CIV/APN/196/2001

IN THE HIGH COURT OF LESOTHO

In the matter between:

NTSIOANA TSATSI	Applicant
and	
MOHAU BOY TSATSI	First Respondent
METROPOLITAN LIFE	Second Respondent
COMMANDER MAKOANYANE BARRACKS	Third Respondent
THE ATTORNEY GENERAL	4th Respondent

For the Applicant : **Mr. Mofoka**

For the Respondent : **Mr. Mosae**

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 10th day of June 2002

This was an application in which Applicant prayed for an order declaring her as a beneficiary on the death of alleged husband, the late Rafutho P Tsatsi, under a policy held by the Second Respondent.

This urgent application was lodged at the time when preparations were already being made by the Second Respondent to issue First Respondent, the deceased's father with a cheque. The First Respondent consequently claim the said benefits as the deceased's father.

Initially the application was not opposed and the rule therein was confirmed in favour of the Applicant. First Respondent applied for rescission of the order which was granted by agreement of the two Counsel. That made for the bulkiness of the papers before Court.

First Respondent opposed the application solely on the ground that Applicant was never married to his late son and hence she could not be beneficiary of benefits resulting to his death. In effect he was disputing that the Applicant was heiress to the estate of the Deceased but that the Respondent was the lawful heir.

The following points of law were raised in-limine on behalf of the First Respondent. Firstly, that the Applicant's founding affidavit did not comply with the requirements of a valid affidavit as it had not been sworn to before a Commissioner of Oath. This point was not persisted in during argument.

Secondly, that the Application did not satisfy the requirements of an on interdict as Applicant has not shown that the award of damages cannot adequately redress her.

And thirdly, that there was a clear and foreseable dispute of fact as to whether Applicant and First Respondent and First Respondent's son were married, hence Applicant ought not to have proceeded by way of an application. This being different from whether the matter can or cannot be decided on affidavit.

The Court thought that Mr Mosae clearly understood the following. That by dispute of fact is already meant; "real dispute of fact." Generally where the facts of a case are in dispute it is undesirable to endeavour to resolve the matter on affidavit. The requirement in every case is that a Court should examine the alleged dispute of fact and see whether there was a real issue of that which cannot be resolved solely on paper without recourse to oral evidence. It necessarily meant that if the Court was able to resolve the matter on the papers there was no need for the referral to *viva voce* evidence.

I had problems with the point made by Mr. Mosae. It was that in order to follow the logic of his argument or points of fact shown in support of the point-

in-limine one would conclude that the Court, on probabilities or relying on the version of the First Respondent, ought to dismiss the application. This meant that even according to Mr. Mosae's argument the Court did not need oral evidence to dispose of the application. I thought in the interest of justice the merits would have to be investigated because there were other factors that went into the nature of the papers filed I dismissed the point-in-limine.

In a similar way to the previous point-in-limine Mr Mosae was not able to argue without asking the Court to conclude that the case would be dismissed on the merits. To start with, where the existence of marriage was alleged by the Applicant such a dispute would be resolved as a matter of evidence even if legal principles would finally decide those issues. The Court would still have to decide whether or not on the papers the matter was such that the Court could decide the dispute of fact on affidavit. This I could only decide after hearing the merits.

Secondly, as a matter of fact, a harm to be apprehended was proved as soon as the Respondent agreed that he had taken steps to seek to uplift the cheque from the Second Respondent. It was Applicant's own contention that First Respondent took such steps.

Thirdly, it was not whether another remedy was available to the Applicant elsewhere. It was whether the remedy claimed herein would, if granted, by more effective more convenient and less costly. In deciding so it has to be taken into account the circumstances of the Respondent. That is, to begin with, whether his rights cannot be instantaneously decided. And in addition whether an alternative remedy would not (to the prejudice of the Respondent) entail re-visiting the facts and the issues which could easily be canvassed in the present application. I thought this point in-limine should also be dismissed.

I then ordered the parties to argue the merits. I understood that the onus was on the Applicants to prove the existence of a Sesotho customary marriage. The following elements should occur in a lawful and valid Sesotho customary law. First, an agreement before the parents as to marriage and as to amount of bohali. Second, agreement between the parties to marry; and lastly payment of bohali or portion thereof (see section 34 of the Laws of Lerotholi). See also **Lepelesana v Lepelesana** 1985-90 LLR 86 as referred to in page 7 ad 18 of **Maqobete Nqosa v Tšiu Nqosa and Another** CIV/APN/155/02 Peete J 27th April 2002. I bore in mind that, about the existence of the alleged Sesotho customary marriage, the Applicant only said the following in paragraph 6 of the founding affidavit:

"In 1996 applicant entered into a Sesotho customary marriage with Rafutho P Tsatsi (deceased) during his lifetime. An affidavit as to marriage is hereto annexed and marked "N1". However applicant's passport and other documents do not reflect the surname "Tsatsi" as applicant has not acquired another passport since marriage. The said marriage subsisted until the demise of the deceased in 2001." (My emphasis)

The Applicant sought to dispel any suspicion or adverse conclusion based on the absence of a different passport. I thought this factor could not be taken in isolation. I noted that in the above paragraph there was no mention of the bride and bridegroom's parents and no mention of agreement for payment of bohali. It ought not to come as a matter for surprise therefore how the First Respondent then responded to the above paragraph 6 (See paragraph 3 of the answering affidavit).

First Respondent denied that there was even a Sesotho customary marriage between the Applicant and Respondent's son. He said if there were such arrangements he could have known. He denied that as parents they were ever involved in making such arrangements. He admitted however that his son and Applicant did cohabit but they remained all along as a boyfriend and

girlfriend. First Respondent was supported by members of his family to say that there was never a marriage between Applicant and the Deceased. See supporting affidavits of Teboho Tsatsi, Matello Tsatsi, Mamotebang Tsatsi, Moeketsi Tsatsi and Makhaile Tsatsi.

First Respondent placed significance on the fact that in 1999 Applicant's father instituted a court action before Majara Local Court where he claimed six head of cattle for abduction (chobeliso) of Applicant by Deceased. Judgment was entered for Plaintiff and First Respondent still remain owing in terms of the judgment for six head of cattle. This action was filed while Applicant had gone away and removed to stay with her father.

The said Annexure M1 entitled "Affidavit as to marriage" "stated that there was a marriage between "Rafutho P Tsatsi" (Deceased) and Ntšioana M Hlalele (Applicant) who were married at Ha Thamae (Upper) Maseru in 1996. Sempe Godwin Hlalele who was the deponent said the means of his knowledge was that the Applicant was his daughter. As I indicated during argument without any other support and more especially because the affidavit was made after Deceased's death its probative value was shaky if not uncertain.

To the said First Respondent's paragraph 31 the Applicant responded as

follows in her replying affidavit, to quote the full paragraph:

> "I reiterate that I was married to the late Rafutho Tsatsi, 1st Respondent's son and Respondent knows this fact as he is the one who asked for my hand in marriage on behalf of his son (deceased). 1st Respondent later agreed with my parents as to how many cattle would be paid as bohali. A copy of the said letter is in 1st Applicant's possession. In 1999 I ngalaed on account of the deceased's adultery and this angered my father who instituted abduction charges against 1st Respondent." (My emphasis)

There is a lot to say about the above statement much as it seeks to fill the gaps in paragraph 6 of Applicant's founding statement. In the first place this was only made on reply stage which is irregular. See **Executive Committee of the National Committee and 10 Others v Paul Motlatsi Morolong** C of A (CIV) No.26/2001, Ramodibedi AJA, 12th April 2002. Mr. Mofoka conceded as much and accepted that this would even make it difficult for Respondent to respond except by way of an additional affidavit at Respondent's own cost and not through his own fault. There were several shortcomings on the evidence of the above Applicant's reply (paragraph 3.1).

Much as Applicant may have been aware that the fact of agreement over bohali and the amount of bohali and when negotiations were made (which was not admitted by Respondent) this was not specified in the statement. That is why it was urged on this Court that, on probabilities, it was irresistible to conclude as First Respondent said in paragraph 3.2 that:

> "..... if the allegation about the existence of the marriage was true it does not make sense at all that Applicant's father could have instituted proceedings for six head of cattle for abduction without also suing for payment of bohali cattle."

It does not mean that there was no reply nor justification sought by Applicant against the above. It was as follows; albeit in the replying stage as said before.

Applicant's father was acting out of anger as a result of Deceased's adultery when he instituted the above action as Applicant said. I read this together with what Applicant's father said in paragraph 12 of supporting affidavit. Applicant's father therein said he had instituted the action because First Respondent and his wife for taking the side of their son "..... when he beat up my daughter .... They failed to reprimand him." While Applicant believed that a claim of abduction did not hinder nor disprove existence of a Sesotho

marriage I found it difficult to reconcile the notion with the alleged agreement by Applicant's father to the effect that the M400.00 paid by First Respondent was taken as part payment of bohali. As Peete J says in **Mapeete Nqosa v Tšiu Nqosa and Another** CIV/APN/155/2002 27th April, 2002, the "evidence as to whether these primary payment for chobeliso or bohali" should not be "equivocal" and inconclusive. See page 14 and 18.

Applicant then pointed out that the First Respondent had been party to marriage negotiation as reflected in the supporting affidavit of Sempe Hlalele (Applicant's father). Significantly this was in the replying affidavit. Much as the Applicant must have had the sense to anticipate she still did not address the question of the number of cattle paid as bohali except to say that

> "..... 1st Respondent has in his possession a letter of agreement as to how many cattle were to be paid as bohali. Such a letter signifies marriage."

The impression is beyond doubt that the Applicant continues to miss the notion that she has the onus to prove as an element of Sesotho customary marriage that bohali or part thereof ought to have been paid. This was further fortified by what Applicant's father says in paragraph 8 of the supporting affidavit that:

> "..... still in September 1996, 1st Respondent duly came to my house and told me that he would only pay part of bohali and that the rest he would pay as time went since a debt does not (subscribe)."

It was not said how may cattle would be paid. The Court was neither told how much was in fact paid as that part of bohali.

The Applicant's father had earlier said he had written a letter to First Respondent in which he wanted 20 head of cattle, ten (10) sheep and a horse as bohali for his daughter. He had not made a copy of the letter. There was no need to emphasize that this still begged the question as to how many head of cattle were paid.

Mr. Mofoka for Applicant agreed the above marriage negotiations, if ever, could best be described as negotiations by correspondence. First Respondent was said to have written to Applicant's father responding to "a request for a reply to a letter in which I had stated how many cattle I wanted as bohali. "The best that the First Respondent did was to prove that he "would inform as to when he would come to conclude the matter."

Later on, and three (3) months later, First Respondent was said to have

apologized (in a letter) for failing to "pay part of bohali as promised." This was said to indicate, together with other circumstances, as the Applicant contended, a marriage between the Deceased and the Applicant having taken place.

Firstly, the abovementioned letter from the First Respondent was said to have referred to a welcome made by the First Respondent of the Applicant in front of his entire family. Furthermore that the Applicant would be sent back (as the letter allegedly said) to the First Respondent for ritual cleansing because she had miscarried.

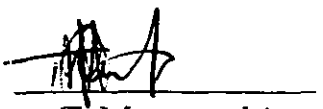
Secondly, a letter of the 1st April 1997 was said to have been written in which First Respondent requested Applicant's father to perform ritual "maseko" ceremony. And furthermore that permission be granted for Applicant and Deceased to "confirm" their marriage-in-church. Applicant's father said he did write a letter granting such permission.

It was submitted by First Respondent that all the above communications between Applicant's father and First Respondent could only demonstrate that there was a longish period of co-habilitation between the Deceased and Applicant. This the First Respondent could have found extremely difficult if not insurmountable to deny. This means that the second element in a Sesotho

marriage would have been or has been easily proved (see page 5 supra).

The crucial issue in this case was whether there was proof that a customary law marriage existed between the Applicant and the Deceased. This is primarily because much as the First Respondent and Applicant's father allegedly negotiated it did not appear that there was ultimately any agreement as to the amount of bohali. If there I was unable to decide on the papers. As the above analysis of the evidence went it may be no such agreement was reached.

Much as one would want to take no account of the Applicant's replying statement, whose pedigree has already been severely criticized, I however thought that, in the interest of justice, it was fair to comment on that evidence. And to decide how I would exercise my discretion in terms of Rule 8(14). Having done so I reached the conclusion that the matter could not be decided on affidavit and it ought to be dismissed with costs to First Respondent.



T. Monapathi
Judge

10th June, 2002