

IN THE HIGH COURT OF LESOTHO

In the matter between:-

**TSEBO RALEBITSO**

**APPLICANT**

and

**TLEBERE BATERE  
KEBITSAMANG NTANYELE  
MOTSEKUA MORTUARY**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete  
on the 22<sup>nd</sup> August, 2001

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On the 12<sup>th</sup> July 2001 her **Ladyship Hlajoane A.J.** granted a **Rule Nisi** couched in the following terms:-

- “1. That the Rules pertaining to the periods and modes of service be dispensed with on account of urgency.
2. That Rule Nisi be issued and returnable on the date and time to be determined by this Honourable Court calling upon the respondents to show cause (if any) why:-

- (a) The 1<sup>st</sup> and 2<sup>nd</sup> respondents shall not be interdicted and restrained from burying the body of the late SEKHOTHALI RALEBITSO pending the outcome of this application.
  - (b) Applicant shall not be declared the rightful person to bury the deceased, SEKHOTHALI RALEBITSO.
  - (c) The 3<sup>rd</sup> Respondent shall not be interdicted and restrained from releasing the body of the late SEKHOTHALI RALEBITSO to anybody including 1<sup>st</sup> and 2<sup>nd</sup> respondents pending the outcome of this application.
  - (d) The applicant shall not be allowed to bury the body of the late SEKHOTHALI RALEBITSO at the time and place of his own choice.
3. That prayers 1 and 2 (a) and (c) operate with immediate effect as interim court order.”

Return date was the 18<sup>th</sup> July 2001.

Thus when the matter was ultimately argued before me the respondents had filed their answering papers in opposition. In his founding affidavit, the applicant states that he is a male mosotho adult of Ha Ramosoeu, Ha Shoepane in the district of Maseru.

In brief he claims that the deceased Sekhothali is his daughter-in-law in that she was the lawful wife of Gerard Ralebitso, the son of late Tsebo Augustinus Ralebitso and Clementina Tankiso Ralebitso. He alleges that Augustinus and Clementina married civilly on the 18<sup>th</sup> July 1956, and that Gerard Ralebitso was born in 1961 from this marriage; he goes on to allege that Clementina then deserted the matrimonial home to cohabit with one Thabo Ntanyelo taking the young Gerard along with her. From

then onwards Gerard was raised by the Ntanyelo family. It is common cause that on the 15<sup>th</sup> August, 1984 when Clementina and Thabo Ntanyelo married, Gerard must have been a mature man because the receipt “bewys” for Gerard’s bohali to Sekhothali (deceased) is dated 1982.

This court has not been shown that prior to their marriage there had been any bohali paid for Clementina. Thabo and Clementina merely cohabited. It is quite clear therefore that when Clementina and Thabo got married in 1984, Gerard was already an adult. The question is whose child was he?

The court ordered that **viva voce** be led on this specific issue in terms of Rule 8 (14). It was the contention of the respondents that Gerald was born and raised in the Ntanyelo family and that his bohali cattle were even paid for by the Ntanyelo in 1982. It could not be established with certainty as to when Augustinus passed away. The evidence of the applicant is to the effect that after Augustinus Ralebitso and Clementina (born Seleke) wedded in 1956, two children were born but they unfortunately passed away. Gerard was then born in 1961 at Ha Kori. Clementina then disappeared with Gerard. He says Augustinus was still alive. As it came out from Moanakuena Kori, Clementina is reported to have said “*ke ilo bereka banna ba tsoheloang*” (I am going to look for men who can have a penile erection.) When she came back she was cohabiting with one Thabo Ntanyelo of Ha Metsing.

He says that Gerard who was then working in Gauteng once came to him asking him to welcome him back into the Ralebitso family and that a feast was later made and a

cow slaughtered to welcome Gerard and his wife Sekhothali back into Ralebitso family. He told the court that Gerard died some time in 1994/95 and was buried by the Ralebitso family at Lithabaneng where he had built his homestead.

Under cross examination he maintained that when welcomed back into the Ralebitso family, Gerard was already married to Sekhothali, though he did not know when - He says that he never knew that Sekhothali had once had a child who passed away at Morija Hospital. Sekhothali, he says, died on 26<sup>th</sup> June 1998 without child.

He told the court that the 2<sup>nd</sup> respondent is the father of Sekhothali; and that when she was very ill, her father agreed to nurse her and did so until she passed away in June 2001.

He admitted that after Sekhothali's death, the 2<sup>nd</sup> respondent refused to release her body and clothing, and that he forcibly took away her clothing after finding that her body already been conveyed to Motsekuoa Mortuary.

Reverend Setente Letsatsi, the Roman Catholic priest at St Rodrique was called to give evidence and later made to produce a Baptismal Register from which he wrote out a hand-written certificate to confirm that Gerard Tefelo Ralebitso was born on 27/3/67 and baptised on 15<sup>th</sup> May 1962 by Father Alexander La Fois in the presence of Clementina Ralebitso and one Ignatius as parents and Raphael Setipe as sponsor.

The Reverend admitted that he mistakenly wrote down the name “Augustinus” when in fact “Ignatius” was written in the Baptismal Register. [It was agreed that the Church Baptismal Register is not a public document and cannot be handed in to prove the date of birth of Gerard. - See **Hoffman** - Law of Evidence 4<sup>th</sup> Ed. page 151]. While it cannot prove the date of birth, the evidential worth of this register is to show that Clementina Ralebitso presented Gerard for baptismal on 15<sup>th</sup> May 1962.

Next called was chieftainess Mashoepane Shoaepane who told the court that she remembered the marriage ceremony between Augustinus and Clementina in 1956 and that Gerard was born to their marriage in 1961 (same year as her own daughter Mamello). She says that Gerard was born long before Clementina deserted and came back with another man Lefa Mpalipali and that she later cohabited with Thabo Ntanyelo. All these were, in my opinion, illicit affairs.

She says that Gerard then already a mature man once came to her informing her that he wished to go back to the Ralebitso family. She says a welcoming ceremony was held by the Ralebitso family and a cow slaughtered at the feast at which Gerard made a speech saying “I am now old - Khomo boela haeno,” and everyone clapped hands welcoming Gerard and his wife into the Ralebitso family. The Ntanyelos were absent.

She says that on the occasion when Clementina returned from her desertion Augustinus took her to task, but Clementina said “*U itse ke ilo sebetsa, ... ke tlile ke berekile monna!*” Augustinus said “*No, you said I am too old!*” Clemetina disappeared again and came back with Thabo Ntanyelo.

She insisted that Gerard was born before Clementina deserted and when she cohabited Thabo Ntanyelo, Augustinus Ralebitso was still alive and they only wedded in 1984 after Augustinus had died.

Moana-kuena Kori, the chief of Ha Kori gave evidence stating that he knew Augustinus and Clementina who got married in 1956. He says the couple had three children two of whom passed away. He says that Gerard was born and survived.

He told the court that Clementina then left Augustinus claiming that Augustinus “...*is too old and can no longer have an erection - it just brushes! ..*” “*It was better to go and hunt for a man with a firm penis (molamu)*”. He says he never met Thabo Ntanyelo.

He told the court that he knew when Gerard made a ceremony where the Ralebitso family had been called to welcome him into their family. Gerald was already a married man. He categorically denied that Gerard was not born when Clementina deserted from her matrimonial home.

For the respondents Tlebere Batere gave evidence. He told the court that Sekhothali was his daughter and that she had married Gerald Ntanyelo in 1982 customarily, and indeed what purported to be a bewys for bohali cattle was shown to the court. In it Gerard was marrying as a son of Thabo Ntanyelo and was marrying Sekhothali Batere. He further went to say that in all seven head of cattle were paid by the Ntanyelo family towards the **chobeliso** and **bohali**. He says Gerard was buried by the

Ntanyelos at Lithabaneng Ha Shoaepane and that he was even asked to speak as a “*mokhotsi*”. He goes further to say that when Gerard died the Ntanyelos poured soil as the family of the deceased. The Ralebitso family were not there.

She says when Sekhothali was ill she informed the Ntanyelo family as his in-laws; he never informed Ralebitso’s about her death.

In this case, the *onus* is upon the applicant to show on a balance of probabilities that Gerard was born before his mother Clementina deserted Augustinus. Most of the witnesses in this case were illiterate or semi-literate and could not recall important dates; for example, when did Augustinus die? When did Clementina desert? We have mutually destructive stories on the important issue of Gerard’s paternity. One has therefore to look at the facts objectively in this inquiry. For example, when Clementina and Thabo Ntanyelo married in 1984, where was Gerard? How old was he? The answer is clear and simple: Gerard was already a nature man whose bohali had been paid for in 1982! When was he born? There is no clear proof because Clementina has since died, and the baptismal register is not helpful in this regard; but I am of the view that even though not a public document, and not admissible as evidence as to prove the date of birth of Gerard, this register shows that in 15<sup>th</sup> May 1962 a child Gerard Ralebitso was baptised by Father La Fois OMI and Clementina was present using a Ralebitso surname. I have no reason to doubt the authenticity or genuineness of the priest’s entries. Even if Gerard was born during the time when his mother illicitly cohabited Thabo Ntanyelo, he could not be a Ntanyelo because Clementina and Thabo then were not yet married. I could safely assume that Clementina’s marriage to Augustinus subsisted still even when Clementina deserted

Augustinus who was still alive but probably “impotent”. The fact that Sekhothali used the Ntanyelo surname is neither here or there because it is common cause that Gerard was raised in the Ntanyelo’s family after his man - hunting mother deserted along with him. A passport - like a baptismal certificate - cannot establish the parentage issue.

In the circumstances of this case, I come to the conclusion that Gerard was born in 1961 to Clementina when she was still living and married to Tsebo Augustinus Ralebitso; and that Gerard’s mother deserted the matrimonial home and that Gerard lived and was raised by the Ntanyelo family. Even if born after desertion took place, Gerard was Augustinus’ son under the maxim “*pater est quem nuptiae demonstrant*”<sup>1</sup>(a child born during the existence of a valid married is legitimate). A valid civil marriage subsists until (a) it is set aside by order of a competent court, (b) death of one of the spouses. It was for the respondents to allege and show that when Thabo Ntanyelo married Clementina in 1984, Augustinus Ralebitso had since died.

Coming to the issue of Gerard’s birth, I am of the opinion that the “**ancient document rule**” applies.

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<sup>1</sup>Wille’s Principles of South African Law (1991) p.210-211 where it is noted that only the mother of the child and her husband are allowed to rebut the presumption and that the presumption cannot be challenged by a third party.



In the case of **Nolan vs Povall & Others** - 1953 (2) SA 202, the “**ancient document rule**” was discussed as an exception to the hearsay rule quoting **Scobble** - Law of Evidence p.36-

*“Documents thirty years old and produced from proper custody, and otherwise free from suspicion, prove themselves, that is to say there is a presumption in favour of their validity and no evidence of their execution need be given although the attesting witness is alive and in court.”*

The Baptismal register proves, not the date of birth of Gerard, but that Gerard Ralebitso was amongst the children who were baptised by Father La Fois at St. Rodrique on the 5.5.1962. As usual, the priest was not interested in the accuracy of the dates of birth but in the baptismal of the child presented at the altar. I do not imagine that Clementina Ralebitso would fabricate the name of a child Gerard!

I hold therefore the Baptismal register produced before this court, is an “**ancient document**”, as it over thirty years old and admissible to prove the fact of Gerard’s baptismal in May 1962 - and not his birth and that Clementina still used the Ralebitso surname.

What has presented greatest difficulty is the legal status of Gerard’s marriage to Sekhothali in 1982. If, as I have held, Gerard belonged to the Ralebitso family, could the Ntanyelos validly negotiate bohali as “Gerard’s parents?” Section 34 (1) of the Laws of Leretholi reads:-

“A marriage by Basuto custom in Basutoland shall be deemed to be 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 and as to the amount of bohali,
- (c) there is payment of part or all of the bohali.”

**Poulter** in his book **Family Law and Litigation in the Basotho Society** (1976) pages 83 and 142-4 discusses the problem. In my view, the Ntanyelos could not stand “*in loco parentis*” to the Ralebitso from whom Clementina had unceremoniously deserted. I therefore hold that the Ntanyelos were not competent to negotiate the bohali and marriage between Gerard and Sekhothali. This brings me to the inevitable conclusion that no valid customary existed between Gerard Ralebitso and Sekhothali.

It is therefore ordered that the body of Sekhothali be buried in accordance with the wishes of the First Respondent only. This means that the Second Respondent has no right whatsoever in the whole matter.

**Rule Nisi** under prayer 2 (a) is consequently partly discharged and partly confirmed. Prayed (b) is discharged. The third respondent is ordered to release the body of Sekhothali to the first respondent and Prayer (d) is discharged.



S.N. PEETE

JUDGE

For Applicant : Mr Fosa

For Respondents : Legal Aid