

**IN THE HIGH COURT OF LESOTHO**

**In the matter between:**

**'Mamorahanye Mphutlane**

**Applicant**

**and**

**Tšepanang Burial Society**

**Respondent**

**Judgment**

**Delivered on 14<sup>th</sup> day of February, 2002 by the Honourable  
Mrs Acting Justice A. M. Hlajoane**

**The appeal was noted against the judgment of the Magistrate in the Court *a quo* which judgment had directed the Appellant to pay back the money which had been given to her by the Respondent as compensation for the alleged death of her relative.**

Briefly the facts of this case are that; the Appellant is a member of the Respondent 's burial society. That on the 19<sup>th</sup> July, 1991 the Appellant made a report to the society claiming that she had lost a relative by the name of 'Matloheli Mphutlane, thereby claiming financial and material assistance from the society. The Respondent acting on the information supplied to it by the Appellant paid out to the Appellant the sum of money and also supplied her with the required goods.

After the compensation had been paid out, the Respondent carried out private investigations which revealed that in fact Appellant's dependant was not dead as she had claimed. When confronted by other members of the society, the Appellant undertook to repay the money equivalent to the value of the compensation and other assistance given to her by the Respondent. This undertaking was made before the chief and was made in writing.

On approaching the Court *a quo* for relief, the Appellant's story could not be believed moreso because even her witness D.W. 2 did not bail her out by supporting her story. Appellant was trying to change stories on who 'Matloheli as her dependant alleged dead was. Appellant

also claimed that she had signed the undertaking to repay the money under *duress* in the form of a hymn.

The issues for determination by this Court are:

- (i) Whether a case has been made out for this Court to interfere with the trial Court's findings.
- (ii) Also whether the undertaking to pay may properly be said to have been made under *duress*.

It is a well established principle of our Law that a Court on Appeal will not lightly interfere with the findings of a trial Court which had the opportunity of seeing and observing the demeanour of the witnesses. It will thus be very reluctant to upset the findings of the trial Court.

*Rex vs Dhlumayo and another 1948 (2) S.A. 677*

The Appellant submits that she undertook to pay the money under *duress*. As yet another principle of our law, is that, in order that a threat could be considered as capable of vitiating an agreement it must not just be an empty threat but must be '*contra bonos mores*'. The basic elements

of this defence of *duress* are dealt with in *Broodryk vs Smuts No 1942 TPD 47*, as the following:

1. Actual violence or reasonable fear
2. The fear must be caused by the threat of some considerable evil to the party or his family
3. It must be a threat of an imminent or inevitable evil
4. The threat or intimidation must be '*contra bonos mores*'
5. And the moral pressure used must have caused damage.

In *Emil Nofal vs Wijma 1970 (4) S.A. 31* the case involving provisional sentence in which the claims were founded on an acknowledgement of debt. According to the defendant, Wijma, the signature of the relevant document had been obtained by threats, i.e threats of Criminal Prosecution, arrest and imprisonment, if defendant had not, by signing the document, acknowledged that he had misappropriated the amounts concerned. The Court held that the alleged threats had not been proved to have been made, also that the alleged

could not be regarded as *contra bonos mores*, the indication therefore being that he had misappropriated the funds.

The trial Court was not convinced that the Appellant acted under *duress* as there was no convincing evidence on that point. This Court also as properly advised and guided by decided cases as shown above, find no just cause to depart from the trial Court's decision. As submitted by the Respondent, the Appellant made an undertaking which is enforceable at law quite independently of the truth or otherwise of her claim that in fact 'Matloheli Mphutlane as her dependent is indeed dead. See the case of *Boloko vs Lehlaka 1974-75 LLR 268 E*.

I have come to the conclusion that this appeal lacks merit and ought to be dismissed, the appeal is therefore dismissed with costs.

This appeal has been dragging since April 1997 when it was first noted. The reason for this was explained as the difficulty in securing the typed record from the Magistrate's Court Maseru. It was on the 2<sup>nd</sup> August 2001 when the Court ordered that a photocopied record be furnished within two weeks from that date. Fortunately it was legible.

But on the date of hearing, the Court was given a notice of withdrawal as attorney of record by Appellant's counsel. The name of the Appellant was thus called three times outside Court and also by the loud speaker but she showed no appearance. The Court therefore proceeded in her absence, considering the length of time it has taken to dispose of this appeal. The Appellant showed no interest in the matter after noting the appeal. The notice of set down for this appeal has been filed by the Respondent.

  
A.M. HLAJOANE  
ACTING JUDGE

For Appellant: Mrs Kotelo

For Respondent: Mr Mohau