CIV/APN/246/2002

IN THE HIGH COURT OF LESOTHO

In the matter between:

MPUTSOE MAKOETLANE — **Applicant**

and

'MATHABO MVELASE — **First Respondent**
PALELI MVELASE — **Second Respondent**

For the Applicant : **Mr. M. Klaas**

For the Respondent: : **Mr. T. Mpopo**

Judgment

Delivered by the Honourable Mr. Justice T. Monapathi
on the 5th day of August 2002

I needed to give an ex tempore ruling on the 11th June 2002 in this case because there was no need to defer the same. My reasons therefore now follow

This matter is about an application for exhumation (for reburial) of the body of the deceased 'Matholang Makoetlane who died on the 4th April 2002. There was no dispute has been buried by the First and the Second Respondent. The centre of the dispute being that the deceased was legally married to Motlatsi Makoetlane who has since died as well.

It appeared that at the time of her death she was in the death of the deceased she was in the hands of the Respondents. And the Respondents being her maiden relatives. She died at that time when she was in the hands of the First Respondent who is said to be her mother. It being said that the Second Respondent was maternal uncle.

Exhumation of a body is a serious business. It has to be done after serious consideration of relevant issues by the Court and serious proof of the rights of people claiming for exhumation. What has to be proved is their rights and relationship with the person whose body is sought to be exhumed. The principle of public policy being that deceased are to be buried peacefully and be left in peace where they are buried. It is that matter of public policy which will exercise the mind of the Court throughout in proceedings of this nature. In the case of **Chemane Mokoatle v Senatsi Senatsi & Ano.** CIV/APN/163/91 dated 13-14 June 1991 the then Chief Justice Mr. BP Cullinan had the following to say

at p.10-11 of the judgment:

> "I have no doubt however that the national interest must at times ..... in any question of the rights of the family ..... Frankly I consider the application an unhappy one, bordering on the morbid, if not ghoulish in places, and contrary to a custom which is common to all mankind, and which I have no doubt rules the hearts of all Basotho, namely respect for the dead and their mortal remains."

See also **Motlatsi v Lenono** 978 LLR 391 at p.393 and **'Manthabiseng Ntloana and Another v 'Mabatho Rafiri** C of A (CIV) No.42 of 2000, Ramodibedi JA, 12th April, 2001 at p.11.

I repeat that the central issue is about the existing of the marriage of the deceased and her late so called husband. The dispute touches on that at the time of the alleged relationship between the deceased herein and Motlatsi. Motlatsi was already married to someone else by the name of 'Makatiso. This is learned from the response by the Respondents.

Indeed the late Motlatsi may have wanted to take the Deceased as his other wife. It appears that there would be no dispute that at one time for a considerable time the deceased Motlatsi and the deceased herein had lived like

man and wife. What I need to note as far as these proceedings are concerned is that it seems like this Applicant has all along been aware that the marriage between Motlatsi and the deceased was disputed.

The above is borne out by the contents of one paragraph in the opposing affidavit which I am not able to place my eyes immediately. Perhaps that there was this dispute explains why no steps were taken by the Applicant to prevent the burial of the deceased because if they thought the deceased was married to them they should have prevented her being buried by those of the Respondents. They may have had reasons why they did not.

What is important now is that they are asking for an exhumation and re-burial of the deceased. Their rights can only flow from a valid marriage. I have noted that all that the Applicant has done is to say that there has been a customary marriage and he does not tell us of the elements that are necessary to prove a Sesotho customary law marriage.

The two important elements of a Sesotho customary marriage are that there must be agreement between the parents about the amount of bohali. The second important is that there must be proof of that payment of bohali or part of the bohali. None of these has been pleaded in the papers. See **'Maneo 'Metso**

v Motšelisi Lekhema & Ano. CIV/APN/6/00, per Guni J dated 17/03/00 unreported, at p.3-4. See also **Laws of Lerotholi Part I** s.34(4)

The Applicant is of the impression that since there were no documentary records of the marriage then a marriage cannot be proved. That is not correct. I agreed with Mr. Mpopo that these elements, these factors must be canvassed on the papers because in the same way with documentary evidence this affidavits constitutes evidence. That is why when an application was made by Mr. Klaas for the leading of *viva voce* evidence the question was : How have you pleaded these thing that you now want to prove by oral evidence? Because if there was any dispute of fact then there should have been a basic allegation that the requirements of the Sesotho customary marriage were complied with but it was a fundamental problem namely that these were not canvassed on the papers. See **Bayer & Ors v Hansa and Ano.** 1955 (3) SA 547 where it was held at p. 553 by Caney CJ that,

> "An applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits file with the notice of motion ..... and is not permitted tu supplement it in replying affidavits."

See also, **Ramakhooana Ntsoana v Monyatsi Lebina** 1991-96 LLR 845.

All that the Applicant attempted to do was to show some documents in his reply about that the marriage was recognized. Things indicating that the marriage was recognized which was done by two documents called Annexure MM"1" and Annexure MM"2". Inasmuch as the did not go to prove that there was marriage I thought they did not help the Applicant in anyway. Even if they attempted to prove that there was marriage I would have quarrelled with the fact that they come on reply not in the founding statement because it would mean that at the stage of the founding statement there was no attempt to prove the marriage. One has to stand or fall by his founding affidavit. See **Ramakhooana Ntsoana v Monyatsi Lebina** (supra); Bayata & Ors v Hansa & One (supra).

I agreed that there was no support for the urgency that was proposed by the Applicant. They were saying the matter was urgent, I disagreed that they treated it as an urgent matter. Firstly, the circumstances themselves do not show it to be as such and secondly there was no statement in the papers indicating how the matter was urgent.

This was an unfortunate matter that seems to have had many weaknesses throughout. It could perhaps even be that the truth is to be found in what the Applicant is saying. For example when it is to be considered that there was an

abduction. But abduction is not proof of a marriage. The deceased and 'Matholang lived together for a considerable time as man and wife. That itself would indicate a marriage only when and if the other elements of the Sesotho marriage had been proved. Because according to our law a Sesotho marriage cannot be presumed. See, **'Maneo Metso v Motšilisi Lekhema & Ano.** (Supra).

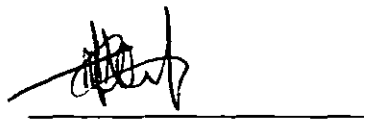
One cannot presume that because people are living as man and wife they are in fact married. That is why it was important in the founding statement this Court should have been shown clear indication that there had been a Sesotho customary marriage.

I was satisfied that the Applicant was aware that this was going to be the attitude of the Respondents was that there was no valid marriage. Hence why there should have been proof of those necessary elements in a Sesotho customary marriage.

Accordingly I refused to say that the Applicant has a right to exhume this body and to re-bury it. That is according to the evidence that is before me. If there is other evidence somewhere it may be proved otherwise than presently.

Just now this application is dismissed because I am not able to establish

that there was a marriage and I dismiss it with costs to the Respondents. Costs are awarded to the Respondents on the ordinary scale. Much care should have ben exercised in bringing about this litigation in the light of a legion of cases before this Court and the Court of Appeal advising against a loose attitude in application for rights of burial and exhumation of dead bodies. This case is an example of such a case. That is my order.



T. Monapathi
Judge

5th August 2002