IN THE HIGH COURT OF LESOTHO

In the matter between

LEBOHANG SELLO	**Applicant**
and	
'MAMOTLATSI SEMAMOLA	**1st Respondent**
MOTLATSI SEMAMOLA	**2nd Respondent**
THE PROPRIETOR MANGWANE FUNERAL SERVICE	***3rd Respondent***

J U D G M E N T

Delivered by the Honourable Mr. Justice M.M. Ramodibedi, Acting Judge on 30th day of September 1996.

The matter before me concerns an urgent application filed by the Applicant on 4th September, 1996 for an order inter alia declaring that he is the sole heir of his wife the deceased 'Makamohelo Cecilia Lieketseng Sello (Nee Semamola) and that he is the only person entitled to determine the deceased's burial place. The matter is opposed.

On 6th September 1996 the 1st Respondent 'Mamotlatsi Semamola who is the mother of the deceased and who actually lived with the latter at the time of her death filed a counter application in which she sought for a Rule Nisi calling upon the "respondent" to show cause why inter alia "in view of the circumstances preceeding the death of 'Makamohelo, the Sello family headed by Applicant's father, or another family

head shall not be ordered to assemble at 'Makamohelo's maiden home in the presence of chief from both sides whereat they shall meet First and Second Respondents herein and discuss the release of the deceased 'Makamohelo Sello." That application is also before me for determination today and it is also opposed.

To compound the matter further on 10th September 1996 the First Respondent filed yet another application being for contempt of court against First Respondent for allegedly having failed to comply with the court order in the above mentioned counter application. This application is also opposed.

All the three applications were for convenience argued together with the consent of all the parties on 19th September 1996. I proceed then to deal with the merits of each application in the sequence in which they were filed which was also the sequence in which they were argued.

The main Application

Although this application was initially opposed the court was however informed on the 12th September 1996 that the parties had reached a consensus in the matter to the following effect:

(1) that the deceased would be buried at Ha Mabote in Maseru district;

(2) that the date of burial was being deferred until the applicant had arrived back from the mines in the Republic of South Africa and that once such date had been determined

the First Respondent 'Mamotlatsi Semamola would be informed through her chief.

(3) that after the date had been determined the First Respondent 'Mamotlatsi Semamola would go to the Applicant's home where she and deceased's mother in law would perform their last rituals.

Indeed at the hearing of the matter on 19th September 1996 the Respondents conceded the Applicant's right to bury the deceased. Consequently I confirmed the Rule in terms of prayers 2 (a) and (c) and released the deceased's body to the Applicant for burial. The argument before me was therefore confined to costs which Mr. Phoofolo for the Applicant insisted upon and submitted that they should be on attorney and client scale.

It is trite law that the question of costs is pre-eminently a matter for the discretion of the trial court. The court must however exercise the discretion judicially and not arbitrarily or capriciously. Moreover it is trite law that courts are loath to grant costs on attorney and client scale light heartedly and that it will often be in very clear cases where such costs are awarded such as abuse of court process, frivolous or vexatious claim, the conduct and/or misconduct of a litigant as well as his attorney, discourtesy to the court, moral considerations, dishonesty or fraud (the list is not exhaustive).

see Nel v Waterberg Landbouwers Ko-Operatiewe Vereniging 1946 A.D. 597.

A close reading of the papers before me has left me in

no doubt that the first two respondents have conceded the Applicant's right to bury the deceased. I am satisfied that the filing of opposing papers and counter application was merely to enable the respondents to enter into discussions with the Applicant's family regarding, inter alia, funeral arrangements. In this regard paragraph 3 of the opposing affidavit of second Respondent Motlatsi Semamole states in part:-

> "I and the family has no intention of holding on to the remains of our deceased sister. But at the same time we do not have a parcel (phahlo) in our possession. We are still awaiting the Applicant and his family to come to us to discuss her expulsion/ngalaeng and her funeral. We all recognize that Applicant's expulsion of our sister not withstanding he has the right to bury. But that does not mean Applicant should ignore the circumstances that surrounded my sister being at her maiden home."

In paragraph 14 of her opposing affidavit the First Respondent herself concludes by stating as follows:

> "I am making this affidavit to show that nobody denies that Applicant has better rights to **'MAKAMOHELO**, but that **SEMAMOLA** family does not know of a parcel which Applicant, his mother and his sister came looking for."

What I found most disturbing in this matter is the cavalier manner in which the court was treated by the Applicant and his counsel. On the return date of the matter on 6th September 1996 the court and respondents' attorney were kept waiting the whole day without even a decency of

an explanation furnished to the court why the Applicant's counsel could not appear in court. It is this type of arrogance and discourtesy to the court that has led me to deny the applicant costs in the matter as a mark of the court's displeasure.

In the result therefore the Rule is confirmed in terms of prayers 2 (a) and (c) of the Notice of Motion. There shall be no order as to costs.

The Counter Application.

I have already found that the filing of the counter claim in this matter was merely to enable the respondents to enter into discussions with the Applicant's family regarding funeral arrangements.

The counter application was couched in the following terms:-

"1. That rules of Court as to for and service be dispensed with on account of the Urgency of this matter.

2. That a Rule Nisi be issued calling upon Respondent to show cause why

(a) Applicant or his agents shall not be interdicted from removing the body of **CECELIA MAKAMOHELO SELLO** from Mangwane Funeral Service pending the outcome of these proceedings.

(b) In view of the circumstances preceeding the death of **MAKAMOHELO**, the Sello family headed by Applicant's father/or another family head shall not be ordered to assemble at **MAKAMOHELO'S** maiden home in the presence of chief from both sides whereat they shall meet First and Second Respondents herein and discuss the release of the deceased **MAKAMOHELO SELLO.**

(c) Should prayer (c) of the main Application be interpreted to mean that the Honourable Court has allowed the release of the body of **MAKAMOHELO** to Applicant then the Respondents pray that the Applicant should show cause why he and his family headed by his father or family head shall not meet with Respondent's family at **MAKAMOHELO'S** maiden home to discuss the circumstances surrouding her expulsion ngalaing.

(d) That Applicant show cause why he shall not be restrained from burying **MAKAMOHELO SELLO** pending the fulfillment of prayers (b) or (c) above.

(e) That in view of the circumstances preceeding the death of **MAKAMOHELO SELLO**, Applicants show cause why the parties shall not agree on the date of the burial of the deceased **MAKAMOHELO SELLO.**

(f) That Applicant shall not pay costs of this Application on the attorney and clients scale.

(g) Respondents shall not be given further and or alternative relief.

3. That prayers a, b, c and d, operate as Interim Order with immediate effect."

7/...

The Rule Nisi was granted on 6th September 1996 returnable on 11/9/96 after the court had been assured by Mrs. Kotelo that the Applicant's attorney Mr. Phoofolo had been made fully aware of the application. Only prayers 1, 2 (a) (b) and (d) were ordered to operate with immediate effect.

Mr. Phoofolo has made much of the fact that the interim orders in this matter were granted in the absence of his client. Well I can only say that they have themselves to blame for treating the court in the cavalier manner that they did and absenting themselves without any excuse furnished to the court. On the other hand the court had no reason to doubt what Mrs. Kotelo informed it namely that the Applicant's attorney was fully made aware of the counter application. Mrs. Kotelo is an officer of this court and the matter was by its very nature extremely urgent.

In any event the court considered that the Applicant suffered no prejudice from the interim orders it made in as much as what was sought therein was merely consultation between the two families concerned. The Applicant's right to bury as such was not being challenged. The court considered that such consultation was necessary if there was to be a decent burial to the deceased's body and the court was determined to achieve this end.

It was for the above reasons that the court felt the circumstances of this case differed from those in Khaketla v Malahleha and others C of A (Civ) No. 18 of 1991 which Mr. Phoofolo relied so heavily on.

It is indeed common cause that the deceased passed away while living with her maiden parents since the 15th February 1996. The Applicant alleges she had ngalaed but the respondents say she had been expelled from her marital home. As I see it, it does not really matter whether she had ngalaed or had been expelled. Now that she had died without the issue having been thrashed out by the two families in accordance with custom the question of her burial had to be addressed as a matter of urgency. Dictates of good morals demanded consultation between the two families. I therefore reject Mr. Phoofolo's submission that because the Applicant had the right to bury consequently he was not bound to enter into any consultations with the deceased's maiden parents regarding her burial.

In his invaluable book : Contemporary Family Law of Lesotho : W.C.M. Maqutu puts the matter very succintly on page 195 :-

> "The Mabona case and other cases imply that there should be consultation before the party who has a final say prevails. Custom makes it a condition precedent that parties should consult and even ask for family intervention before any of the parties exercises the legal right to prevail. In Basotho society the general practice is to consult widows and take their wishes into account when male relatives decide before a final decision on the question of burial is reached."

It is also correct as the learned author W.C.M. Maqutu observes on page 190 of his book that "although courts are trying to formulate general principles on the subject (the Duty to bury) our confused dual system is a problem in itself."

I would caution, therefore, against the air of self-righteousness as demonstrated by the Applicant in this case, simply based on the fact that he is the deceased's husband and heir. In my view each case must be decided on its own merits and the court must not be bound by any inflexible rules when determining the question as to who has the right to bury. It is true the heir must always be given first preference whenever it is just to do so but there may well be cases where even the heir himself is unsuited to bury the deceased such as for example where he has not lived with the deceased for a very inordinate length of time and has actually killed the latter in circumstances repugnant to public morality such as for ritual purposes. This court subscribes to the view that in determining the duty to bury the court must be guided by a sense of what is right as well as public policy.

In developing his argument that the Applicant was entitled to ignore the respondents and go ahead with the burial without any consultation Mr. Phoofolo referred the court to Serema Lethunya and another v Matlere Thejane and another CIV/APN/178/87.

I do not think, however, that Mr. Phoofolo read the following remarks of Lehohla J. on page 2 of the judgment:-

> "But dealing as we are here with a matter of custom I have resolved to take the view that in as much as a matter of customary law marriage denotes not merely a Union between the parties to that marriage but also their respective parents' families' interest and right in the marriage, there does not seem

> to be any grave danger in assuming that Lesesa's elder brother as head of the Lethunya family as he avers albeit belatedly in his replying affidavit is a true and proper representative of Lesesa before this court."

With respect I agree entirely with the principle enunciated therein. I conclude therefore that the deceased's maiden parents could not simply be ignored in the matter and that the application for consultation was well taken in the circumstances. I observe that in Lethunya's case the court was concerned not with consultation as such, but with whether a resolution of the question of the deceased's ngala should be determined before the burial. The two cases are thus distinguishable.

Mr. Phoofolo raises the objection for the first time in argument before me that Mamotlatsi Semamola who filed the counter application had no locus standi to do so "it being obvious from the affidavits that Motlatsi is the male issue, son of the respondent and heir of the first respondent." As I see it there are four problems to this argument which I have no hesitation in dismissing straight away. They are these:-

(1) As stated above there has been no objection to the counter application based on locus standi.

(2) There is nowhere in the affidavits that Motlatsi is shown to be the heir.

(3) The question whether a person has locus standi or not is a question of fact which

must be proved on the facts. There is no such proof before me.

(4) The Applicant had himself sued Mamotlatsi Semamola in the main application. The latter was therefore in my view entitled to bring a counter application in the same matter.

Mr. Phoofolo then submits that prayer 2 (b) of the counter application was seriously flawed in as much as the court was being asked to grant orders against people who were not parties to the proceedings before it such as the Applicant's father. I consider that technically speaking there is merit in this argument and that the prayer as well as the order therein were inelegantly drafted.

It is significant however that on the 12th September 1996 the court was informed by both parties that a consensus had been reached after all and that consultation between the parties had taken place as ordered. In the circumstances the argument before court mainly turned on costs on the insistence of Mr. Phoofolo for the Applicant.

In the circumstances of this case I see no reason for departing from the court's approach on costs in the main application herein as above stated in as much as we are dealing with essentially one and the same matter. This was a family matter in which reconciliation and consultation should have been uppermost on the minds of the litigants in order to have a decent burial. A lot of unnecessary acrimony was

allowed to develop between the parties with the result that the court's valuable time was wasted in the process. Consequently I order that there shall be no order as to costs.

Contempt of Court

I have already found that prayer 2(b) of the counter application as well as the order therein were inelegantly drafted. Predicatably the Applicant has sought to hide behind this technicality on the ground that the interim court order did not direct him to "specifically do anything." Nor does the matter end there.

In paragraph 7 of his answering affidavit the Aplicant states as follows:

> "While I have no desire to disobey an order of this court, I submit that it is not possible to comply in as much as I have already stated such an attempt has already been made, and my efforts were fruitless. I also can't instruct any member of my family who is not cited as a party in this proceedings to go to deceased's home as this Honourable Court has ordered. I respectfully submit that this order was erroneously granted in my absence, and after respondents did not disclose to this Honourable Court the fact that I and my family have already visited them for discussions as prayed for in my application. Furthermore the order is prejudicial and humiliating to me and my family because my family is no longer on talking terms with respondents in the matter. Consequently I am going to ask at the earliest opportunity that the rule be dischared."

13/...

The Applicant's attitude as aforesaid was persisted in by his attorney Mr. Phoofolo before me on the 11th September 1996 when he argued that the interim court order was "impossible and humiliating" to his client. The court then warned Mr. Phoofolo that his client's attitude amounted to contempt and that until such contempt had been purged he could not be heard. I am satisfied that the main reason for the Applicant's non compliance with the interim court order was because the Applicant felt that it was erroneous and humiliating to him. Thus he did not even make a token attempt to comply thereto. Indeed after the matter had been stood down after the court's warning as aforesaid the contempt was fully purged. There was consultation between the parties resulting in a consensus as earlier stated. I find that the application for contempt was both bona fide and necessary to preserve the court's dignity. In the circumstances of the case I decline however from commiting the Applicant to contempt. I do so very reluctantly on the technicality advanced above. In fairness to Mrs. Kotelo, she did not insist on a finding of contempt as such after the consensus reached by the parties. There has now been substantial compliance with the court order.

Once more the argument before me turned on the question of costs upon the insistence of Mr. Phoofolo who felt that his client was in the right and that consequently he was entitled to costs. One was reminded of the dubious Shylock in the story book: The Merchant of Venice. That gentleman is credited with having insisted upon his pound of flesh which ultimately back-fired on him.

As earlier stated I have taken into account the cavalier manner in which the court was treated by the Applicant and his counsel in this matter. The court deserves to be treated with dignity and respect at all times even when litigants may feel they have been wronged. However this was a family matter for which the court does not find the need to punish one litigant as against the other with costs in the interests of preserving harmony between the two families concerned.

In the result therefore there shall be no order as to costs. The Applicant may count himself lucky that he has escaped having to pay costs merely on the technicality in the drafting of the interim court order as aforesaid. Others relying on such technicalities in future may not be so lucky as each case must be determined on its own merits.

M.M. RAMODIBEDI
ACTING JUDGE

30th September 1996

For Applicant : Mr. Phoofolo
For 1st and 2nd Respondents: Mrs. Kotelo