

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

'MATHOKOA KHOLOANYANE  
'MAKHAREBE KHOLOANYANE

1<sup>st</sup> Plaintiff  
2<sup>nd</sup> Plaintiff

and

JOEL HAE RAHAE  
LETEBELE MATLOTLO  
NAKO NYELIMANE  
MASELELA MATLOTLO  
MOAHLOLI RAHAE  
LEBOTH MATLOTLO  
LITŠESE LIMO  
MOETI LIMO  
CHABELI MATLOTLO  
TEKENYANA MATLOTLO  
HARETEKE

1<sup>st</sup> Respondent  
2<sup>nd</sup> Respondent  
3<sup>rd</sup> Respondent  
4<sup>th</sup> Respondent  
5<sup>th</sup> Respondent  
6<sup>th</sup> Respondent  
7<sup>th</sup> Respondent  
8<sup>th</sup> Respondent  
9<sup>th</sup> Respondent  
10<sup>th</sup> Respondent  
11<sup>th</sup> Respondent

**For Plaintiffs : Mr. T. Fosa**

**For Defendants : Mr. T. Mpopo**

**Reasons in Application for Absolution From The Instance**

**Delivered by the Honourable Mr. Justice T. Monpathi**  
**on the 22<sup>nd</sup> day of August 2001**

I have already made my extempore judgment in this matter on the 10<sup>th</sup>

August 2001

This matter is about an application for absolution from the instance after the close of the Plaintiff's case. This Defendants would want this case to be discharged at this stage after hearing six witnesses for the Plaintiffs in this longish case which included the evidence of PW 6 Dr Hoadofia.

In this case the claims arise out of the alleged unlawful killing of the Deceased by these Defendants. These claims include one for loss of maintenance and funeral expenses amongst others.

There are various grounds upon which the Defendants would want to be absolved at this stage. One of them being that the Second Plaintiff who is the second polygamous lawful wife of the Deceased has not herself testified in her own behalf. The others is that some special damages could not at this stage have been proved. Even if it were to be so I could not decide these issues piecemeal. This would be conducive to great inconvenience confusion and unwise use of discretion. One of the last few contentions was that the doctor's medical evidence did not prove directly or otherwise that the alleged assaults (with whips and sjamboks) were the cause of the Deceased's death. This was so contended inasmuch as the doctor had said a great force could have been brought to bear on the heart area whose membrane (the heart) ruptured.

Perhaps at the end of the whole case all or most claims could or could not have not been successfully or sufficiently proved. I have said perhaps that will be the situation. I however found it difficult to want to accept that these matters should be debated at this stage with a view to reaching finality concerning things that had to do with credibility of witnesses. Most significantly that was the main pursuit (to attack credibility) of the Defendants challenge in their quest for absolution. I found it difficult to accept a debate primarily geared towards the issues of findings on credibility. Because mostly these debates were undoubtedly about credibility. The Courts have frequently emphasized that absolution should not be granted at the end of the Plaintiff's evidence except in very clear cases, that questions of credibility should not normally be investigated "until the Court has heard all the evidence which both sides have to offer." Defendants' arguments main ---- was definitely not about whether there was a *prima facie* case against the Defendants.

There are instances where in instances like this the Courts would be forced to enter absolution on the basis of credibility of witnesses. Examples or comparisons such as those that one finds in criminal cases application for discharge of Accused at the end of the Crown case are very helpful. There one of the test for a valid application for discharging the witness or witnesses' testimony must have been palpably false beyond a reasonable doubt or that testimony of any witness must

have been utterly destroyed, to use the words commonly used. See **S v Phetha and Others 1983(4) SA 262 at 265 D-F** I did not find that there was any reason for me to get into issues of credibility. Because I found that there was none of any witnesses of the kind that I have just described.

When you consider the evidence of PW 2 and PW 3 you find that there was corroboration of a simple situation. It was where this Deceased having been lured from a project where he was working, he was put into the hands of the Defendants if not most of them. He was heard screaming and was seen being beaten up by a group of men. And around those circumstances he ended up a dead man. His death had occurred far removed in terms of time from where his assailants, had him in unlawful control.

When evidence is heard about the evidence of the doctor it might even end up being that those beatings were not the cause of the death of the Deceased. But this stage of the trial is not one for that argument or inquiry according to our procedural laws. In the interest of justice the Court must hear the explanation of the Defendants. Here are a people who have been seen in control or possession of someone who was being beaten about, who was screaming and who ended up being an injured man. And then he died in or around those circumstances. Surely there must be some explanation.

I have in my probing of Counsel made an extreme example of someone who was attended at a charged office. He hears screams of someone who sounds like being beaten up or molested. The police are later charged with the assault of this person who was heard screaming in the police cell. This person who heard the screams and neither recognized the person ostensibly being assaulted nor seen who the assailant was. Following on the above set of circumstances the police are charged with assault in a civil court. The man may never have actually seen who his assailant was because it was dark in the cells. Now it is being said by the victim that the police assaulted him.

I cannot see the police at the close of the Plaintiff's case, allegedly saying that there is no *prima facie* case. This would be so even if the defence could be (which they could even prove on probabilities) that it was fellow cell mate who assaulted the victim who later died. The Court would in my view in the interest of justice call upon the police to explain away the allegation against them. The police may end up being exculpated despite that the killing took place in the premises controlled by them. Because evidence would have proved that the man ended up being killed by a cell-mate. But the point being made is that the police had to explain.

I find that this is the kind of explanation where these Defendant must explain because there is a case to answer. I have significantly spoken about the evidence of

PW 2 and PW 3. And in my judgment I refer to those heads of arguments from both Counsel most especially the very thorough treatment of the principles by Mr. Fosa, Plaintiff's Attorney about absolution. I found that Counsel spoke about the case of **Casgoynne v Paul and Hunter 1917 TPD 170** (which has been followed repeatedly). It is a case that properly enunciates the principle involved. In addition Counsel referred to **The Civil Practice of the Superior Court in South Africa** 4<sup>th</sup> edition at page 681. What I found most enlightening was this quotation found at that page that is:

“The question there is: Is there evidence upon which the Court ought to give judgment in favour of the plaintiff? It is quite possible, therefore, for a Court that has refused an application by a defendant for absolution at the conclusion of the plaintiff's application to give a judgment of absolution after the defendant has closed his case even though no evidence has been tendered by the defendant.”

This to me sums up an angle which is an important pillar of the approach.

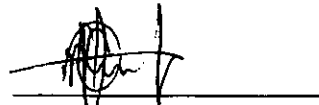
I would repeat that the principles are almost similar to an application for a discharge after close of prosecution's case in criminal proceedings. So that we have a situation where this Defendants must explain. The situation is that at the end of

the whole case I might even find that some or most of Mr. Mpopo's argument are valid. I say for example that argument about the doctor's medical report. I am not saying that I will accept it but I am merely saying that it is strongly arguable. But it will come at its time. And there are other issues including this distinction about special and general damage. And whether some of this special damages could have been fully proved as matter stand. But this is not the moment because arguments such as those belonging to a situation where the Court has heard the whole case that is after the case for the Plaintiffs and the case for Defendants in the event that the latter puts in some evidence..

I would have to say something about costs concerning this application. This is an application whose arguments were strained. I hesitated to say far-fetched. Defendants' Counsel did not have it easy to support some of his arguments. One would have event thought that, on reflection, he would have been advised not to have gone on with this application.

The principle is normally that costs on an application for absolution can be awarded separately from the main case. In my discretion however I order that there will be costs in the cause. I am reluctant that the Defendants be mulcted in costs for this application. But I have to give a warning that these applications should not be made as a matter of course. They must always be well considered.

And this is one of those which were not well considered.



T. Monapathi  
Judge

22<sup>nd</sup> August, 2001-