

CIV/APN/393/2001

IN THE HIGH COURT OF LESOTHO

In the matter between:

NQHEKU MOKHOANE

APPLICANT

and

MAFEELA TŠEOLE

1ST RESPONDENT

'MAMATŠELISO TŠEOLE

2ND RESPONDENT

LESOTHO FUNERAL SERVICES QUTHING

3RD RESPONDENT

For the Applicant : Mr. H. Lebusa

For the Respondent : Mr. M. Mpaka

JUDGMENT ON COSTS

Delivered by the Honourable Mr. Justice T. Monapathi

On the 16th day of November 2001

The Court decided that, despite having agreed to confirm the main order on the 19th September 2001, there had to be argument over the costs of the application

as Counsel for First Respondent had rightly contended. See **Findlay v Cooper** 1954(4) SA 702. It was because award of costs is in the discretion of the Court. What had to be considered was fairness to both sides and relevant facts. One of the facts would be whether there has been abuse of process of Court. See **Ward v Sulzer** 1973(3) SA 701 as I respectfully agreed. Furthermore, as I concluded, ethical consideration may enter into the exercise of that discretion. See **Mahomed v Nagdee** 1952(1) SA 410 AD at 420.

Argument followed on the 2nd October 2001 September 2001 after hearing the *viva voce* evidence of the Applicant and the First Respondent. Hence the following reasons for my decision of the 2nd October 2001.

Apart from the fact that this application was filed on urgent basis, without notice, on the day preceding the burial, I had suspected that there was something wrong with this application. It was (as it turned out) that this was an application that ought not to have been filed because it was unnecessary. It also amounted to abuse of process of Court. See **Carter v Carter** 1982(2) SA 378(1). See also **Bester v Van Niekerk** 1960(2) SA 363 where a successful party was nevertheless ordered to pay costs where his haste has been wholly responsible for legal proceedings that had been unnecessary had a measure of prudence been employed.

My use of superlatives wherever they are found should illustrate the dim view I took of the conduct of one of the parties and not anything else.

This application was about a fight between the Applicant who was the Deceased's husband and First Respondent who was the Deceased's brother over the burial of the deceased. If I heard the evidence well this Deceased died on or about the 7th August this year. It was only on the 15th September that she was buried. There were circumstances that contributed to the confusion and disorder. It had firstly to do with the relationship between the Deceased and her husband (this Applicant). It was that at the death of the Deceased she was no longer staying together with her husband. They were estranged. The other being that at her death she was staying with a relative of her maiden parents not with the First Respondent. And her death having followed another death of a relative that had occurred at the place where she stayed. What was important was that the First Respondent, having been informed of the deceased's death, immediately caused her body to be put in a mortuary. First Respondent says he sent a messenger to the Applicant to inform him that his wife had died.

It could or it could not be that this First Respondent's messenger informing his brother-in-law became delayed through a messenger by the name of Molahlehi.

But I would find nothing wrong with the step that the First Respondent took by immediately taking the body of his sister to the mortuary. Without any dispute the next-of-kin was deceased's husband who had thereafter displayed a difficult attitude. If he had initially intended to indicate to the First Respondent that he intended to bury the deceased (which was not the case) he could not have shown this attitude.

I was forced by the evidence that I heard to believe that the First Respondent took urgent steps to cause the Applicant to know that his wife has died as aforesaid through one Molahlehi. And that Molahlehi did exactly that as it was later revealed before the chief. He told the Applicant that his wife has died. And as a result one of the relatives of this Applicant Thabang got involved by attending together with the Applicant of the number of meetings called by the chief. How would one therefore suspect any ulterior motive when the First Respondent even caused these people to be called before the chief? It was revealed that on an occasion or two this Applicant refused and did not attend at the chief's place despite having been told to attend.

In all the circumstances it was revealed that the First Respondent was desperate that his sister must be buried. Uncontroverted evidence revealed that he

was keen that there be a burial and everything therein confirms that he had initially never intended that he must be the one to bury his sister. If he came to be interested to do so himself he was forced by this Applicant. And this is corroborated by MT"2" this minute of the meeting before chief of the 15th August 2001. This minute is expressive of what must have transpired at the meeting. It has everything of sentiments that would normally be spoken about in a dispute of this kind.

This minute of the chief demonstrates that the Applicant was difficult. To show that Applicant was difficult he even insisted that his wife's corpse must be brought from the mortuary to his place without telling the public as to when and where he would bury the corpse. How could the First Respondent be expected to release the corpse not knowing his deceased's (is his sister) burial who was not a stranger? How can he be expected to do such an untoward thing?

So that for the Applicant, to speak about issues such as that certain things would not be done by Batloung Clan far from which he came and that he wanted a mortuary certificate for release of the corpse so that the corpse was brought by someone else to his home was rather nonsensical considering that he was unprepared to bury the body. This man has been very difficult. To show that he

was difficult one just has to calculate the time from the 15th August 2001 to the time when he came to Court. This Applicant is a kind of man who caused this unpleasant circumstances. It resulted in unnecessary urgency. It was of his own making.

If Applicant was keen on burying his wife why did he not come to Court may be two days after the 15th August 2001 which was on the day of the meeting at the chief's place? Why does he take almost a month to come to Court to claim for burial of his wife? It showed the kind of man this Court was dealing with. And this delay of a month is something that this Court would not tolerate. It showed further that this man was playing football out of the burial of his wife and to made this Court part of the game. Unfortunately (this unnecessary fight over burials) is a common place occurrence. That is why I said despite the fact that there was agreement that the corpse be buried I still had to say something about the Applicant with regard to the question of costs of the application and the moment arrived.

To repeat the Applicant waited from the 15th August 2001 to the 14th September 2001 and then came to Court on an urgent basis. He abused process of this Court. He abused the roll, disturbed programmes and work of Court. This

is not how this Court should operate. Not least over a serious thing like a burial of the body of the deceased person. A burial is not only a matter of public concern. It touches the feeling of other people most intimately. First and foremost are Deceased's relatives. The Deceased had relatives including the Applicant. I looked at the Applicant's attitude in the witness box.

I became sure and satisfied that the Applicant was never prepared to bury his wife on time. He just wanted everybody to suffer. And in the end he made this Court part of the game.

One had to think about the expenses that the First Respondent had incurred up to the time of the interdict. He also spoke about MKM Burial Society expenses. I need not decide the aspect. This is just to say that First Respondent incurred unnecessary expenses. What was important was that he ended up making up his mind to bury the deceased. This was against the background of the attitude of the Applicant. It is important to bear in mind that whether one is a poor man or not, he must bury his next-of-kin. It is a duty. See **Ramaisa v Ramaisa** 1991-1996 LLR 899, **Peete v Peete** 1991-1996 - LLR(2) 864, **Khojane v Mokatsanyane** 1991-1996(1) 263

Whether there is MKM Burial Society or whether there is Lesotho Funeral Services or any other burial society people must bury their deceased relatives on time. That is why I remarked when the Applicant said he could still bury this corpse after two years. I thought that was irresponsible. The suggestion that he had all the time to bury the deceased showed what was in his mind. It was to injure the feelings of other people. I believe that the attitude of the First Respondent (after what the chief said) was to proceed with all reasonable haste and bury his sister. It was honourable. And this must have been because Applicant had actually said he does not eat corpses (“ha a je litopo”). This the Court heard in evidence as a measure of Applicant’s arrogance. I don’t see how the chief would write down such a serious allegation in his minutes if it is not what actually happened.

This Court appreciated the perception that the First Respondent, who then had a sister to bury, was seen to have been made a fool by the Applicant who just came to Court to prevent the First Respondent from burying the deceased. It was after so inordinately long time, having unjustly caused the delay.

As I said before I thought the question of costs was properly to be argued. See **Findlay v Cooper** (supra)It ended up demonstrating that the Court should

indemnify this First Respondent who has been treated in this way through abuse process of the Court. It was because the Court by use of its process contributed to the embarrassment as it had been unwittingly attracted. The Court was misused. The Applicant misused the Court to embarrass the First Respondent. The Court ought to should demonstrate to the Respondent that it was regrettable that he had to be placed in that sort of embarrassment and inconvenience.

What the First Respondent had done was to prepare over a period of time for the burial of the deceased and at the last minute someone (Applicant) comes to prevent the burial and when the Applicant (who had a right to bury the deceased) was abandoning the right and actually said so. When First Respondent wanted to bury deceased the Applicant came to Court as if to say that was madness on the part of the First Respondent. And he used the hand of the law to embarrass the First Respondent. It was wrong because it was in the circumstances an abuse of process of court.

The Applicant was difficult, was adamant, just for nothing. If he had problems he had to have courage and dignity to say: "Oh! My wife has died what can we do? I want to undertake burying my wife but I am a poor man" or whatever. But he ought to be seen to be wanting to bury his wife and if he had

problems he should have asked for assistance from his brother-in-law because the latter has done nothing wrong by sending the body to the mortuary.


I made an example of police. Policemen will find a dead body and will immediately send the corpse to the mortuary. Now the Applicant thinks that somebody will wait for him where he is, where he stays with his concubine, as alleged. I don't care about that, that is his own life. But there was no need for people to wait for him so that he can give directives so as to what should be done at his own time. And even after a meeting of the 15th August 2001 he waited for a long time until he decided to come to Court. Why did he expect that First Respondent would wait and not bury his sister. I have said all these to show that I concluded that Applicant has caused this application to be brought unnecessarily. For a case that was brought on patently false basis see **Bef (Pty) Ltd v Cape Town Municipality** 1990(2) SA 377(C). I think he should bear the costs.

The Court was tempted to say that Applicant must pay costs of this application on a higher scale. It was not because of the hopelessness of the application but because of bad faith on the part of the Applicant. In addition he filed the application precipitately or till all hours. Furthermore it would be to expressing the Court's disapproval of Applicant's conduct. I was mindful that the

discretion of the Court was not restricted to dishonest, improper or fraudulent conduct. See **Rautenbach v Symington** 1995(4) SA 553(O).

Even against the above background I however thought otherwise on the issue of awarding costs on a higher scale. My observation was that Applicant was an ordinary Mosotho man who was possibly misled to an attitude over what was essentially a serious thing like in the instant where there was a corpse to be buried. My order was that he shall pay the costs of this application on the ordinary scale.

As for guidance as to recent reported cases in which the Court of Appeal was “forced” to order costs on Attorney and client scale see **Lutaro v NUL** 1999-2000 LLR 52, **Sotho Development Corporation (Pty) Ltd v Nedbank (Lesotho) (Pty) Ltd** 1999-2000 LLR 381 and **Swissborough Diamond Mines (Pty) Ltd & Ano. V LHDA** 1999-2000 LLR 432. In all of them there were very special and exceptional circumstances.



T. Monapathi
Judge

Noted by: Mr. Molefi (Office of Chief Legal Aid Counsel)

Mr. Moqhali (Office of Director of Public Prosecutions)