CIV/APN/155/02

IN THE HIGH COURT OF LESOTHO

Held in Maseru

In the matter between:-

MAQOBETE NQOSA APPLICANT

and

TSIU NQOSA 1ST RESPONDENT
OFFICER COMMANDING MASERU POLICE 2ND RESPONDENT

JUDGMENT

Delivered on the Honourable Mr Justice S.N. Peete
on the 27th April, 2002

The applicant herein claims that the 1st respondent should be ordered to bury their deceased daughter Puseletso Nqosa who passed away unmarried on 12th February 2002 aged thirty (30) years old. She applied for and was granted an interim court order on the 28th March 2002 couched as follows:

"**It is ordered that**:

1. *The ordinary Rules of Court pertaining to modes and periods of service are dispensed with.*

2. *Directing respondents to file their opposing affidavits (if any) on or before noon on the 2nd day of April 2002, and the applicant to file her replying papers on or before noon on the 3rd day of April 2002, and the matter be heard on Thursday the 4th day of April 2002 at 9.30 am. Or so soon thereafter as the matter may urgently be heard.*

3. *A Rule Nisi be and it is hereby issued returnable on the 4th day of April 2002 calling upon the respondents to show cause (if any) why:*

   (a) The first respondent shall not be directed to take over the responsibility of burying the late Puseletso Nqosa from House No.186 at Mohalalitoe in Maseru.

   Alternatively:

   (ii) Interdicting 1st respondent from interfering with funeral arrangements and ceremonies in respect of the late Puseletso Nqosa to be held at House No.186, Mohalalitoe Maseru on 6th day of April 2002.

   (b) The second respondent and/or officers subordinate to him shall not be directed to maintain peace at the said funeral on the day of 6th April 2002.

   (c) The respondents shall not be ordered to pay costs hereof in the event of opposition hereto.

4. *Prayers 1 and 2 operate with immediate effect as interim court order."*

In her founding affidavit, the applicant avers that in 1968 the 1st respondent eloped with her. A *chobeliso* had occurred. She states that their parents met later and agreed that twenty head of cattle, a sheep and a horse were to be paid as *bohali* for marriage.

She goes further to allege that "*six cattle were given in marriage. ... I aver that our marriage took place in 1975*" (my underline). This is important because it is not in dispute that the deceased was born in 1972.

She goes on to state that in 1984 there was a court litigation at Ralejoe Local Court wherein Tholae Nteso her father sued Kelebone Nqosa – the senior brother of 1st respondent – for 14 head of cattle being the balance due to complete the twenty bohali "*Sekepele*". She annexes a document "MN2" which is dated

"*4.2.75*
Ha Nqosa, Lipeleng
Lesotho

Re lumellane le Kelebone Nqosa ka likhomo tse tseletseng tsa lenyalo 'me tse 14 ha li e-so tsoe ha sekepele sa lenyalo e le mashome a mabeli a likhomo.

Lipaki tse neng li le teng lehlakoreng la Tholae Nteso
Ke Zakaria Nteso
Le Bosiu Nteso

Lehlakoreng la Kelebone Nqosa ke Lazaro Nqosa.

Mongoli ke Tholae Nteso."

It is clear that this document was written *post facto* in 1975. The persons it mentions were not present and did not sign the document as is the usual practice.

It is clear therefore that in 1968 when the six head of cattle were paid something was written down. The fact of *chobeliso* was still a standing issue and was not forgone. Certain documents seem to have been handed in at Ralejoe. Their importance required that they be retrieved because they would indicate whether the six cattle were being paid for *chobeliso* or for *bohali*. Unfortunately these documents could not be found at Ralejoe. This does not help the applicants an *iota*. Our Basotho courts have held that the mere description given in a *bewys* - "*bohali*" or otherwise – can never be decisive since the *bewys* is commonly obtained by the man's family who unilaterally instruct the *bewys* writer to put the word "*bohali*" hoping that their cattle will be accepted as such – **Limape vs Lebona** – J.C. 95/1966. The Ralejoe Local Court judgment is however not at all definitive on the issue of *bohali* because it dismissed the case upon the reasoning that the first respondent should have been sued and not Kelebone Nqosa. The matter is therefore not *res judicata.*

It is common cause that since 1982 the applicant and 1st respondent have been living apart – a substantial period of about 20 years – and the 1st respondent is now married and living with another woman at Plot No.186 Mohalalitoe below the Lesotho High School.

The applicant avers that when he was informed about the death of Puseletso the 1st respondent shirked the paternal responsibility stating that Puseletso was not his child and that there was not marriage between himself and the applicant.

She states she is now living in a rented flat at Matamane Borokhoroaneng and that the 1st respondent should shoulder as father of the deceased and her husband all the funeral arrangements.

She advises the court that the first respondent is a "*rowdy and belligrent person*" and wants the court to order that the police should be present to maintain peace and security at the funeral.

In his opposing affidavit the first respondent he admits that in 1968 he and applicant eloped but contends stated that the cattle which were paid later were for elopement (*chobeliso*) and not for bohali.

He states that MN2 (supra) is a forged document surreptitiously made by the applicant's father Tholae Nteso who being the chief secretary was able to affix thereto the chief's stamp. He states that the applicant maliciously deserted and left the matrimonial home in 1985 publicly stating that even Puseletso was not his child.

He says he is presently living with his wife whom he married by civil rites on the 23rd March 1988.

He goes on to state that the plot no.186 at Mohalalitoe where he is presently living is his sole matrimonial home with his wife Mamatete Nqosa and that applicant cannot claim that funeral arrangements for Puseletso be made at the house. He concludes that Puseletso belongs to the applicant and Nteso family. The Nqosa family is under not legal obligation to bury her.

It is quite evident that there was a serious dispute as to whether a lawful customary law marriage between applicant and the 1st respondent ever existed. The *onus* naturally is on the applicant to prove this fact on a balance of probabilities. In terms of Rule 8 (14) of the High Court Rules oral evidence was therefore allowed to be led on the issue of marriage.

On behalf of the applicant, Bosiu Nteso was called and he informed the court that the applicant was his younger sister. He confirmed the fact that in 1968 the applicant and first respondent eloped and that later six head of cattle were paid by Nqosa family in 1968 or 69 "they were for *bohali*" and that "*chobeliso*" was forgone. Present then were Zakaria Nteso (late), Kaizer Ratalenyane (late), Moahloli Nqosa, Simon Nqosa. Although something was written down after this cattle payment was made in 1968, the court is however still in the dark as to what was written down and we have the two conflicting versions of the applicant's witnesses that the six cattle were being paid for *bohali* and that of the 1st respondent that it was for *chobeliso* and that *bohali* was never agreed between the parties. It is clear however that the applicant lived in the matrimonial home for about seventeen years. Cohabitation however does not *per se* establish a marriage where none exists. Under the customary law in Lesotho marriage is established only if there exists:

(a) agreement between the parents of the parties as to marriage and as to amount of *bohali*,

(b) agreement between the parties to marry; and

(c) payment of *bohali* or portion thereof. (Section 34 of the Laws of Lerotholi)

While one would assume in applicant's favour that their cohabitation indicated their willingness to live as man and wife, there is no credible evidence – besides the two opposed versions – that (a) and (c) were established on a balance of probabilities by the applicant.

As my Brother **Molai J.** stated in **Lepelesana vs Lepelesana** – 1985-90 LLR 86 at 90-91 where the parties had cohabited for some time, but there was no parental agreement

> *"In my view, for a valid Sesotho customary marriage, all the requirements referred to under the provisions of S. 34 (1) of the Laws of Lerotholi must be satisfied. The second requirement, has on the balance of probabilities not been satisfied. I come to the conclusion therefore that on the evidence no valid Sesotho customary marriage has been proved...."*

In that case the learned judge noted that from their living together, "it seems reasonable therefore to infer from this that the parties had agreed to marry each other."

In this case a lawful marriage would be proved if it is showed that the Nteso's and Nqosa's agreed in 1968 that marriage between applicant and first respondent was to take place and that the six head of cattle paid were being paid for *bohali* and not for *chobeliso*. That the documents handed in at

Ralejoe in 1984 are missing is not a misfortune that should be placed at the door of the first respondent – it is for the applicant to rise or fall by her case.

Sebastian Poulter in his book **Family Law and Litigation in Basotho Society (1976)** p.115 opines that where six or less head of cattle are paid following an elopement (abduction) they will be presumed merely to constitute a compensatory payment for abduction and therefore the *onus* is thrust upon the man's family to prove that they requested the inclusion of these cattle in the *bohali* and that the girl's father acceded to this request. (**Matlere vs Raphoto** – J.C. 74/1966; **Puseletso vs Raphoko** – J.C. 11/1957.

Poulter (supra) goes on to say

> *"The task of proving a valid marriage where less than six cattle have been paid following an elopement will be just as hard, if not harder, for the parties will still usually be at an early stage in the marriage negotiations."* P.115

In conclusion the learned author states:

> *"The broad position is this. For any marriage following an elopment to be regarded as complete it must satisfy the requirements of Section 34 (1) of the Laws of Lerotholi). While it is true that compensatory cattle may be "borrowed" for inclusion within bohali if the girls' father is agreeable, the fact that he has really consented both to this and to the marriage is far more readily established where he has*

accepted a total of more than six cattle. Even here, this fact of accepted is far from conclusive proof of a completed marriage. But where six cattle or less have been paid it is clearly correspondingly harder to prove his agreement to the marriage". P.116-7.

The evidence of Bosiu Nteso is to the effect that one Kelebone Nqosa later brought an emaciated horse pleading that it be taken as two cattle to make eight cattle (this version, as we shall see, is denied by Kelebone Nqosa). Bosiu says the Ntesos refused to accept the horse and Kelebone returned with it and never came back. Until the present no other animals have been paid by the Nqosa family. The number of cattle paid therefore ever since stood at five according to the applicant's version.

Next called by applicant was Moahloli Nqosa who stated that in 1968 he was invited by Tholae Nteso to attend the meeting between the Ntesos and Nqosas at which cattle were being paid as *bohali* for the marriage between applicant and 1st respondent; present also were Zakaria Nteso, Bosiu Nteso, Tholae Nteso, Kelebone Nqosa, Tatolo and Simon Nqosa, most of whom are now late. At this meeting only a horse had been brought by Kelebone Nqosa. At this meeting, the Nteso's refused to accept the horse as a substitute for two cattle. He conceded that he was absent when the payment of other cattle had been made. Nonetheless, something was written down but this court was not shown the relevant document. Under cross-examination, this witness failed to explain why if he was present at the meeting his name was not included by Tholae in the document (unsigned by those present) purportedly made in 1975. I will not go as far as to say that this document is forged – all I can say is that it is not satisfactory and seems to have been made *post facto*

in the absence of the persons alleged to have been present; in all probability Tholae Nteso forgot to mention Moahloli Nqosa when he wrote this document seven years later in 1975.

Matsiu Nqosa was then called on behalf of the applicant. She told the court that in 1968 Tsiu eloped Tseleng Nteso and Qobete was later born only to pass away after two months. Puseletso was then born in 1972 when applicant and first respondent were living together. She went on to say that in 1969 she was present and sitting on "*moiteli*" when six head of cattle were being paid for *bohali*. Later Kelebone Nqosa brought a horse as a substitute for two additional cattle, but that the Nteso refused this offer. She maintained that the applicant and 1st respondent were man and wife – but estranged since 1985.

The applicant then closed her case.

Called on behalf of the first respondent was Kelebone Nqosa who informed the court that he is the elder brother of the first respondent and that their father was the late Tahlo Nqosa. He informed the court that after *chobeliso* had taken place in 1968, he informed Tilane Moshoeshoe – apparently because applicant stayed with him but that her mother wrote a letter objecting to any payment of cattle being made to the Moshoeshoe's.

He continues to state that five cattle were personally driven by him to Tholae Nteso as payment for *chobeliso* in 1968 and these animals were accepted as such; he later sent a horse as a "sixth cow" and was accepted as such. He

denies that the horse he presented was rejected. This is diametrically opposed to the applicant's version.

He says that before the Ralejoe Local Court he handed in two documents and one of them was a *bewys* dated 1968 and another a document evidencing payment of cattle being for *chobeliso;* he contends that the Nqosa's never entered into any negotiations for marriage nor were the cattle being paid for *bohali* because applicant's mother had clearly stated her opposition to her daughter being married to Nqosa family. He states that during the 1970s he again drove a horse which was accepted as a "sixth cow" for the *chobeliso* payment.

He says that in 1982 the applicant and first respondent separated after a bitter accusation by 1st respondent that applicant was committing rampant infidelities, was a drunk and that he had grown tired of assaulting her illicit menfriends. He says the applicant was impenitent and in fact publicly declared her fixed intention of leaving the 1st respondent as in fact no marriage existed between them. In response to this the applicant merely states in her replying affidavit

"10.2 I went to the Nqosa family as clearly appears in "BB" hereunto attached. Otherwise other contents are irrelevant and I do not accept them."

Under cross examination by **Mr Mosito** he denied that the name of Qobete was formally given to the applicant's first child because, as he put it, the's child was born mysteriously "only six months" after the elopement. He says

that the Nqosa family did not even wear a mourning cloth when Qobete died two months after birth. Tholae Nteso had been invited to attend the funeral as a maternal grandfather.

He maintained that in 1968 he personally drove the five cattle to the homestead of Tholae Nteso and that a document evidencing receipt of the cattle was written and that cattle were being received as payment for *chobeliso*. He says he handed in this document of Ralejoe Local Court in 1984. (NB it appears as Ex "B" dated 15.5 1968. He says Rantsala Nqosa had accompanied him on this journey.

He further denied knowing anything about an agreement reached by the Nqosa family that deceased Puseletso be buried at Mohalalitoe. He denied ever having seen the document or letter "BB" dated 26.2.2002 purportedly signed by Rantsala Nqosa and other thirteen members of Nqosa family (including his wife Makhethisa Nqosa). He recognized the signature of Rantsala Nqosa but refuted that purporting to be his wife's.

He denied that he was ganging with the 1st respondent to shirk off responsibility to bury Puseletso. He dissociated himself completely from what was written in the document. "BB"

Next called was Tsiu Nqosa the 1st respondent. He told the court in no uncertain terms that the applicant was not his wife but was "only a girl friend" and that they had eloped in 1968 – at the time she described herself as a daughter of Tilane Moshoeshoe – but later a letter from her actual mother Matiisetso Nteso clarified the position.

He further informed the court that he personally secured the *bewys* for the five cattle from his Chief Seeiso Makotoko Theko and accompanied Kelebone Nqosa halfway when the said cattle were being driven to the house of Tholae Nteso a distance of five kilometers. He says these five cattle were a payment for *chobeliso*, and that a horse was in later years sent as "a sixth cow".

He explained that he has been living at house No.186 Mohalalitoe since 1977 and that because of marital problems, the applicant left the marital home in 1984. He had summoned the holding of a joint Nqosa – Nteso family meeting at which the applicant had declared that she no longer loved him and since there had been no marriage she was taking all the children along.

He informed the court that in 1986 he married his present wife Mamatete Nqosa and that they have two children.

He says he was never informed about or invited to the Nqosa family apparently held on 26.2.2002 at which a decision was made that Puseletso be buried at No.186 Mohalalitoe. He dissociates himself from its decision as taken.

Under cross examination by **Mr Mosito** he admitted that he was not personally present when the five head of cattle were handed over to Tholae Nteso on the 15.5.1968. He says that on that day he noticed that Rantsala Nqosa was also present at Tholae Ntesos.

On being hard pressed by **Mr Mosito** the 1st respondent was led to state publicly that though he might be the biological father of Puseletso, Moetsa and Julia, they are not his children because he was not married to their mother.

The crucial issue in this case is whether customary law marriage existed between applicant and respondent and since Puseletso was born in 1972- about four years after elopement -Puseletso can only be a legitimate offspring of 1st respondent only if – and only if – the cattle paid in 1968 were being paid for *bohali* and not for *chobeliso*. As I have stated, the evidence in this regard is equivocal and inconclusive. If *chobeliso* had not occurred, perhaps things would stand on a different footing. We cannot wish it away either.

It is our law that where an applicant launches an application and foresees a dispute of fact (and in this case such dispute was clearly foreseen because since 1975 or at most 1985 the existence of the marriage was being questioned), the respondent's version will be accepted where there is a conflict. In this case the applicant's case is embattled by the fact most of the people who are alleged to have been present in 1968 meeting have since passed on to the other world; secondly, the important document, are missing from the Ralejoe Local Court file. She must however, as applicant, stand or fall by her papers and the *viva voce* evidence also given. This evidence is equivocal and mutally destructive and I am of the view that the applicant has failed to discharge on a balance of probabilities the onus resting on her to show convincingly that the payment of cattle was for *bohali* and not *chobeliso*. Ralejoe Local Court made no definitive decision on this issue.

Much reliance should not be place on the document MN2 because it is not signed by people allegedly present but only by Tholae Nteso. I also fail to understand why the document is dated 1975 when the cattle were paid in 1968 – 7 years previously. The court has not been told that this 1975 document was for the agreement made in 1975 when the horse was brought – anyway there is no mention of a horse in the document.

Whilst conceding that **chobeliso** occurred in 1968, **Mr Mosito** submits in the main that a distinction has to be brought between "right to bury" and "duty to bury" and argues that "duty to bury" is a matter more of public policy and of what is morally right. He quotes in support thereof the case **Ntloane** – C of A ..... No.42 of 2000. **Mr Mosito** further submits that it is against public policy and amoral for a father to forsake the burial of his biological offspring. The 1st respondent whilst not refusing paternity, states that he has no legal obligation to bury Puseletso his daughter at the house at No.186 Mohalalitoe.

As regards marriage, **Mr Mosito** submits that where parties cohabit for a long time there arises a rebattable presumption of validity of marriage and the evidential burden then rests upon the respondent to show on a balance of probabilities that no marriage exists. Caution must however be had before applying a common law presumption to a customary law problems. He submits that the 1st respondent and his witness Kelebone are "disaster" witnesses who are unworthy of credence. He says it is more probable that the document "BB" dated 15.5.68 was handed in as evidence of *bohali* payment. One should however note here that Kelebone could not possibly hand in a document which was prejudicial to his interest. It is probable

therefore that it was handed in as evidence for *chobeliso* payment and not for *bohali*. The document *MN2* dated 21.2.75 would, in my view carry satisfactory weight, if it was signed by persons allegedly present; it is only signed by Tholae Nteso. This document was handed in at Ralejoe Local Court and date – stamped 24.4.84 as Ex.A. and Kelebone has however dissociated himself from it.

Mr Mosito further submits that the fact that Matsiu Nqosa says she was sitting on "*moiteli*" confirms the version that *bohali* negotiations were taking place. He argued that all the evidence – on affidavit and *viva voce* falls to be subjected to the *litmus* test of credibility and argues that must of the version of the respondents' case was not put to the applicants witnesses to admit or deny and that the demeanour of 1st respondent and Kelebone Nqosa left much to be desired; he cited the cases of **R. v. M.** 1946 AD 1023; **Small v Smith** 1954 (3) SA 433 at 438 and **Khanyapa vs Rex** 1997-8 LLR 8. He rested his case upon the argument that in this case the ideal of public policy should tip the scales of probabilities in favour of the respondent.

Mrs Thabane, for the 1st respondent, submitted in the main that all requirements of a valid marriage have not been shown to exist under customary law. The occurrence of *chobeliso* prior to the payment of cattle has, in her respectful submission, marred the applicant's case; she argues that unless it can be shown that there was a *prima facie* parental agreement and part-payment of *bohali* over and above *chobeliso* issue, the *onus* rests heavily upon the applicant on the balance of probabilities to prove the existence of such marriage. Marriage under customary law, she argues, cannot be presumed – and that section 34 of the Laws of Lerotholi lays

down the essentials of a customary law marriage. (cf **Hoffman and Zeffertt** – *SA Law of Evidence* 4 ed p.538 as to presumption of marriage under common law)

In this case, she further submits there is absolutely no *prima facie* evidence that the delict of *chobeliso* was condoned. She submits that no much reliance can be placed upon the fact that Matsiu Nqosa had said that she sat on *moiteli* without first deciding on the issue of *chobeliso*.

Mrs Thabane submits that if Matsiu wishfully sat on *moiteli* without mutual parental agreement, she did so indeed prematurely or indeed presumptuously.

xxx

A brief restatement of the concepts of *chobeliso*, *bohali* and customary law marriage deserves a glimpse. Our customary law marriage in Lesotho differs greatly from the marriage entered into under western civil rites in that a customary law marriage is a process that involves the parties' agreement to marry and the mutual agreement between the parents of the intending spouses; it further involves nominal payment of *bohali* cattle. The western type marriage can indeed come into existence within minutes after the two parties solemnly agree before the marriage officer if no impediments exist. The common law presumption of validity of marriage does not in my view apply under custom even if parties live together ostensibly as man and wife unless the parental agreement as to marriage and part payment of *bohali* can be established. In the application *in casu*, the applicant's case is shadowed

by the fact that (a) *chobeliso* occurred and (b) the number of cattle paid in 1968 did not exceed six and (c) the evidence as to whether these primary payment was for *chobeliso* or *bohali* is equivocal and is mutually destructive, (d) the important document dated 15.5.68 is missing. The Court is in the dark! (e) the important witnesses have since died.

In view of all these, the court has to make do with the available material presented to it. Credibility may be the issue, but our customary law – static as it seem – requires those three important essentials (section 34 of Laws of Lerotholi) before this court can come to a conclusion that a customary law marriage exists. As my Brother **Molai J** stated in **Lepelesana vs Lepelesana** (supra) cohabitation of parties does not *per se* create a marriage under customary law unless it shown that there was a mutual parental agreement as to marriage and amount of *bohali* and some nominal payment (or at least agreement thereto). To do otherwise, would be to create a customary law marriage where none exists. Marriage is a legal status created by law .·. not mere volition.

Having considered all the circumstances of this case, I have come conclusion that in view of the equivocal nature of the evidence presented before this court and this being an application, the court must accept the respondents' version that the cattle which were paid in 1968 were for *chobeliso* and not for *bohali*.

In this matter there has existed a very serious dispute of fact on the existence of marriage since 1984 (cf Ralejoe Local Court CC6/1984). This must have been obvious from the start. The existence of this customary law marriage

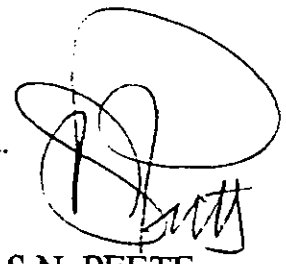
could not possibly be decided upon affidavits – See **Deke vs Qhoai** – 1985-1990 LLR 458 where **Sir Peter Allen J**. dismissed a similar application (abduction followed by cohabitation resulting in birth of children) upon the sole ground that the application should have foreseen that the fact of existence of marriage would be highly disputed and should not have sought relief by way of application.

Furthermore, as **Cullinan CJ** (as he then was) aptly stated in **B.T. Wholesalers v Lesoma** 1985-1990 LLR 276 that where there are two stories mutually destructive, the court has to be satisfied on adequate grounds that the story of the litigant upon the onus rests is true an that of the and the other false. In this application the version of the respondents has not shown to be false.

I am therefore going to make no definitive conclusion as to the existence or non-existence of marriage in this application proceedings; and since this matter was not decided on at Ralejoe Local Court, the issue will remain and may be pursued fully as a trial in another forum. The legitimacy status of children should never be decided upon mere affidavits.

Order:

The rule is therefore discharged.



S.N. PEETE

JUDGE

For Applicant : Mr Mosito

For 1st Respondent : Mrs Thabane