IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) 56/2017**
CIV/APN/281/2017

In the matter between:

MOHLALEFI JUSTICE PHAE **APPELLANT**

AND

SEBONOMOEA RAMAINOANE **1st RESPONDENT**
MKM BURIAL SOCIETY **2nd RESPONDENT**
COMMISSIONER OF POLICE **3rd RESPONDENT**
OFFICER COMMANDING MASERU
CENTRAL CHARGE OFFICE **4th RESPONDENT**
ATTORNEY GENERAL **5th RESPONDENT**

CORAM: **M. CHINHENGO AJA**
J. VAN DER WESTHUIZEN AJA
N. T. MTSHIYA AJA

DATE OF HEARING: **18 October 2019**
DATE OF JUDGMENT: **01 November 2019**

Summary

Customary marriage – Validity of customary marriage when there is already a civil marriage – Customary burial rights – Relief sought

becoming moot – need to properly apply for custody of children and access to burial site, if denied or so wished.

Judgment

MTSHIYA AJA

INTRODUCTION

[1] The proceedings started by the granting of an application for condonation of late filing of heads by the respondents. The application was granted by consent. This is an appeal against the Judgment of the High Court, wherein it ruled in favour of the 1st respondent.

[2] On 27 July 2017 the appellant filed a notice of motion in the Court *a quo* seeking an order in the following terms:

> "1. Dispensing with the normal rules relating to modes of service of court process on account of urgency thereof.
>
> 2. That a Rule Nisi be granted and issued returnable of the date time to be determined by this Honourable Court calling upon the Respondent to show cause (if any) why:
>
> a) The 1st Respondent or anyone else acting under his authority shall not be restrained and interdicted forthwith from removing from the 2nd Respondent mortuary, the body of the late 'Makleinchere Ramainoane (born 'Mopa Phae) pending finalization of this matter.
>
> b) The 1st Respondent shall not be restrained and interdicted forthwith from burying or causing and/or facilitating the burial of the remains of the late 'Makleinchere Ramainoane at Koung, Ha Chere in the district of Maseru or at any other place of his choice pending the outcome of this application.
>
> c) The 2nd Respondent shall not be restrained and interdicted from releasing to the 1st Respondent and/or his agents or anyone under his authority, the body or the late

'Makleinchere Ramainoane pending the finalization of these proceedings.

d) The 1st Respondent shall not be ordered to surrender all the necessary documents of the late 'Makleinchere Ramainoane to the Applicant, including the death certificate, death report, mortuary letter, passport and the Identity Document pending finalization of this matter.

e) The 2nd Respondent shall not be directed to release the body of the late 'Makleinchere Ramainoane to the Applicant or to his duly authorised agents and to nobody else pending finalization of this matter.

f) The 1st Respondent shall not be ordered to return the minor children of the late 'Makleinchere Ramainoane to Applicant pending finalization of this matter.

g) The 3rd and 4th Respondents shall not be ordered to assist the Sheriff or the Deputy Sheriff of Court in executing the Orders made by this Honourable Court.

h) The customary marriage entered into by and between the 1st Respondent and the late 'Makleinchere Ramainoane shall not be declared null and void ab initio.

i) An order shall not be made declaring the Applicant's rights and duty to bury the late 'Makleinchere Ramainoane.

OR
ALTERNATIVELY

In the event that the 2nd Respondent has released the body of the late 'Makleinchere Ramainoane to the 1st Respondent, he must be called upon to show cause why:

j) He shall not be ordered to return the body of the late 'Makleinchere Ramainoane to the 2nd Respondent mortuary at his own costs pending finalization of this matter.

OR
ALTERNATIVELY

k) He shall not be ordered to exhume the remains of the late 'Makleinchere Ramainoane and deliver them to the 2nd Respondent mortuary at his own costs.

3. That the 1st Respondent be ordered to pay costs of this application on attorney and client scale.

4. That Applicant be granted such further and/or alternative relief this Honourable Court shall deem fit, just and proper.

5. Prayers 1, 2(a), (b), (c), (d), (e), (f), (g) and (j) operate with immediate effect as an interim relief.

[3] On 28 January 2017 the 1st Respondent filed an Answering Affidavit opposing the application. In the main, the 1st Respondent averred:

> "2.1 I married my late wife 'Makleinchere Ramainoane according to customary law in 2008 to constitute a Second House as my First House was constituted by my first wife 'Matabane Ramainoane. My initial payment of bohali consisted of ten head of cattle in 2008; I paid the balance of thirteen head of cattle in 2012, the same year the applicant made me traditional feast of "ho hlabisa bohali: in appreciation of my substantial payment of bohali in respect of his daughter.
>
> 2.4 My wife passed away on the 22nd July, 2017 and I was duly informed of her passing by the applicant. On the 23rd July, 2017 both our families met at applicant's place and discussed about the funeral, we all agreed to bury my dear wife 'Makleinchere on Saturday 29th July, 2017 at Koung Ha Chere.
>
> 2.5 On the 24th July, 2017 Applicant brought children to my place together with some of my family property which been in the possession of my wife while at her maiden home; included in the said items were: my wife's passport, national identity card and the medical confirmation report. The said documents are annexed hereto and marked "SRR1", SRR2" and "SRR3".
>
> 2.6 To my great shock and surprise on the 26th July, 2017 Applicant came to my place in the company of Khojane Phae and Makhetha Liaho evincing bellicose attitude and demanding the release of the death certificate to them; they refused to calm down. As they tried to corner me and prevent me from out of the house – I managed to escape. I still cannot fathom what caused Applicant to suddenly become hostile and dangerous.
>
> 2.8 Funeral arrangements are at a very advanced stage now. Two cows have already been slaughtered, one was

slaughtered on the 26th July, 2017 and another on the 27th July, 2017. Food in abundance is being prepared and cooked. Many mourners from Thaba-Tseka, Mokhotlong and South Africa have already arrived for the funeral.

6.3 Both my family and Applicant's agreed on funeral arrangements of my late wife. We have never reneged on involving Applicant's family in this painful process from the beginning to the end.

6.4 I earnestly appeal to Applicant and his family to cooperate with us in burying my late wife with dignity. If there are any issues that need to be addressed we can deal with them after the funeral.

7.4 On the facts Applicant has not shown that my marriage with my late wife was not putative.

12. In all the circumstances of this matter I humbly pray that this Honourable Court may be pleased to dismiss this application with costs on a punitive scale."

[4] Although, the judgment appears to indicate that the matter was heard and disposed of on 25 July 2017, I think that the correct position is that the matter was heard and disposed of on 28 July 2017. The burial, according to the papers was set for 29 July 2017 and in paragraph 1 of the judgment of the court, obviously sitting on 28 July 2017 states that: "This urgent application is about burial 'Makleinchere Ramainoane (Deceased) who is going to be buried tomorrow according to the papers ……." 'Tomorrow' was referring to 29 July 2017.

[5] The Court dismissed the application and in so doing, the Court *a quo* in part, said the following:

"[15] And I refuse these orders sort by the Applicant, I say these prayers by the applicant must fail, and say the family must attempt to come together, and if they do not succeed my only worry is that the deceased must be buried, and this Respondent Mr. Ramainoane must see to it that a decent

burial is brought about for the burial of the Deceased. If he slaughters many cattle that is very good, and some other good things. A burial is a big thing, and he is chief he must do the necessary things, I repeat; a lot of food.

[16] I once had a problem, these people of MKM were complaining that they were forced to bury litopo tse nkileng matsatsi a 30 e le bona (these corpses which have taken 30 days by themselves). When confronted with a problem like that I asked Chief Hlathe Majara of Khubetsoana to go ahead and bury a known deceased. I said that you can do that immediately few days thereafter, because I said, lelapa le leng le leng lea hobane malapa a qabana (every family fight among itself because there are conflicts in the families), this is a fact of life. Traditionally the chief and villagers had a task to bury a deceased person. There were no disputes like this.

[17] This application fails, and I do not award any order as to costs. Because these people who are disputing are still family. They must work together."

[6] Displeased by the court *a quo's* dismissal of its orders as sought by the appellant. The appellant now appeals against the entirety of that judgment. The grounds of appeal are listed as follows:-

"1. The honourable Court *a quo* misdirected itself and made an error in the following respects:-

1.1 The Court *a quo* erred in ruling *mero motu* that the Appellant has no *locus standi* to challenge the validity of the customary marriage between the deceased's daughter and the 1st Respondent.

1.2 The Court *a quo* erred in ruling that it was not entitled to determine the validity of the customary marriage between the deceased and Respondent; but it was only concerned with the issue of burial of the deceased and about who can fairly and decently bury the deceased.

1.3 The Court *a quo erred* in ruling that it could not be right for the Respondent who had been regarded by all as the husband of the deceased be deprived of the opportunity to bury his wife, thereby totally disregarding the law governing marriages.

1.4 The Court *a quo* erred and misdirected itself by ignoring the fact that the 1st Respondent's rights and duty to bury the deceased solely depended on the validity of the marriage between himself and the deceased.

1.5 The Court *a quo* erred in ruling that it could not pronounce that the marriage between the deceased and the 1st Respondent is invalid because it would have the effect of bastardising the children born of the marriage."

BACKGROUND

[7] The facts of this case are that the 1st respondent was married customarily to the appellant's daughter, the deceased in 2008. The marriage was to constitute a second marriage as the first house was between the 1st respondent and his first wife 'Matabane Ramainoane.' In and around May/June 2017 appellant's daughter fell ill and the appellant and his wife took his daughter and her children to her maiden home. Subsequently, on 22 July 2017 the appellant's daughter passed away. The first respondent was informed. The two families then met on 23 July 2017 and agreed that burial would take place on 29 July 2017.

[8] The dispute that then arose was whether the two families were agreed and working together on the burial arrangements. The appellant contended that, apart from agreeing on the date of burial, the 1st respondent had alienated his family from the further arrangements in respect of the burial. Furthermore, the appellant contended that when the deceased was customarily married to the 1st respondent, her family was not aware that the 1st

respondent's first marriage was still subsisting. That state of affairs therefore rendered his daughter's marriage to the 1st respondent null and void. On this basis the appellant argued that he had a clear right and duty to bury the deceased.

[9] As already seen, in opposing the application, the 1st respondent contended that he had lived peacefully with his wife save for one disagreement which had long been resolved by the time of her death. On this basis he argued that the urgent application ought to be dismissed in order to allow him to provide a decent burial for his wife where preparations were already underway.

[10] The record shows that the appeal was filed on 8 September, 2017. Clearly by that time most of the reliefs sought by the appellant had become moot. This point was put to the parties by the Court during the appeal hearing. However, the appellant's Counsel, while partly conceding to the mootness of the matter, maintained that two of the reliefs sought were still live. These were:

a) The 1st Respondent shall not be ordered to return the minor children of the late 'Makleinchere Ramainoane to Applicant pending finalisation of this matter.

b) The customary marriage entered into by and between the 1st Respondent and the late 'Makleinchere Ramainoane shall not be declared null and void.

LOCUS STANDI

[11] I think the issue of *locus standi* requires no debate. It is not in dispute that the appellant was the biological father of his

deceased daughter. It is also not in dispute that the appellant was a party to the agreement establishing the questioned customary marriage. Those established and undisputed facts confirm his interest in the matter. The first respondent did not pursue the argument on the issue. That was the right course to take because the issue of *locus standi* does not, in my view, arise. In the case of **Masopha v Mota LAC (1985 – 1989)** relied on by the respondent, the application was dismissed for the non-joinder of the wife who was still alive. That is not the case in *casu.* The appellant's daughter is late. The appellant had a clear interest in the matter. However, given the issue of mootness and the decision on the reliefs claimed to be live, success on that point will still not take the appellant anywhere.

[12] In submissions the appellant then went on to ask this Court to set aside the Court *a quo's* order and replace it with the following:

> "(a) The customary marriage between, 'Makleinchere Sebonomoea Ramainoane (born Phae), the deceased, and the 1st Respondent is declared null and void ab initio.
>
> (b) The Applicant shall have custody of the minor children, Litleetse Ramainoane (Tšireletso Phae) and Makubu Ramainoane.
>
> (c) The Applicant is declared as having the right and duty to bury the deceased.
>
> (d) The 1st Responded is ordered to pay Applicant's costs."

Given the admitted mootness of the other reliefs sought, it is imperative therefore that this Court should only concern itself with the two main reliefs now sought, namely the custody of the minor children and a declaration that the customary marriage was null and void *ab initio*. These reliefs fall to be discussed undergrounds of appeal 1.4 and 1.5 which state:

> "1.4 The court *a quo* erred and misdirected itself by ignoring the fact that the 1st Respondent's right and duty to bury the deceased solely depended on the validity of the marriage between himself and the deceased.
>
> 1.5 The court *a quo* erred in ruling that it could not pronounce that the marriage between the deceased and 1st Respondent is invalid because it would have the effect of bastardising the children born of the marriage."

[13] Notwithstanding the multiplicity of the reliefs earlier sought, it remains clear that the appellant's main desire was to be given the right to bury his late daughter. However, and as already pointed out, as at 8 September 2017 when the appeal was filed, burial had already taken place on 29 July 2017. In the main, all the other reliefs were intended to secure the appellant's right to bury his daughter. In rejecting the application, the Court *a quo* concluded:

> "17 This application fails and I do not award any order as to costs. Because these people who are disputing are still family. They must work together."

[14] In advancing argument for the remaining reliefs sought, the Appellant's Counsel argued that a declaratory order on the dissolution of the customary marriage would enable the

Appellant to fulfil certain customary rituals such as the erection of a tombstone at the grave of his daughter. She said it was common cause that due to s. 29(1) of the Marriage Act 1974 (the Act) the customary marriage was null and void *ab initio.* Indeed s. 29 (1) of the Act prohibits the co-existence of a civil marriage and customary marriage in these circumstances. This is now common cause in this jurisdiction. (**Mokhothu v Manyaapelo, LAC 1970 – 1972).**

[15] In an effort to support his claim to bury 'his wife', the respondent claimed the existence of a putative marriage. I think that, it was because of that claim respondent's Counsel, whilst agreeing with the legal effect of s. 29(1) of the Act, seemed to suggest that it was not common cause that the customary marriage was null and void *ab initio.* The law, in my view, is clear as it prohibits any other marriage in the face of a civil marriage. All the authorities cited by the appellant support that position. If either of the parties were to rely on the existence of a putative marriage, there would be need for evidence to be led. The appellant's case was not based on the existence of a putative marriage. That could not be because there is no evidence that the deceased herself was not aware of the existence of the civil marriage. The appellant was in fact arguing that there was no valid marriage between his deceased daughter and the first respondent. To that end, the appellant argued that the 1st respondent had no right to bury his daughter.

[16] In **Mokhothu** supra, it was stated that:

> "A marriage which is null and void ab initio produces none of the legal consequences of a marriage… The mother of a child born out of a wedlock is its natural guardian and has the right to its custody… the natural father has, however, locus standi in judicio to show that it would be in the best interest of the minor children for the court as the upper guardian of all minors, to award custody to him."

It was further stated that:

> "Section 29 (1) states that no person may marry who has previously been married to any other person still living unless such previous marriage has been dissolved or annulled by a Court of competent jurisdiction."

Furthermore, we find the following in the **Mokhothu** case:

> "Though it is not necessary to have the void customary marriage formally annulled, either party to it may, because a proper customary union is recognized in Lesotho, approach the court to have it declared a nullity. Such a declaration does not change the status of the parties but merely places on record that they are not married to each other."

Given the above pronouncements on the law, it is clear that the customary marriage between the 1st respondent and the appellant's daughter was null and void *ab initio.*

[17] In view of the foregoing, the declaration sought in *casu* would, however, not result in any automatic rights ensuing in favour of the appellant. Unlike in other cases where the right to bury is claimed in order for a party to be entitled to some inheritance benefits from the estate of a deceased, the relief sought in *casu* does not go that far. The appellant, having accepted the mootness of the other reliefs, merely insists that a declaration on the status of the customary marriage would

allow him access to the grave and custody of the children of the deceased. The nullification of the customary marriage was being called for in order to be granted the right to bury. Burial is no longer in issue and the declaration sought would be of no consequence. Access to the grave can be prayed for through any competent court. In any case, the death of the appellant's daughter ended the customary marriage. Although nothing will come out of the declaration sought, the appellant's contention on the invalidity of the customary marriage is correct.

I therefore do not understand why the Court *a quo* refused to grant the declaration when it was clear that the customary marriage was a violation of s. 29(1) of the Act. Notwithstanding the fact that the declaration would yield no benefit, the court erred in refusing to grant it.

[18] With respect to the custody of the children it was conceded that the High Court, as the upper guardian of children would have to be approached through separate proceedings, if the need arose. The custody of the children would not, as the Court *a quo* noted, be determined as part of the dispute that was before it. In any case, I must note, in passing that in his answering affidavit 1st respondent at paragraph 2.5 says:

> "On the 24th July, 2017 Applicant brought children to my place together with some of my family property which had been in the possession of my wife while at her maiden home; included in the said items were: my wife's passport, national identity card and the medical confirmation report. The said documents

> are annexed hereto and marked **"SRR1", "SRR2",** and **"SRR3"**."

The above was never disputed. The appellant is free to properly apply for the return of the children if necessary. The 1st respondent averred that he does not deny the appellant access to the children. Ordinarily, as stated in the **Mokhothu** case, the deceased as the mother of a child born out of wedlock, would be the natural guardian of the child. It does not follow though that the father of a deceased unmarried woman automatically becomes the guardian of the deceased's children. In any case that was not an issue that the Court *a quo* could deal with without invoking the provisions of the Children's Protection and Welfare Act, 2011.

Section 4 of that Act provides as follows:

> "(1) All actions concerning a child shall take full account of his best interests.
>
> (2) The best interests of a child shall be the primary consideration for all courts, persons, including parents, institutions or other bodies in any matter concerning a child."

The granting of that relief (custody of the minor children) could not be dealt with by the Court *a quo.* The appellant if he so wishes, can still approach a court of competent jurisdiction for the custody of the children.

[19] All in all, it must be apparent from the foregoing that this appeal succeeds in part only (i.e *locus standi* and declaration on the invalidity of the customary marriage).

[20] In view of the fact that this was a family dispute which brought great pain to both parties, I think it is only fair for each party to bear its own costs. The respondent actually said he would not ask for costs.

I therefore order as follows:

1. The order of the Court *a quo* dismissing the application in respect of the declaration sought is set aside and substituted with the following:

   "The declaration sought in paragraph (h) of the Notice of Motion is granted."

2. In light of the mootness of the appeal in relation to other reliefs sought, this court makes no order in relation thereto.

3. Each party shall bear its own costs

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N. T. MTSHIYA
ACTING JUSTICE OF APPEAL

I agree

M. CHINHENGO
ACTING JUSTICE OF APPEAL

I agree

J. VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

For the Applicant: **Adv. M. V. Khesuoe**

For the Respondents: **Adv. Z. Mda**