CIV/APN/41/96

IN THE HIGH COURT OF LESOTHO

In the matter between:

LEJAKA GIDEON MAKUMANE	APPLICANT
VS	
MASEIPATI LISELE MAKUMANE (alias PEKANE)	1ST RESPONDENT
LESOTHO FUNERAL SERVICES	2ND RESPONDENT

REASONS FOR JUDGMENT

Handed down by the Honourable Mrs. Justice K.J. Guni
on the 9th day of February 1996

In this matter, the Applicant who is the eldest son in the family of Makumane, approached this court to seek an interdict against his sister and the burial society. The deceased and 1st Respondent are the sisters of this Applicant. Their parents are late and there is no dispute as regards the heir and the head of the Makumane family. The deceased has a minor son. It would appear that the deceased and her minor son had established their own household. With the assistance of her minor son's biological father the deceased maintained and supported herself and her son. There was no time when the

/...

Applicant exercised any rights in respect of the deceased's separate household. Perhaps that is why he now brought this application to be declared the lawful person to bury the deceased even before anyone challenged him.

There are points in limine which had to be resolved before the merits of the application are considered. The first point so raised is that of the Applicant's locus standi. The deceased has the son who is at least eighteen years (18) of age. The Applicant has brought this application in his own right not in his representative capacity. The right to bury the deceased and to use all the monies and assets of the deceased is claimed as a real right against the whole world. May be that is why this Applicant approached this Court in this fashion to interdict the Respondents whom he allegedly feared were about to usurp his right. The mention of the existence of the minor son of at least (18) years of age is not made in the founding Affidavit by this Applicant. It was argued on behalf of the Applicant that the omission of the mention of the existence of the minor son of the deceased was not intentional and was not negligent. What was it? By implication such omission was deliberate. The omission is not denied. It has been made. Does this minor son have any interest in the property of his later mother and in the burial of his own mother? 1st Respondent averred that the property of the deceased should rightfully be inherited by her 18 years

old son - Thabiso. The Applicant in his replying Affidavit has not challenged or disputed this averment.

At the age of eighteen (18) years the son of the deceased is still a minor. He is under the tutalage of the Applicant who is the guardian of both the deceased and her son. It is not in dispute that this Applicant is the guardian of the deceased's son. The applicant is not suing in his representative capacity. He is claiming that he is entitled to bury the deceased against the 1st and 2nd Respondent and against everyone. In cases such as this one it is not just the right to bury the deceased but going hand in hand with the claim of right to bury is the right to use or inherit the property of the deceased. In the past, customary law allowed the head of the family of the mother who is also the mother's guardian to be her heir. On the authority of Rasethuntsa vs Rasethuntsa J.C.216/1947, the deceased Elizabeth Makumane who was unmarried remained a minor whose property at her death should pass to her father or his heir. The Applicant is the heir of their parents - the late Mr. and Mrs. Makumane. Over the years this position of the customary law has changed through practice despite the failure twice to pass the motion changing that position by legislation as shown by scholarly research, done by Sebastian Poulter in his "Family Law and Litigation in Basotho Society". CLAREDON PRESS OXFORD 1976.

/...

In this book the learned author pointed out at page 237, that many of those who gave evidence before the national council's select committee on wills, estates and Marriages in 1962, expressed the view that illegitimate children ought to be allowed to inherit in their mother's families. There was a great deal of unhappiness with the customary law as it stood then. The law was, at that time when the National Council was considering changing it by statute, regarded as repugnant to justice, morality and good conscience; more especially because through practice the position had evolved well beyond what the law said particularly where the mother had a separate establishment of her own household. The deceased, in our present case Elizabeth Makumane had taken the charge of the affairs of the household. In our present case the position is a little different because the son of the deceased is a minor. There should be someone to take care of that minor. That person should protect and guard against the interests of this minor. That person should deal with the funeral matters on behalf of this minor in conjunction with the guardian or the person who was the guardian of his late mother. Since there has been no family council meeting the guardian will be assisted by the family members.

Another point of Law raised was the existence of major facts of dispute which the Applicant should have forseen.

The question of existence of major disputes was not pursuit. No mention was made of specific facts of dispute. Advocate Makotoko urged this Court to accept that although no mention is made of those disputed facts, they are contained in the body of the answering affidavit. The 1st Respondent disputed that she is not married as alleged. The 1st Respondent's status has no bearing to her position. As a single girl she still does not claim to have a superior claim to that of this Applicant.

This Application is essentially, on the main, an interdict. The Applicant's prayers, particularly 1(a) (b) and (d) are requesting that Respondents be interdicted from performing or carrying out certain actions. In cases where damages alone may not be a sufficient or appropriate remedy, the application for an interdict is usually resorted to. There are essential elements which must be established for an interdict application to succeed.

Firstly, the Applicant must establish a clear right. The Applicant has shown that he is the eldest son of Mr. and Mrs. Makumane. The two sisters, 1st Respondent and the deceased are minors under his guardianship. As far as the deceased's is concerned although not married it appeared that the applicant never played any role of a guardian. The deceased

and her son THABISO MAKUMANE with the assistance of one MOSEBI MAINE the natural father of THABISO MAKUMANE, established their very own independent and separate household. The claim by applicant to be the person lawfully entitled to bury the deceased, in the circumstances described above, is totally unsupported by the facts.

The second essential element that should be established for this application for interdiction of the Respondent to succeed is the actually committed or threatened harm based on well founded apprehension that it is imminent. It is alleged by the Applicant that the Respondent claimed to be the person lawful entitled to bury the deceased. There is no firm ground on which this allegation can be established. The Respondent admitted that the Applicant is the eldest son and her guardian. The Respondent denied that she ever made the claim that she is a person lawfully entitled to bury the deceased. There is no foundation to support the allegation that the Respondent threatened to usurp the Applicant's right. Without actual or threatened mischief, this application cannot succeed.

This applicant should have satisfied the Court that there is no adequate protection from that mischief which is being done or threatened. ..... Setlogelo vs Setlogelo 1914 AD. 221. There is no harm actually committed or

threatened. The protection against that harm which is non-existence is therefore not required.

This application to interdict the Respondents does not meet any requirements for an interdict and therefore cannot succeed.

It is the respondent's contention that this application has been prematurely brought before this court. At the time this application was filed there had been no family council meeting. Death in SESOTHO custom is the matter for the whole family of the deceased. It is not the matter for considerations of one individual. It is when there is irreconcilable difference of opinion amongst the members of the family that the courts are called upon to intervene. MATSOTANG MAFEREKA v TJOMELANE MAFEREKA and Others CIV/APN/301/95.

It is in the common cause that there has been no such family council meeting.

On these points in limine alone, this application must fail.

K.J. GUNI
JUDGE

For Applicant : Mr. Makotoko