CIV\APN\65\97

IN THE HIGH COURT OF LESOTHO

In the Application of :

MALITSI MARINAKHOE	**Applicant**
Vs	
MATHE MPAKANYANE	**1st Respondent**
'MAKHETHANG MONTŠO	**2nd Respondent**
MONTŠO MONTŠO	**3rd Respondent**
LESOTHO FUNERAL SERVICES	**4th Respondent**

JUDGMENT

Delivered by the Hon Mr Justice M L Lehohla on the 18th day of March, 1997

Yesterday this Court discharged the rule that was extended by my Sister Guni J, on 10-3-97 though my perusal of the file does not reveal in minuted form when exactly this rule was obtained. The order made was that each party was to bear its own costs.

However the Registrar's date stamp indicates that the applicant's Certificate of Urgency and the Notice of Application together with accompanying affidavits were filed of

record on 26th February, 1997 and service on the other side, or to be specific, on the 1st respondent was effected on 3rd March, 1997.

Since the record does not bear proof of the filing of the interim restraining order against the respondents and particularly against the 4th respondent concerning whom the tenor of prayer 2(a) was directed, I am left with no option but to presume that my Sister Guni J, must have at least had a glimpse of the interim court order which she accordingly extended to yesterday i.e 17-3-97 on 10-3-97 as her minuted notes on the inside cover of the file indicate only the latter underlined portion.

The undisclosed interim order obtained on the undisclosed date presumably obtained not before but perhaps on 26th February, 1997 came about following an application couched in terms that I shall deal with later, - prefaced by a phrase to the following effect, namely :

that the applicant intends making an application on 10th March, 1997 at 9.30 a.m. Significantly the original month dates are whited over with what appears to be Tipp-ex save that an uncovered letter "y" appearing before the word March suggests that what was originally written was February. This led me to conduct a further investigation. By applying a mirror on reverse side of the page to decipher what was originally written I discovered that this was 3rd February this year.

Considering the vast distance in time between the hearing of this matter yesterday and

the probable date when a very urgent matter of this nature could have been heard one was tempted to think at first blush that 3rd February 1997 might have been too early hence it was legitimate to white over the ordinal figure "3rd" and name "February" with Tipp-ex. But this notion instantly dissipates to naught when considering paragraph 9 of the applicant's founding affidavit which indicates that the deceased Marefuoe Marinakhoe who is the subject matter of this application ".....passed away on 25th January, 1997.....". This is buttressed by "M1" the deceased's acceptance form to the funeral parlour attached to the respondents' opposing papers showing that the body of the deceased was received by the Lesotho Funeral Services on 6th February, 1997.

For the moment the above will suffice to register the court's displeasure at the levity and laxity with which dead bodies and their relatives seem lately to be treated despite earlier and repeated warnings given against this attitude in the past.

Returning now to the applicant's prayers; the orders prayed are in the following terms:

(1) That the modes and periods of service be dispensed with on the basis of the urgency of this application.

(2) That *Rule Nisi* issue returnable on the date and time to be determined by this Honourable Court calling upon the respondents herein to show cause, if any, why:-

(a) The 4th respondent shall not be interdicted and restrained, from releasing the body of the late 'Marefuoe Marinakhoe to the 1st, 2nd and 3rd respondents.

(b) The said body of the late 'Marefuoe Marinakhoe shall not be released to the applicant for burial.

© The 1st, 2nd and 3rd respondents shall not be ordered and directed to release

to the applicant the four children of the deceased together with their clothing and personal effects.

(d) The 1st. 2nd and 3rd respondents shall not be ordered and directed to release to the applicant all the household property and the following Insurance : F?M(*sic*) policy, S1 policy, H2-4113683878, H3-411 7619350, H4-1864006554, which they removed unlawfully, and other documents.

The applicant avers that the late Lebohang Marinakhoe was married to the deceased by civil rites and in community of property on 2nd April, 1988 and that at the time of their death the marriage still subsisted.

He goes further to say there were four children born of the said marriage namely :

1. **Refuoe, a boy born in 1983**
2. **Mohau, a boy born in 1985**
3. **Bolepeletsa, a boy born in 1987**
4. **Likopo, a boy born in 1994**

He says the first three children were legitimised subsequently by the marriage of their two deceased parents.

He further avers that he is the eldest male surviving member in the family (presumably the Marinakhoe family) and that he has to undertake the duty and responsibility of ensuring that the wife of his younger brother is buried decently and very soon because his children were still very young.

The applicant avers in paragraph 11 as follows :

"I am informed by my Counsel, and I verily believe him that the said children are the

joint heirs of my younger brother, each being entitled to a child's share in terms of the Intestate Succession Proclamation, 1953, and that the 1st, 2nd and 3rd respondents are not entitled to any portion of the said estate".

Mr Nthethe **taking up the cudgels for the respondents indicated that Form M1 regarding who should take the responsibility of signing in the deceased 'Marefuoe into the funeral parlour for storage none other than the 2nd respondent did so without objection by the applicant.**

Mr Nthethe **further indicated that this placed the 2nd respondent in a contractual relationship with the 4th respondent from which 2nd respondent couldn't be bailed out without attracting liability to the 4th respondent.**

Learned Counsel further drew to the court's attention the fact that in her last declaration the deceased 'Marefuoe when truly on the point of her final departure on deathbed at Queen Elizabeth II Hospital on 20-01-97 (see M4) wrote a letter to her chief asking her chief to divide her property among her children in equal shares and that he should engage the services of 2nd respondent and one Moitsoali Mpakanyane to find all the aggregate of her estate.

It is significant that the surname of this Moitsoali is the same as that of the deceased's father the 1st respondent. It is also significant that despite that opposing papers were served on the applicant as early as 10th March, 1997 no replying affidavits were filed until long after

the hour 9.30 a.m. had struck on the date of hearing of this matter. The hour 9.30 a.m. is the usual starting time for Court business on any given day in the High Court.

I take it as significant that although reference was made in the applicant's founding affidavit to the marriage certificate none accompanied that affidavit. The said certificate MM1 was only filed together with the replying affidavit at the belated stage when the respondents, who through 1st respondent insisted that there was no marriage between his late daughter 'Marefuoe and her purported "husband" who died more than a month earlier, could not have had any opportunity to react to the said marriage certificate.

The Court finds it significant that the handwriting employed throughout this certificate seems to be of one person. Indeed there are columns in the body of this certificate which can legitimately be and could have very well been filled by the Marriage Officer. These columns relate to the names, ages and condition or status of the parties contracting the marriage. I however cannot bring myself to agree that even where the form says "This marriage was solemnised between us" so and so and so and so such names should be written not by the parties subsumed in "us" but by the same person who purported to officiate in the solemnisation. I need not go further and express my dissatisfaction with the fact that even the names or signatures of witnesses are not by the witnesses themselves but by the same person who filled the marriage certificate form.

It is clear that the actual age of the deceased 'Marefuoe is of essence in this matter, yet

I was only referred to the marriage certificate which does no more than reflect her age as 24 years at the time of the marriage without giving the actual birth date or month and year. When the Court inquired about these it was referred to paragraph 6 in the replying affidavit which instead of improving matters by supplying the required information went only as far as merely repeating the inadequacy. In my opinion that is not enough because what is required would at least be the birth certificate of Marefuoe or an affidavit sworn by someone who knew her or was present when she was born. Moreover, what appears in the marriage certificate, which is a reproduction of facts written by a certain person, falls short of this requirement in that at best this marriage certificate is only a copy of the actual marriage certificate, or at worst it bears no indication that it is a certified document yet as shown above this is not a case where it could be held that the marriage certificate marked MM1 speaks for itself. (See *Ramaisa and Another vs Ramaisa* at pp 6-7 below).

Confronted with the above untenable state of affairs *Mr Putsoané* for the applicant blithely suggested that perhaps the hearing could be adjourned till the following day in order to call evidence to clarify the matter as it is quite brief.

I could not bring myself to entertain this request; first as indicated above an inordinate delay hovering on utter disrespect for the need to lay the deceased to rest in good time, had already been incurred. Next, this Court in *CIV\APN\222\93 MOKHOTHU vs Malebusa MATLOHA and 3 OTHERS* (unreported) at p.2 had this to say :

> **".....The reason the Court refused the application for postponement was that this is an urgent application involving the final and important need to lay the**

> **deceased's remains to rest. It should be brought home to litigants that this Court will always view with disfavour any attitude that litigation involving disposal of dead bodies should be conducted at leisure with the unwholesome reassurance that such bodies need not be laid to rest within reasonable time because refrigeration in the funeral parlours prevents them from decomposing. The callousness incidental to this attitude and sheer lack of respect for the dead cannot move this Court to condone postponements sought under colour of going to canvass further evidence necessary to support one's case"**

These remarks are most apposite in the instant case where further evidence sought to be led relates to a document filed much later than even the proverbial eleventh hour. It is significant that no explanation is given why the marriage certificate which should have been filed along with the founding papers is filed along with replying papers almost three weeks later. This comes into sharper relief when considering that the deceased's father said his daughter was not married to the late Marinakhoe, she only cohabited with him and that their children were adulterine and thus by custom belong to Marefuoe's family as their own mother's brothers and therefore legitimately deserving to be brought up in their minority by their mother's parents one of whom is the 1st respondent.

Indeed, asked why this matter took so long to be brought for hearing *Mr Putsoane* to his credit indicated that during the week when the matter was to be heard he was told by the Registrar or someone standing for her that all Judges of the High Court were unavailable as they were attending a colloquium which went on for a week. I take judicial notice of the fact that the colloquium started on 24-2-97, and would hasten to say that even so the deceased had been dead for a month already. Anyway I found it fitting to advise that urgent matters cannot be prevented from being heard by virtue of the fact that Judges are attending a Colloquium

or a conference. Surely a judge seized of a matter of this importance would find it fitting to hear it outside conference hours even should he or she have been unable to disentangle himself or herself from participation in the conference at the time the urgency of the matter was brought to his or her attention. *Mr Putsoane* took this piece of judicial counsel in good grace albeit too late in so far as the instant case is concerned. It is for the Registrar and her staff to heed this caution in future lest this sad and unpardonable episode rear its ugly head again.

Be that as it may while still on the unsavoury question of letting dead bodies remain endlessly in cold storages while counsel are luxuriating in endless search for postponements I wish to re-iterate the word of caution expressed by this Court in *Serema Lethunya and Another Vs Matlere Thejane and Another* (unreported) in CIV\APN\178\87 and referred to at page 199 of Mr W.C.M. Maqutu (now Judge of the High Court) in Contemporary Family Law of Lesotho deploring the practice of keeping dead bodies in mortuaries for inordinately long times that :-

> **"Traditionally this could not happen because of lack of (artificial) permafrosts afforded by mortuary facilities for preservation of dead bodies. Indeed a dead body would commonly be buried within three days of the death at the longest..... The practice of the Basotho to bury the dead within a short time of the death is a wholesome one and indeed a vestige of antiquity" which should not be departed from "..... It is thus inconceivable that in such circumstances the Basotho would hold the question of burial in abeyance pending finalisation of the discussions which might protract beyond seven days or more; or even be interrupted by postponements to later dates spanning sometimes six months as the case might be".**

Cullinan C.J as he then was is quoted in the Honourable Maqutu's works above on page 199 as follows :

> **"..... The burial of the deceased that has already been twice postponed should be effected without delay..... The present proposal to leave the remains in antiseptic refrigeration of a funeral parlour, for anything up to a year shatters any belief I ever had that the application stems from altruistic motives. Frankly, I consider the application an unhappy one, bordering on the morbid, if not ghoulish in places, and contrary to a custom which is common to all mankind... namely respect for the dead".**

Mr Nthethe **deftly rammed the point home in his submission based on the averment appearing in paragraph 7 of the opposing affidavit that the applicant has not been candid with this Court and has not given local colour to 'Marefuoe's death. Ad Para 9 the deponent Matheakubu Mpakanyane the father of the late 'Marefuoe avers :**

> **"I admit that 'Marefuoe Marinakhoe died in Queen II Hospital on the alleged date but wish to disclose to the Honourable Court the circumstances that led to the death. Lebohang Marinakhoe who was a policeman during his life time, quarrelled(sic) and shot my daughter. Thinking that she was dead, he then shot himself and died instantly. My daughter was taken to Queen II Hospital where she ultimately passed away. Ever since the applicant never went to visit her in Hospital nor even cared for the children".**

With this in the background it is easy for the Court to see that the applicant's main interest in the matter is firmly rooted in what benefit he can derive from the insurance policies which are in part the subject matter of this application. But that aspect of the matter has been adequately taken care of by the deceased 'Marefuoe's deathbed repentance and wish. All I need do is to ensure that it is respected.

I agree with the submission by *Mr Nthethe* that the applicant has no *locus standi in judicio* in this matter.

Finally in coming to my decision I relied heavily on C. Of A. (CIV) No.2 of 1993 *Ramoeno Ramaisa & Another vs 'Makatiso Ramaisa* (unreported) by Leon J.A. at p.7 where as in the instant matter -

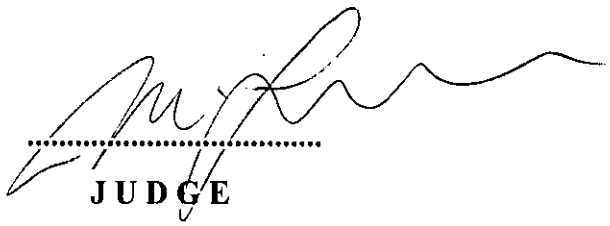
> **"It appears from the certificate that the parents' consented to the marriage but the deceased's parents have sworn that they did not".**

In the instant certificate it is indicated that the consent is of the parents and of their own. The respective ages given of the bride and groom are 24 and 26. The bride's father says she couldn't have been of age where she could consent to the purported marriage. The father hadn't the benefit of the marriage certificate to respond to as it only came after he indicated that his consent was never sought when it should. So on the basis of a plethora of authority in similar matters there is merit in accepting what is common cause and in the event of serious disputes of fact; accepting the respondent's version and rejecting the applicant's as illustrated by Ackermann J.A's words in C of A (CIV) No 33 of 1992 *Bernard Moselane & Ors vs Bonhomme High School* (unreported) at page 3 that -

> **"The application being one for final relief a Court is entitled to assume the correctness of averments by applicant which are admitted or not challenged by the respondent and the correctness of the version of the respondent".**

The fact that the "marriage certificate" was filed so late without explanation and accompanied by discomfiting features I have referred to suffice to make me feel there was more to that than meets the eye.

In the result the application was discharged each party bearing its own costs.



.....

J U D G E

18th March, 1997

For Applicant : Mr Putsoane

For Respondents : Mr Nthethe