

IN THE HIGH COURT OF LESOTHO

In the matter between:

FRANCIS PITA

Applicant

and

'MALIAU 'MASENUKU BOROTHO

1st Respondent

POLICE OFFICER COMMANDING MORIJA

2nd Respondent

SUPERINTENDENT OF QUEEN ELIZABETH II HOSPITAL

3rd Respondent

ATTORNEY GENERAL

4th Respondent

JUDGMENT

Delivered by the Honourable Chief Justice Mr Justice
J.L. Kheola on the 27th day of May, 1997.

This is an application for an order in the following terms:

- 1 That the periods and mode of service be dispensed with on the basis of the urgency of this application.
- 2 That the rule nisi be issued and be returnable on the date and time to be determined by this Honourable Court calling upon the respondents to show cause, if any, why :
 - (a) The first respondent herein shall not be interdicted and restrained from burying the body of the late Moorosi Pita.
 - (b) The applicant shall not be allowed to bury the said body of the late Moorosi Pita as his heir and eldest son.
 - (c) (i) The third respondent shall not be ordered to release the body of the late Moorosi Pita to

the applicant for burial, the body which is kept by the second respondent at the mortuary at Queen Elizabeth II Government Hospital or alternatively

(ii) In the event that it is no longer in the mortuary of the third respondent the first and the second respondent produce the body of the late Moorosi Pita.

(d) The respondent shall be directed to pay costs of this application in the event of opposition.

3. That prayers 1, 2 (c) (i) and (ii) should operate with immediate effect as an interim order.

It is common cause that the applicant in this matter is the eldest son of the deceased person, Pita. Now as he is the eldest son of the deceased he is the heir and for all intents and purposes he is the heir of the deceased.

Now the position of the first respondent seems to be very clear and I will assume for the purposes of this application that she was legally married to the deceased. This assumption which I make is actually based on evidence, there is a document here which has been produced; the usual document which parties to a marriage usually write as evidence that there is a solemn marriage.

The mother of the applicant had a formal divorce some time before the deceased started living with the first respondent.

As I have said to both counsel it is not very material in this case to prove the marriage between the deceased and the first respondent because there is only one heir. There is not any other one that is being canvassed in these proceedings, there is only one heir and in a situation like this the heir has a better right than any other person according to the authorities that I am going to quote here. The first one is the case of **Martha Lepelesana vs Lepelesana** which was quoted by **Mr. Mphalane**. Apparently he missed only a few lines which are very important and these are quoted at page 12, it is unreported. There are many decisions indicating that where a spouse dies leaving no heir who has reached the age of majority public policy and the sense of what is right dictates that the wishes of the remaining spouse should prevail and that it is her duty or his duty and right to bury the deceased where he or she pleases. The learned Judge quotes the case of **Tseola vs Maqutu** and the case of **Mathibeli vs Chabalala** and the case of **Mabona vs Mabona**, that is the case I referred to the counsel as they were addressing me; the case of **Mabona vs Mabona** is very relevant to these proceedings.

I wish to quote from **Mabona vs Mabona** what the learned Judge said, he first of all approved what was quoted by Judge Munnik in the case of **Tseola vs Maqutu** where he said:

"In a dispute of this nature the widow's wishes where she is an heir should prevail".

Now the learned Judge Molai goes on to say:

"The widow's wishes prevail where she is the heiress and not where the deceased has died leaving an heir, it is trite law that in Lesotho the eldest son of the deceased person is his heir. The applicant must of necessity fail in her prayer that the body should be exhumed and be buried in a place of her choice."

The learned Judge goes on to quote the case of **Khatala vs Khatala** where it was held that the question of whether the deceased marriage had been concluded according to Sesotho law and custom or civil rights plays no part in a case like this.

Now the law is very clear that where there is an heir who has reached the age of majority then the widow cannot have any better right than the heir.


In this case as I have already said the applicant is the heir of the deceased whether the first respondent was lawfully married is immaterial because she is not the heir of the deceased.

Let me not be misunderstood, she has got certain rights to her own estate, to her own house; she has certain rights to that and she cannot be deprived of those rights because as I said I

assume that she was legally married to the deceased but as far as the body is concerned that body belongs to the heir and the heir is the applicant in this case.

The cases that I have quoted here are not in conflict, they say the same thing, the only thing is that in some cases there would be no heir and then the widow would take over; but in a case where there is an heir the cases are very clear that it is the heir who has to bury the deceased.

For these reasons the rule is confirmed with costs.


J.L. KHEOLA
CHIEF JUSTICE

27th May, 1997.

For Applicant - Mr. N.K. Lesuthu
For Respondent - Mr. N. Mphalane