

CIV/APN/94/97

IN THE HIGH COURT OF LESOTHO

In the matter between

TŠELISO SEPHAPHATHI

APPLICANT

and

**MAHLOMOLA FOKA
NTETA 'MALERATO FOKA
PRINCIPAL SECRETARY-MINISTRY OF
HEALTH
ATTORNEY-GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
On 29th Day of April 1997.

This application involves the right to bury. The applicant filed the application on an urgent basis on the 24th March 1997 seeking an order in the following terms:-

- “1. That a RULE NISI be issued, returnable on a date to be determined by this Honourable Court, calling upon the Respondents to show cause, if any, on a date to be determined by this Honourable Court why:-
 - (a) The Rules of Court be dispensed with on account of the urgency of this matter;

- (b) The body of the late MAMOITHERI SEPHAPHATHI (born FOKA) shall not under the supervision of the Third Respondent herein be exhumed and kept at a mortuary known to all parties pending the finalisation hereof.
 - © The Applicant shall not be declared the rightful person to bury the body of the late MAMOITHERI SEPHAPHATHI (born FOKA)
 - (d) The First and Second Respondents shall not be directed to pay the costs hereof; and the Third and Forth (sic) Respondents only in the event of their opposition.
 - (e) The Applicant shall not be granted such further and/or alternative relief as this Honourable Court may deem fit.
2. The prayers 1 (a), (b), © operate with immediate effect as temporary interdicts.”

When the matter was moved ex parte before me on the same date namely the 24th March 1997 I duly granted the Rule Nisi as prayed but refused to order prayer 2 © to operate with immediate effect.

I should mention that the application is opposed by the First and Second Respondents only. Indeed the Third Respondent has filed what he terms “permission to exhume the remains of the body of the late Mamoitheri Sephaphathi” in terms of Section 74 (3) of the Public Health Order No.12 of 1970.

At the hearing of the matter on the return date on the 2nd April 1997 I ordered that viva voce evidence be heard on the question whether the deceased Mamoitheri Sephaphathi or Mpho Foka was legally married to the Applicant. This was the sole material bone of contention between the parties in the matter and

counsel were agreed that it was necessary to hear oral evidence thereon.

In this regard the Applicant called the evidence of three witnesses namely PW1 Molati Sephaphathi, PW2 Maratha Sephaphathi and PW3 Moeketsi Sephaphathi.

The evidence of PW1 Molati Sephaphathi is briefly that he is the Applicant's father. It is his evidence that the Applicant got married to the deceased around 1981. The said marriage was preceded by seduction and impregnation of the deceased by the Applicant. It was agreed between the two families concerned that six (6) head of cattle be paid in respect of the said seduction and impregnation. This was done. The two families further agreed on marriage between the Applicant and the deceased. Two (2) more head of cattle were paid to the deceased's family towards that purpose.

According to the evidence of PW1, a total of eight (8) head of cattle were paid to the deceased's family on that particular day and they were made up as follows :

- (a) cash amounting to M500-00 representing five (5) head of cattle, in other words the parties specifically agreed that M100-00 represented one (1) head of cattle. This indeed is common cause.
- (b) two head of cattle.
- © five goats representing one (1) head of cattle.

In cross examination PW1 testified that the two families agreed on twenty (20) head of cattle as the total amount of bohali in the matter.

PW1 further testifies that the said agreement between the two families was duly documented and he has handed in the document thereof as Exhibit "A". According to PW1 this document was executed by the deceased's father himself namely Ruben Molatoli Foka. Only the latter and PW1 signed the document because they were the only literate people present.

Those who were present when this agreement was reached were:

PW1 Molati Sefhaphathi himself, PW2 Maratha Sefhaphathi, PW3 Moeketsi Sefhaphathi and Molato Sefhaphathi on the Applicant's side. On the other side were Fusi Foka, Lefu Foka and the deceased's father, Ruben Molatoli Foka, all of whom have since passed away.

PW1 is adamant that the first and second Respondents in this matter were not present at the meeting in which the said agreement was reached. I should mention that I was impressed by PW1's response to the question why 2nd Respondent was not at the meeting. This is what he said:

"I find that Basotho men when negotiating bohali, women are not there and if there is a dispute the message is sent to the women wherever they are."

This statement commends itself to me as being in accordance with Sesotho custom. In any event PW1 remained unchallenged in this statement and I can find no reason

for disbelieving him particularly as he is corroborated by respondents' own witness DW2 Motlatsi Mifi to the effect that in terms of Sesotho custom "women do not participate in matters like that one."

The evidence of PW2 and PW3 corroborates that of PW1 in material respects. It is thus unnecessary for me to traverse the whole evidence in detail any more than I have done in respect of PW1.

The first Respondent Mahlomola Foka neither filed an answering affidavit in this matter nor did he give viva voce evidence before me. I shall assume in his favour that he relies on the evidence of DW1 Nteta Malerato Foka and DW2 Motlatsi Mifi. I proceed then to examine the evidence of these witnesses.

DW1 Nteta Malerato Foka is the second Respondent in the matter. She is the mother of the deceased Mpho. It is her evidence that she was present at the meeting where PW1 had come to pay compensation for the impregnation of Mpho by his son the Applicant. He duly paid six (6) head of cattle made up as follows:

- (1) two head of cattle
- (2) five goats making one (1) head of cattle
- (3) M300.00 cash representing three (3) head of cattle.

She is adamant that no marriage was ever entered into despite the fact that according to her initial version Mpho "spent thirteen (13) years in that family." According to DW1 nothing was written down and no receipt was issued despite the fact that the cash and the livestock in question were accepted by her husband. Accordingly it is her evidence that she does not know Exhibit "A".

I observed DW1 as she gave evidence and I formed the impression that she is not a truthful witness at all. She was all out to deceive the court as much as she could. In particular I have no hesitation in rejecting her evidence that she was present at the meeting where PW1 entered into negotiations with her husband Ruben Molatoli Foka and finally made payments. As earlier stated I believe the unchallenged evidence of PW1 and DW2 himself that according to Sesotho custom women do not participate in matters of this nature.

It is significant that in her answering affidavit DW1 stated that PW3 was not present at the meeting between the two families yet in her oral evidence before me she has conceded that he was present. In my view this self contradiction is an indication that DW1 was herself not present at the meeting in question.

I turn then to consider the evidence of DW2 Motlatsi Mifi. It is his evidence that those who were present at the families' meeting on the side of the Foka family were himself, Ruben Molatoli Foka, Fusi Foka and Lefu Foka adding "that was all." It means therefore that according to him DW1 was not present at the said meeting. Yet DW2 later tries to improve on this version and alleges that DW1 "was present but seated a distance" about 7-8 paces from where the meeting was held.

According to DW2 Applicant's family paid R300.00 five goats and two cattle all of which represented six (6) head of cattle. This was compensation and not marriage although the Sephaphathi family promised to come back again to negotiate marriage.

I should mention that this witness made a very poor impression on me as a witness. He was rude to counsel for the Applicant to the extent that he would even

reverse the roles and ask him questions himself such as the Court had to warn him. I formed the impression that he was not present at the meeting in question despite his protestations thereto.

Indeed when he was taken to task as to the denominations of the R300-00 allegedly paid by PW1 to the Foka family his reply was startling. He said it was in R100 notes. Both counsel are in agreement however that R100 notes were not yet in existence at the time of the said payment in 1981 - 82. I agree. Accordingly I have no doubt that DW2 was caught with his guard down and was exposed for what he is - a liar.

The document Exhibit "A" is vehemently attacked by Mr. Matabane for the First and Second Respondents as being nothing more than a forgery. In this regard it is important however to bear in mind the question that was put by Mr. Matabane to PW1 in cross examination on the document Exhibit "A". He asked :-

"Q: I put it to you that this is not the agreement which was written that day?

A: This is the agreement which was written that day."

I am satisfied from the tone and nature of this question that the respondents impliedly concede that there was in fact a written agreement on the day in question even if it might not be Exhibit "A" according to them.

I find it highly unlikely that PW1 could have agreed to part with such a big amount of money and number of livestock without any receipt or written acknowledgement of some sort. Probabilities are that the parties did in fact execute

documentary proof of their transaction. In this regard I accept PW3's rhetorical question in confirming that a document was in fact executed and signed by PW1 and the deceased's father namely "I would say yes the document concerning proceedings was signed - what kind of a meeting would be that without documents?" This epitomizes the Basotho general practice of recording their marriage agreements in writing. This includes negotiations for payment of damages for seduction and/or impregnation or abduction.

Although as earlier stated the Respondents have suggested that there was in fact a written agreement in the matter they have nonetheless failed to produce such agreement. In my view this is a factor to be taken into account in deciding whether Exhibit "A" is the written agreement in question. I should also mention at this stage that having watched the demeanour of the witnesses in this matter I believe the evidence of PW1, PW2 and PW3 and reject that of DW1 and DW2.

Accordingly I find that Exhibit "A" is in fact the written agreement that was entered into by the respective families in the matter. I further find that the first signature on Exhibit "A" is that of the deceased's father Ruben Molatoli Foka. In this regard I attach due weight to the fact that it took DW2 a very long time in cross examination to summon enough courage to deny it.

Mr. Matabane has made much of the fact that Exhibit "A" has cancellations. I don't think however that much turns on this in as much as PW1 explained and I believe him that this document was executed by the deceased's father Ruben Molatoli Foka himself. It had transpired when the document was read back to the witnesses that the said Ruben Molatoli Foka had not accurately recorded the parties' agreement. He was accordingly queried hence the cancellations which were made

by the said Ruben Molatoli Foka himself. Indeed PW1 and his witnesses could not believe their ears when Exhibit "A" was read back to them and it was said that a proper document would only be issued on the day the Applicant brings the livestock in question. This was strange because they had brought the said livestock with them and Ruben Molatoli Foka had even inspected them.

As I read it Exhibit "A" was inaccurate in another material respect even though the Applicant does not seem to have picked it up. It is that whereas it is common cause that two (2) head of cattle were paid along with the cash and the goats, Exhibit "A" only mentions one (1) head of cattle. Accordingly I am inclined to suspect that the said Ruben Molatoli Foka himself intended to cheat the Applicant in the matter but was soon caught out hence the cancellations. Be that as it may I am satisfied as earlier stated however that Exhibit "A" is a genuine document that was executed by the parties. I believe applicant's witnesses that the hand writing and the first signature appearing on Exhibit "A" are those of Ruben Molatoli Foka himself. I accept that he executed the document in their presence. I have also observed the latter's signature in his driver's licence Exhibit "B" that it is exactly similar to that appearing in Exhibit "A".

I should mention that both Exhibits "B" and "C" were handed in by Mr. Matabane as emanating from the deceased Ruben Molatoli Foka's family. I consider therefore that Ex "B" in particular contains the latter's genuine signature. I am not sure about some of the signatures in Exhibit "C" because the signatures appearing thereon are not quite the same. Mr. Matabane conceded however that Ruben Molatoli Foka signed his signature differently. In my view this may then account for the alleged discrepancies that Mr. Matabane sought to rely upon.

What stands out as peculiar in Ruben Molatoli Foka's genuine signature as reflected in Exhibit "B" is that he writes the F in an unconventional manner. It faces left instead of right. It goes like this "Ɔ". This is exactly a similar situation in Exhibit "A". In my observation, the signatures and handwriting thereon are so similar that the court does not need an expert witness to see.

I accept the evidence of PW1 and PW2 to the effect that eight (8) head of cattle were paid as "bohali" in the matter and that they were broken down in the manner suggested by PW1 as above mentioned. This means therefore that a sum of M500-00 was paid as cash and not M300-00 as suggested by the Respondents. I disbelieve DW1 and DW2 on this aspect as well. Moreover as earlier stated I accept that neither the Respondents nor their witness Motlatsi Mifi (DW2) were present at the meeting at which Exhibit "A" was executed.

In my judgment PW1 could only have paid eight (8) head of cattle and not just the statutory six (6) head of cattle for compensation if there was an agreement to enter into marriage. I find therefore that the fact that PW1 actually paid eight (8) head of cattle is proof of the parties' agreement as to marriage. I believe that this most probably explains the reason why the deceased's parents never claimed her back as well as the minor children even long after the deceased had left Applicant's home.

I further accept PW1's evidence that the parties agreed on twenty (20) head of cattle as the amount of "bohali" payable.

Regarding the Applicant and the deceased I am satisfied that by living together as husband and wife they clearly agreed to marry. Accordingly I find that

the essential elements of a Sesotho law marriage as defined in Section 34 (1) Part 11 of the Laws of Lerotholi were fully satisfied.

Now Section 34 (1) Part 11 of the Laws of Lerotholi provides as follows:

“34(1) A marriage by Basuto Custom shall be deemed to be completed when:

- (a) There is agreement between the parties to the marriage;
- (b) There is agreement between the parents of the parties or between those who stand in loco parentis to the parties as to the marriage and as to the amount of bohali;
- © There is payment of part or all of the bohali....”

That satisfaction of the essential elements of marriage as defined by the said Section 34 of the Laws of Lerotholi amounts to a legal customary marriage, in my view, admits of no doubt and in this regards I respectfully bear in mind the statement of Smit JA in Mokhothu v Manyapelolo 1976 LLR 281 at 286 to the following effect:

“In Lesotho parties may enter into a civil rites marriage under the Marriage Act 10 of 1974 (formerly the Marriage Proclamation 7 of 1911), or into a marriage according to Sesotho law and Custom as stated in S. 34(1) Part 11 of the Laws of Lerotholi” (my underlining).
See also Molapo v Molapo 1974-75 LLR 116 at 118.

In the result therefore I have come to the conclusion that the deceased Mamoitheri Sephaphathi or Mpho Foka was legally married to the Applicant and that the latter has the duty and the right to bury her.

Indeed I find that respondents' opposition to this application was not genuine at all. In this regard it is necessary to bear in mind what DW1 namely the Second Respondent stated in cross examination:-

“Q: Is it correct that the Foka family has not taken any action to recover the children

A: We did not - we had hoped that there would be reconciliation between the deceased and her husband.”

It is clear to me therefore that she finally yielded to the pressure of cross examination that the Applicant is in fact the husband of the deceased. There lies the truth at last.

Accordingly the Rule is confirmed and the application granted as prayed with costs against the First and Second Respondents.


M.M. Ramodibedi

JUDGE

29th April 1997

For the Applicant: Mr. Nathane

For First and Second Respondents: Mr. Matabane