

CIV/APN/464/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

LABANE PHAKOE
MAMOSOTHO PHAKOE

1ST APPLICANT
2ND APPLICANT

v.

THUSO MOFOKA
TŠITA PHAKOE

1ST RESPONDENT
2ND RESPONDENT

AND

CIV/APN/464/95

In the matter between:

THUSO MOFOKA
TŠITA PHAKOE

1ST APPLICANT
2ND APPLICANT

v.

LABANE PHAKOE
RAMATLA PHAKOE
TATOLO PHAKOE
'MAMOSOTHO PHAKOE
PHAKOE PHAKOE
LIKHOA PHAKOE
MAMATLAKALA PHAKOE

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu

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on the 18th day of January. 1996.

The subject of litigation in these proceedings is the right to bury the late Teboho Phakoe, whose corpse has been waiting for burial since the 2nd December. 1995.

The funeral was stopped on the 21st December. 1995, a few days before deceased was to be buried. This was because Labane Phakoe brought an application in which he claimed he was the sole person who had the right and duty to bury deceased. The Chief Justice granted a temporary interdict in terms of which a *rule nisi* was issued returnable on the 4th January, 1996. The matter was not heard until the 9th January, 1996.

On the 9th January, 1996, I dismissed applicant's application with costs because deceased had a younger brother Tšita Phakoe who often used the surname of Mofoka. Among other things. I said in that judgment. was that I would not join Tšita Phakoe as respondent at that stage. I asked the family of Phakoe to meet to arrange the deceased's burial amicably.

Labane Phakoe had sought to introduce Tanki Tlali

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Phakoe as co-applicant because he alleged deceased had not been shown as married until then. I ruled that I would not entertain this application at that stage. I made it clear that the matter was too complex to deal with at this stage. I ruled that this matter of deceased's marriage would have to be dealt with in different and distinct proceedings. No order which might prejudice the status of Tanki Tlali and his mother ought to be hurriedly made at this stage.

This reference of the matter to the family was subject to a great deal of misunderstanding. At the root of the misunderstanding may be the order itself and the interpretation both or one of the Counsels put to it.

The result of reference of this matter to the family was that Labane Tšita and his group buried the deceased on the 13th January, 1996. When they did this, they were aware that Tšita Mofoka and his group were going to bury deceased on the 14th January, 1996.

Why the two groups did not meet is not clear. Both groups blame each other.

On the 13th January, 1996 I ordered that the body be

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exhumed and be returned to the mortuary. I ordered all the people who authorised the burial to be joined as parties. I postponed the matter to the 16th January, 1996. An application for committal of Labane Phakoe for contempt of Court was made but I deferred it while I was dealing with the question of burial of deceased.

In view of the urgency of the matter and the need to get the body of deceased buried, I acted in terms of Rule 59 of the *High Court Rules* 1980 to do whatever was necessary to speed up the finalisation of the matter. In terms of this Rule in a fitting case, the Court may depart from the *Rules*.

On the 16th January, 1996, I ordered that Mamosotho Phakoe, the mother of Tlali, should be joined as a party. The reason being that there are papers which show she is probably the wife of deceased. It appears deceased regarded her as his wife and even gave some cattle towards her marriage. None of the family even at this stage were shown to know of her marriage although Labane Phakoe and his group decided to recognise her as deceased's wife and use her to defeat Tšita Mofoka's right to bury deceased. Nothing was said or added that could change my mind about her not interfering with the burial and claiming her

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rights and those of her son on some other occasion.

On the 16th January, 1996 I joined Tšita Mofoka as a party in these proceedings because the stage had been reached when he could be joined as a party. I had stated that this might happen at a later stage. This is because there is no possibility of an amicable agreement being reached among the members of this family.

It is common cause that if deceased had no wife and son, Tšita Mofoka, is the one who by Basotho custom is entitled to bury deceased. the reason being that he is the deceased's younger brother. He could even be the deceased's heir. That issue cannot specifically be decided because it could emerge at a later stage that Tanki Tlali is the deceased's legitimate son and that deceased was in fact married to Mamosotho. That issue will not be decided in these proceedings.

In this case, it is clear that deceased long separated with Mamosotho. Since a Basotho customary marriage is a process rather than a contract entered into on a specific date, it is not always easy to determine whether or not a marriage did in fact materialise. There are several cohabitations that were intended to be marriages

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in which even some *bohali* changes hands that fail to be marriages for one reason or another. We also have to consider that deceased is entitled to decide where and how he should be buried. It, therefore, does not readily follow that the deceased would have liked to be buried by a woman with whom he was no more cohabiting at the time of his death.

It is a bad practice for people who claim rights of succession to delay burials and claim their rights when they are aware, the matter cannot be properly ventilated. Courts are forced to act on incomplete evidence, thus making unjust decisions a real danger. Deceased bodies should be buried and not be held to ransom. I will not encourage this practice.

I noted that according to Voet XI.7.7 heirs were at common law relatives who were blood relations. A spouse was not regarded as such a relative. Consequently until the *Interstate Succession Proclamation 2* of 1953, the widow or spouse could not be the heiress in intestacy. In Basotho custom, a spouse is regarded as a relative. Consequently, the decision of *Tseola v Maqutu* 1976(2) SA 418 where it states a widow (where she is heiress) should always prevail is not necessarily correct because it is

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based on American authorities that were not even available to the Court. We are here dealing with Basotho custom. See *M. Mafereka v. T. Mafereka & Ors.* CIV/APN/301/985. That being the case, Mamosotho would not automatically prevail. Matters of burial are not that straight forward in Basotho custom.

The other members of the Tlali family had no right to exclude members of the deceased's immediate family holding a meeting and deciding to bury deceased without his brother Tšita. Other members of the Phakoe family come to help but not to seize control of the affairs of the deceased's immediate family. Houses and families in Basotho custom always remain separate and distinct although they have to co-operate.

According to the papers before me at the moment. Tšita Phakoe is the only person who is clearly the brother of deceased, head of the family. Tšita Phakoe is also heir by Basotho custom of the deceased (until one day Tanki Tlali Phakoe could be proved the deceased's legitimate heir). A contingency that has not yet arisen

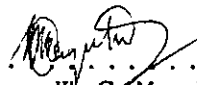
I therefore declare that Tšita Phakoe is the only one person entitled to bury deceased's body. I therefore

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order that he should take the late Teboho Phakoe's body and bury it at a place of his choice within five days.

I do not order any costs against the other members of the family that participated in the burial of deceased under the leadership of Labane Phakoe.

In respect of Labane Phakoe, I order that he should show cause on the 5th February, 1996, why he should not be committed to prison for contempt of Court and pay the additional costs of this application.

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W.C.M. MAQUTU
JUDGE

For the Applicants : Mr. N.E. *Putsoane*
For the Respondents: Mr. T. *Fosa*