement of marriage which had been previously reached. In seeking to dissolve the marriage they said:

> "This is to certify that ..... we have agreed to cancel our previous agreement of marriage which we had entered into previously. Thabo Tau agrees to release to Rantahli Seetane his children because he and his son have failed to marry or to pay. Children will remain those of Rantahli exclusively. Thabo Tau and his son remain having released themselves. Balance of cattle should not be paid.
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> Witness : Motsoela Seetane
>
> "Chief" Thabo Kopano ."

The question that arose was where the deceased and the First Respondent/Applicant were when the marriage agreement was being gone about being "cancelled."

What then bordered on the dangerous was that a gentleman called Motsoela Seetane who was allegedly a witness when the above agreement was purportedly cancelled denied having been a witness nor that he knew about this agreement nor that he was present nor that he signed. I asked Counsel to allow me to get an unsworn statement from the gentleman. Counsel agreed. This resulted in the said total denial. The question would therefore be where did Applicant get this kind of letter. Why do people give such a misleading impression that there was a surreptitious exercise to dissolve a marriage? Shouldn't a dissolution of a marriage be a public act?

The second disconcerting aspect in the purported cancellation of the marriage between the deceased and the First Respondent was the absence of any reference to the attitude of the deceased and the Respondent. This type of omission was referred to in the case of MASUPHAv 'MOTA LAC (1985-89) 58 albeit about joinder and *locus standi.* This would sharply bring into question the decision of parents who decide to question marriage in the absence of the bride and the bridegroom, when their marriage was being so questioned or in the instant case when it was purported to be dissolved. See also my judgment in MOTSOMI MOTSOMI v TSEPA NKUATSANA AND FIVE OTHERS CIV/APN/82/98, 18th December 1998.

This problem of dispute of rights of burial concerning multiple marriages keeps cropping up. Instead of receding it appears to be on the increase. Husbands who contract these marriages do not care about the legal position. Lo and behold! what happens after their deaths. I do not know why legislature cannot intervene in its own wisdom to attempt to solve this problem. Just in relation to this question of disputed burials. One may digress to say the following.

That the present position appears to be rigid and legalistic which is undesirable. It is the most equitable and sympathetic approach that is desirable. It would be as follows. That the person to bury the deceased should be the person with whom the deceased was most attached to and who ended his last days with the deceased. This is the person who the deceased probably loved more than others judging from the total circumstances. It is the person whom the deceased would have loved to see burying him. It is this person who most probably gave the deceased peace, calm and comfort. It is the person who should be given the rights of burial. This should be so regardless of whether it was the lawful wife or the first lawful wife as against others. Unfortunately this is not the law.

In other jurisdictions one would have to inquire as to the person who last lived with the deceased. And that in probability is the person the deceased loved best. It is the person whom he would have liked to have been buried by. The issue of whether the marriage is a lawful one and who would have prior right to the estate causes problems if it continues to be an approach adopted in isolation and against other approaches. But it is the law of this country. It is just that lawyers cause confusion by adopting arguments which may be fundamentally sound or logical. When they fail they are re-worked although they are not the law of the country. Sometimes it is a problem of evidence or proof. The legal position remains nevertheless clear that it is the male heir who has the right of burial. In the event of minority or absence of the male heir the senior wife of the deceased will have those rights.

In the end I would have recommended to the legislature to have a law that looks at the total circumstances. It should not exclude the consideration that consultation of the family cannot be ignored in our country as things are as they are. A classical situation, for its pathos, that this Court has come across was three (3) years ago in the case of MASSA v MASSA CIV/APN/5/97 dated 14th January 1997. A man had left his wife and lived with another for about twenty (20) years or more. It was a peaceful family life and a good homestead was established. The family lived in calm and peace. After deceased's death the former wife and eldest son of the first family surfaced. There was a dispute about the deceased's burial. The larger family supported the eldest son. The decision was that the son was the rightful person to bury the deceased. The decision was not a pleasant one to make. That is why I expressed those sentiments which I have just observed in the judgment. But the decision was in terms of the law of this country.

In the present situation it appeared that the first and lawful wife of the

deceased was the First Respondent. That is the finding that I made and a declaration that I would make includes that she would be entitled to benefits and rights as if or similar to the prayers which the Applicant has sought and which would flow. The deceased's marriage to the Applicant appeared to be null and void following the interpretation of the law.

I was not addressed on the question of the Applicant's and deceased child a boy called Suping. The Respondent's response to the statement that there was this boy, was merely an answer that the contents of the statement were noted. Respondent said however that she did not have any knowledge thereof and could not admit the same and "put the Applicant to the proof thereof." I need not comment further than that except to remark that it would have been interesting to investigate whether the marriage of the Applicant was putative or not. See THOKA v HOOHLO 1978 LLR 375.

The application was an unfortunate one. It included a situation where after the application was anticipated on a Sunday the parties and relatives went about waiting and roaming about for a hearing as promised. They waited in vain. The judge was also kept waiting. A logistical problem was described as unavailability of a Registrar. It prevented the application from being heard. These people who waited as said above included two ladies who were later present in Court, two other ladies, an elderly gentlemen and a gentleman from the deceased's work place in the mines of South Africa. The latter had been sent by his and the deceased's employer and colleagues of the deceased to bring financial assistance and take back reports about the funeral. He had to go back disappointed because the funeral did not take place on Saturday (the 25th June 2000) as a result of the burdensome interdict.

It was again unfortunate and quite embarrassing that the deceased's corpse

was allowed to be removed from the mortuary to the deceased's village where he would be buried. It was from there that the corpse had (as I suspected) to be taken back after service of the interim court order. It was because of Applicant's Counsel's failure to have hastened to serve the Second Respondent. These are unpleasant incidents in the ill-starred court order. These can undoubtedly be laid at the door of Applicant and the attitude of her legal adviser.

I have thought seriously about the award of costs of this application. What I considered included Mr. Khauoe's submission that those costs should be awarded against the First Respondent on Attorney and Client scale thus inclining to punish the First Respondent. Costs are in the discretion of the Court. The Court looks at the conduct of litigants and their Counsel and circumstances immediately surrounding the prosecution or defence of the dispute in Court. It is true that the award of costs which are exemplary is not restricted to dishonest, improper and fraudulent conduct. Other unreasonable actions would call for such award against a defaulting party. In cases where an application was brought where an applicant was held to have known that the application would not succeed costs were awarded on an Attorney and client scale (EX PARTE CONTROLLED INVESTMENT PTY LTD 1948(2) 339(T). Situations like these often flow from bad legal advice. In this case my attitude was also influenced by the following observations.

In speaking about the conduct or attitude of the litigant (Applicant) one cannot ignore the standard of the community in which she lives. This is however to be done with caution for fear of misdirection and undue disturbance of policy principles. I would look at the Applicant and Respondent who are ordinary Basotho womenfolk. These are people or one of them against whom I was indirectly told to expect and exact high standards of attitude and discretion when they had to rely on legal advise of trained legal professionals. How far can this

expectation from them go when they ought to be guided by these lawyers? It could mean that there is punishment for receiving bad legal advice. Most of the times it is.

The last consideration is that this thing of disputes or fights over burial rights in our courts seems to be here to stay. It will take a long time. It seems to be part of our modern society in which no one seems immune. One would reasonably expect that one day and not far one or one's next- of- kin will be involved in such a fight over a corpse. It can fairly be said to be the way our people live. It is a way of thinking. It is unwise to be unduly judgmental over this situation which seems to be of sociological origin. Neither can one say it is bad but it is nevertheless disagreeable to some extent. If there is a way the tendency has to be discouraged. And the legislature in its wisdom would be invited to be involved in an exercise that others would call a kind of social engineering. Laws for change can be used to change people's attitudes. If parliament would intervene the disputes will be lessened. As courts we accept that we will still have this kind of litigation on our unavoidable menu list of disputes in which we have no choice. It can only be comforting to our people that we remain in readiness to entertain this kind of disputes in the same way as others to the extent that they do not become abuse of court process.

It cannot however be encouragement for litigants to come later on Fridays and Saturdays to apply for interdicts against burials. There will be punitive costs against both litigants and their lawyers and against the latter these will be born personally (*de bonis propris)*. This should be heeded. In the background are always factors of involved preparations, publicity and an expectation that deceased will be given their respect and dignity of early burials. See CHEMANE MOKOATLE v SENATSI SENATSI CIV/APN/163/91, Cullinan CJ (unreported) In some

religions the dignity and respect to a deceased person is the burial itself not these abundant foods and beverages and other expensive preparations and trappings which are now order of the day.

In the end the application was dismissed with costs on the ordinary scale.

T. MONAPATHI
JUDGE

28th June 2000