IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) N0.34/2010

In the matter between:

KEITUMETSE SERAGE **FIRST APPELLANT**

'MABAKOENA SERAGE **SECOND APPELLANT**

AND

'MATLALENG TAIOE **RESPONDENT**

CORAM: RAMODIBEDI, P
SCOTT, JA
MAJARA, JA

HEARD: 11 APRIL 2011
DELIVERED: 20 APRIL 2011

SUMMARY

Practice – Application on Notice of Motion for declaration that the applicant, now respondent, was the rightful person to bury the deceased and for consequential relief – Dispute of fact concerning the second appellant's alleged marriage to the deceased – The trial court wrongly deciding the dispute of fact on paper – The matter remitted to the trial court for the hearing of oral evidence on the following issues:-

a) Whether the second respondent, 'Mabakoena Serage, was validly married to the deceased.

b) Whether the applicant, 'Matlaleng Taioe, as a woman who is married into another family, has a prior right to bury the deceased in the Serage family.

JUDGMENT

RAMODIBEDI P

[1] This matter commenced in the High Court by way of a notice of motion launched by the respondent against the

appellants and others. She sought and obtained a rule nisi against the respondents to show cause, if any, why:-

> *"(a) The Applicant shall not be declared the [rightful] person to bury the deceased* ***MOJALEFA PATRICK SERAGE****;*
>
> *(b) The 3rd Respondent shall not be ordered to release to the Applicant the deceased last pay-slip (i.e. July 2010) to receive the burial funds from 5th Respondent;*
>
> *c) The 3rd Respondent shall not be ordered to pay the terminal benefits of the deceased to the Applicant;*
>
> *d) The 5th Respondent shall not be ordered to release to the Applicant the burial cover as contained in Policy No.4139577286 of which 1st Respondent is not a beneficiary;*
>
> *e) The 1st Respondent shall not be ordered to pay to the Applicant the death cover of the deceased contained in Policy No.4287620361 with the 5th Respondent of which she is a beneficiary;*
>
> *f) The 5th Respondent shall not be ordered to pay to the Applicant the death cover as contained in Policy No.4287620361 for the purposes of burial of the Deceased;*
>
> *g) The 1st and 2nd Respondent shall not be interdicted from interfering with the burial of the deceased as they have no locus standi;*
>
> *h) The 1st and 2nd Respondent shall not be ordered to pay the costs of this application;*

i) The Applicant shall not be granted such further and/or alternative relief."

[2] On the return day the court a quo granted prayers (a), (b), (d), (e) and (f). Curiously, prayer (b) was granted to both the first appellant and the respondent jointly. The first appellant was also granted prayer (c).

[3] The admitted facts as gleaned from the affidavits show that the respondent is the biological mother of the deceased, Mojalefa Patrick Serage ("the deceased"). After giving birth to the deceased she got married into another family, namely the Taioe family. This, in my view, obviously raises the question whether she had a prior right to bury the deceased in the Serage family? In view of the approach which this Court has adopted in this matter it is undesirable for the Court to answer this question at this stage. It is undesirable for the Court to express a

concluded view in case the matter comes back on appeal at a later stage.

[4] A genuine dispute of fact arose between the parties as to whether the second appellant, who is the first appellant's mother, was validly married to the deceased by customary law or at all. While conceding that the deceased fathered the first appellant, the respondent maintained that the only payment that was made was in respect of the second appellant's impregnation by the deceased, presumably leading up to the birth of the first appellant – the facts are sketchy on this point. It is the respondent's case that no payment of bohali was made to the second appellant's family.

[5] The second appellant's case on the other hand is that she was validly married to the deceased by customary law.

She averred in paragraph 7 of her opposing affidavit that nine (9) head of cattle were paid as bohali. She further averred that although documentary proof of the marriage had subsequently been destroyed by fire, certain annexures "A", "B", "C" and "D" attached to her opposing affidavit established the existence of the marriage in question. Annexure "A" is the deceased's "Application For First Appointment" as "Technical Officer: Conservation". The name of the second appellant, Puleng, is reflected as the deceased's wife. Similarly, annexure "C", which is a letter written by the local chief dated 25 August 2010 and addressed to the Master of the High Court, reads in relevant parts as follows:-

> *"I salute you,*
>
> *Here I introduce to you and also to ask for assistance for Mrs 'Mabakoena Puleng Serage about the death of her husband Mojalefa Patrick Serage who died in South Africa on 5.08.10.*

The family of the husband is refusing to assist her with all that she needs in order to bury her husband.

Therefore I ask your office to help her in any manner that it can afford.

Thank you.

.....
L.M. KEISO"

[6] Although the second appellant's documents may not be conclusive as to the existence of a valid marriage between herself and the deceased, I consider that they are sufficient to raise a genuine dispute of fact in the matter.

[7] In fairness to him, Mr. Khauoe for the respondent readily conceded at the hearing of this appeal that there is a dispute of fact concerning the second appellant's alleged marriage to the deceased. He submitted that the respondent was "prepared to go back to the trial court and

lead viva voce evidence." This concession was, in my view, very fairly and properly made in the circumstances. It was plainly wrong for the court a quo to resolve disputes of fact on paper. The court a quo should have referred the matter to the hearing of oral evidence in the circumstances. In this regard Rule 8 (14) of the High Court Rules 1980 reads as follows:-

> *"(14) If in the opinion of the court the application cannot properly be decided on affidavit the court may dismiss the application or may make such order as to it seems appropriate with a view to ensuring a just and expeditious decision. In particular, but without limiting its discretion, the court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear to be examined and cross-examined as a witness, or it may order that the matter be converted into a trial with appropriate directions as to pleadings or definition of issues, or otherwise as the court may deem fit."*

[8] It is regrettably necessary to once again comment on the growing tendency by some judicial officers to decide disputes of fact on papers. That is to be regretted as this

practice may often lead to a miscarriage of justice. See for example such cases as **Central Bank of Lesotho v Maputsoe 1995 – 1999 LAC 292; Ntloana And Another v Rafiri 2000 – 2004 LAC 279; Vice Chancellor of The National University of Lesotho And Another v Putsoa 2000 – 2004 LAC 458; Mahlakeng And Others v Southern Sky (Pty) Ltd And Another 2000 – 2004 LAC 742.**

In the **Vice – Chancellor** case this Court expressed itself in paragraph [18] of its judgment in the following terms which bear repeating:-

> *"[18] Too many matters are brought on motion in the High Court despite glaring factual disputes. Too many orders are sough ex parte. Too often inadequate notice is given, with a vague and general reliance on urgency. All this is harmful to the proper functioning of the courts, and unfair to those practitioners and litigants who do seek to adhere to the Rules. The purpose of the judgments cited in paragraph [16], and this one, is to make that clear. The passages in question in these judgments constitute practice directions by this court, which are*

to be appropriately enforced by the High Court and this court, and which are binding on litigants and their legal representative."

As has been repeatedly said time and again it is undesirable for courts to resolve disputes of fact purely on the basis of believing one typewriter as against the other.

[9] In the result the following order is made:-

1) The appeal is upheld.

2) The orders in prayers 2 (a) (b) (d) (e) and (f) granted in favour of the applicant in the court a quo are set aside.

3) The matter is remitted to the court a quo before a different Judge for the hearing of oral evidence on the following issues:-

"(a) Whether the second respondent was validly married to the deceased.

(b) Whether the applicant, as a woman who is married into another family, has a <u>prior</u> right to bury the deceased in the Serage family."

4) There shall be no order as to costs.

5) The Registrar of the High Court is directed to give the matter first preference on the High Court roll.

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M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree: _____

D.G. SCOTT
JUSTICE OF APPEAL

I agree: _____

N. MAJARA
JUSTICE OF APPEAL

For Appellants: Adv. N.K. Lesuthu

For Respondent: Adv. Mr. K.T. Khauoe