

CIV/APN/538/01  
IN THE HIGH COURT OF LESOTHO

In the matter between:

MOHALE CAMILIUS RATŠOANE	Applicant
and	
SEABATA MACHACHAMISE	1st Respondent
MANTHOTO SEKOLI (duly assisted)	2nd Respondent
MALEBOTA KHUELE	3rd Respondent
MKM MORTUARY	4th Respondent

For the Applicant : Mr. D. Metlae

For the Respondents : Mr. M. Nthloki

EX TEMPORE RULING

Delivered by the Honourable Mr. Justice T. Monapathi on the 2nd day of January 2002

The various attempts to make the parties to settle the dispute over the burial of the late Makhutsang (Mathabo) Ratšoane have failed. The deceased during her lifetime was married to the Applicant of family of Ratšoane. It is undisputed fact

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that her maiden relatives are those of Machachamise including the first three Respondents who were her siblings.

As I have said before argument on Friday it was during recess and this Court would not have had enough time to make a fully reasoned judgment. I would not give my reasons for judgment but I would just make a ruling because the reasons would come later if necessary. I had even been given the file just that morning of Friday. Meaning that I had to depend on what I heard when Counsel were arguing having not previously read the file.

I am sure that not many facts are in dispute in this case. These Counsel were almost the common cause on almost 75% of the facts including that the marriage between the deceased and this Applicant had subsisted until the death of the deceased. And that before her death the deceased had filed a certain trial before this Court (CIV/T/122/2000) and this claim that had to do with seeking a decree of divorce on the grounds of the Defendant's adultery. An alternative prayer included that of decree of divorce on the grounds of defendant's malicious desertion.

It appeared and it was common cause that the Deceased and this Applicant had separated for close to seventeen years. There was virtually no connection between the Deceased and the Applicant during this period of time. Hence her claim in the High Court for divorce which I have spoken about. I might as well indicate that this was a claim that went undefended although this Applicant speaks of his intention to uplift the bar. The bar means that procedural barrier which stipulates that the defendant will no longer be allowed to defend. If I understood well such an attempt had not yet been made although argument would have been

that if such an application was done it was a matter of discretion by the judge who would hear argument over that application to uplift the bar.

My understanding therefore about the law is that a right of burial is a right that is separate from other rights of heirship and indeed Counsel have convinced me that there could be rivals as to who has the right to bury. Meaning that there could be someone who has a prior right and one who has a lesser right. As Mr. Ntlholki has quoted from *Lebohang Sello v Mamotlatsi Semanama and 2 Ors CIV/APN/319/96* per Ramodibedi J 30th September 1996 the right is not exclusive. There are circumstances where one who has a right can be said to have abdicated such a right because one had not exercised it properly.

I also noted and agreed with the last mentioned judgment that the Court should be guided by a sense of what is right and this being what should not appear to be immoral or unconscionable. It cannot of course then be off the mark to say that it should not be against public policy. About remarks on sense of right and public policy see *Tšeola and Another v Maqutu and Another 1976(2) SA 418 (T.H.C.) At 624(H)*. Public policy has said to be an unruly horse but it is not difficult to understand that which is against public policy or the circumstances will dictate what is good in terms of public policy and what is not. I also noted and agreed that each case will always depend on its own merits.

The law as to the rights of burial has developed. Speaking for myself I noted a case that I spoke about that I referred to as *Malerato Kane v Motsemoholo Kane CIV/APN/193/84* per Cotran CJ August 1984. In this case the deceased's eldest son through a previous marriage contested against the deceased's widow the right of the widow to bury her dead husband. The Chief

Justice decided that it was fair, equitable and it made good sense that the deceased be buried by someone who was closest to him his recent wife the applicant with whom he was living at time of his death. As I said the law has developed to such an extent that the present position is that the right to bury is no longer exclusive.

The person who has a right even has to consult. That right of consultation meaning more in sense certain circumstances and meaning less in certain circumstances. I would endorse that in this case there seems to have been such an attempt to consult which has failed. I repeat that there is not much disagreement between the parties over the facts involved except the issue of there allegedly having been that directive or instruction by the deceased as to her burial as contended for by the Respondents.

To begin with I may indicate that I remained unconvinced that the alleged wish of the deceased was something that could have gone though satisfactory proof. The likelihood could have been that the deceased indeed had a wish but the circumstances that the Respondents speak are very unspecific and unreliable. Although this aspect of the bare assertion that it could have been "around October 2000" was not well on nor was there any taxing of the Respondents' said statement over that aspect (except a mere denial by the Applicant) it remained not worthy of credence to me.

The Court noted Mr. Ntlhoki's submission in relation to the so called deceased's directive that one would have to take the version of the Respondents as against the bare and unsubstantiated denial of the Applicant in this respect. See Supreme Furnishers v Molapo 1995-1996 LLR-LB 377. I however had my

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reservation over the criticism to the Applicant's response. The response made sense. In particular he was not present when the directive was made nor was it written down. A further reservation being that the circumstances of the Applicant were such that he could rightly merely contend that he could not have been expected to say more than that he did not know and that he would not deny. I became apprehensive that if this kind of proof would be allowed then there would be a flood of people who would come to Court and say that they heard deceased make certain statements, more especially when there was nothing written, nor anything witnessed except that as in the instant the Respondents will come to corroborate each other without stating satisfactorily the circumstances in which the statement was made. I said it would be unsafe to accept the statement. I should now go over other aspects of this case.

As a fact the deceased and the Applicant has separated over an unduly long time. During this period I am convinced that there was no relationship nor connection between these parties. I believed this was so except that the interest of this Applicant seems to have come out just after a lot had been done to keep the deceased's body safely in the mortuary and to do other things to enable that preparations for a burial could be finalised. I do not even want to consider nor associate myself with any of insinuations such as that the Applicant is after certain financial benefits. But as a fact what has happened was that a long period of separation between the parties had ensued. This leads me to the conclusion that there is that likelihood that the deceased may not have wished to be buried by the Applicant.

Now what is it that is a sense of right. Is it that understanding that merely because this Applicant is the husband, he has the right to bury? Shouldn't there

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have been more to it than that? Without believing the claims contained in the Court action that I have spoken about, that is the High Court summons is it not apparent or likely that the intention of the deceased had been to have a permanent separation with the Applicant? Then where is the sense of right if merely because the Applicant was the husband that he may bury this deceased? The suggestion is clear that this Applicant had abdicated his right over the deceased.

These things about rituals and customary ceremonies that the Applicant speaks as a reason for wanting to bury the deceased (his wife) make sense but they must go with that sense of right. The Court will not do something that is unconscionable. I have in the meantime looked at the meaning of the "unconscionable" from the Concise Oxford Dictionary. This is the meaning: "having no conscience, contrary to conscience, unreasonably excessive (example an unquestionable length of time) not right or reasonable". My thinking is that it would be unconscionable to direct that the Applicant should bury the deceased. I have mentioned as reasons the question of inordinately long time of separation, and the fact that there had been already an application for a divorce.

I would make my order as much uncomplicated as possible. I would say that the First Respondent shall bury the deceased and he shall as much as possible accommodate the Applicant and the other Respondents. The right to bury the deceased and when and how will be preponderantly with the First Respondent Mr. Seabata Machachamise. The Application therefore fails.

I repeat that the right to bury is not a right like other rights. Other rights still remain with the Applicant as deceased's husband and I suppose the First Respondent will accommodate this Applicant as much as possible as regards the

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burial. It has to be impressed that the right to bury is not an exclusive right more especially when someone has died and she or he has to be buried with dignity and speed like in other cultures and nothing more.

I am convinced that I have done as much as possible to make this people to settle and they have refused. Paramount is that this deceased person must be buried with dignity and expeditiously so.

This application is dismissed with costs.

T. Monpathi  
Judge