

CIV/APN/41/2011

IN THE HIGH COURT OF LESOTHO

In the matter between:-

**MALEFETSANE LETUKA
MAMONYANE LETUKA**

1ST APPLICANT
2ND APPLICANT

and

**TABOLANE MOILOA
MATLHOKOMELO MOILOA
TLHOKOMELO MOILOA
LESOTHO FUNERAL SERVICES**

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

JUDGMENT

CORAM : HON MR JUSTICE S.N. PEETE

DATES OF HEARING: 17TH, 18TH, 28TH FEBRUARY & 15TH MARCH 2011

DATE OF JUDGMENT : 17TH MARCH 2011

Summary

Burial – Chobeliso (abduction) – Customary law marriage – Section 34 (1) of the Laws of Lerotholi – Payment of cattle after *chobeliso* – Absence of satisfactory evidence that families agreed that animals be accepted as *bohali* partpayment – Right to bury deceased depends upon proof that a lawful customary marriage exists – Onus on the respondents to establish existence of a valid customary marriage.

Where a woman is abducted and some less than six cattle are later paid, in the absence of evidence showing that the said cattle are paid as part of bohali, a customary law marriage cannot be deemed to exist.

Where the respondents fail to discharge an onus to establish a valid customary law marriage the biological parents of the deceased woman have the right to bury her.

Annotations

1. Reported cases

Mantsebo Rammotsi v Malineo Ramootsi – C of A (CIV) No.14/08 **BT Wholesalers v Lesoma** – 1985-1990 LLR 276.

National Employers Mutual General Insurance Association v Gany – 1931 AD 187 **Selamolele v Makhado** – 1988 (2) 372.

Ramakulukusha – 1989 (2) SA 420. **G vs Commander Vender Defence Force.**

2. Books – **Maqutu** – *Contemporary Family Law of Lesotho* – 1992 *NUL*

Peete J.:

[1] This application involves the burial rights over the corpse of one ‘*Maleoaneka Letuka* which is presently at the mortuary owned by the Lesotho Funeral Services, the fourth respondent.

[2] In their **Notice of Motion** dated 25th January 2011 the applicants sought and obtained an order couched thus:-

“(1) That Rules pertaining to the periods and mode of service be dispensed with on the grounds of urgency.

(2) *That a RULE NISI be issued calling upon the Respondents on the date to be determined by this Honourable court to show cause (if any) why an order in the following terms shall not be made final:*

- (a) *4th Respondent shall not be interdict from releasing the body of 'MALEOANEKA LETUKA to the respondents pending finalization of this matter.*
- (b) *1st, 2nd and 3rd Respondents shall not be restrained from burying the remains of the late 'MALEOANEKA LETUKA pending the outcome of this application.*
- (c) *1st and 2nd Applicants shall not be declared as the rightful persons to bury the body of 'MALEOANEKA LETUKA as their child.*
- (d) *the burial shall not be carried out at Matukeng at Applicants' home.*
- (e) *4th respondent shall not release the body of the 'MALEOANEKA LETUKA and give Death Certificate to the 1st and 2nd Applicants.*

(3) *Costs of suit in the event of opposition.*

(4) *Further and/or alternative relief.*

(5) *That prayers 1, 2 (a) and (b) operate with immediate effect as Interim relief."*

[3] On the 25th January 2011 my sister **Mahase J** issued an interim order returnable on the 3rd February 2011 and on the same day the respondents filed a notice of their intention to oppose along with the answering affidavit of *Tlhokomelo Moiloa*. It is important to note that in his affidavit *Tlhokomelo Moiloa* does not mention the fact that he

was the messenger sent out had been sent to Matukeng to report about the abduction of the deceased. Neither was Lephethesang Ramosebetsi called, though alive and available.

[4] In his founding affidavit, the first applicant alleges – and this is not disputed by the respondents – that the deceased was abducted on the 31st December 2007 by 1st respondent. He claimed that no customary marriage was ever entered into and hence the respondents have no right to bury the deceased.

[5] In cases of this nature involving the right to bury, our courts are at *ad idem* that the *onus* is on the respondents to establish the existence of the customary marriage entitling them to bury the deceased as the in-laws. In cases of civil rites marriage, proof of marriage is usually easily established by producing an authentic marriage certificate demonstrating that a person who claims the right to bury was lawfully married to the deceased and that at death the marriage still subsisted.¹

[6] Where it is alleged that parties married customarily, *section 34 (1)* of the **Laws of Lerotholi** comes into play. It reads thus:

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

(a) *there is an agreement between the parties to the marriage;*

¹ Hoffman and Zeffert – Law of Evidence – page 620.

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

- [7] As **Ramodibedi P** recently noted in the case of ‘**Mantsebo Ramootsi and other vs ‘Malineo Ramootsi,**² section 34 of the *Laws of Lerotholi* while forming the legal foundation of customary marriage in Lesotho has been the subject of much controversy especially on the question of payment of *bohali*.
- [8] The learned Judge President of Appeal came to the conclusion that the issue of payment of bohali is not a *sine qua non* of a valid customary marriage but one which obviously depended on the intention of the girl’s parents. Each case must be judged in the light of its own peculiar facts and circumstances. I agree.
- [9] Whether there is an agreement that bohali need not be paid or whether the compensation for “*chobeliso*” must be foregone is basically a question of fact which must in most cases be established by leading evidence.
- [10] Whereas **Ramodibedi P** stated that non-payment of *bohali* is not fatal to the validity of a customary law marriage, the learned Judge should not be taken as stating that the wishes of the girl’s parents should be sidelined and agreement imputed despite their vehement denial. There

² C of A (CIV) NO.14/08

must exist a factual agreement to create a validly binding customary law marriage.

- [11] In this case, the Court heard oral evidence on the question whether or not the first respondent had legally been married to the deceased in terms of customary law, all the time bearing in mind that the respondents bore the *onus* of establishing the existence of a customary law between the first respondent and the deceased.

Elopement (*chobeliso*)

- [12] It is only proper to start from a premise that the first respondent abducted or eloped with the deceased on 31st December 2007 and cohabited thereafter the deceased till she died recently.
- [13] *Mamoiloa Moiloa* was called by the respondents, and she informed the court the deceased had been abducted by first respondent and that a messenger had been sent to the applicants home – the deceased's parents. She says a “*koa*e” sheep was then slaughtered and deceased was given the marital name ‘Malillo.
- [14] She went further to state that when deceased became pregnant later with her first child (Lillo), she had accompanied deceased to her maiden home, where she was smeared with ochre and was caused to wear a skin dress and this traditional Bafokeng (*bipiso*) ceremony was

- performed in the presence of the first applicant – the deceased’s father at whose home she remained until Lillo was born.
- [15] She further states that even when her father-in-law passed away the deceased and her mother came to mourn with the Moiloas; and her hair was shaven in mourning.
- [16] She says further that Lillo later passed away and was buried at Lithabaneng and the deceased donned a white doek, which she removed later at Matukeng and was given a sheep.
- [17] She says one day in July 2010 (three years after *chobeliso*) she saw two cattle, one donkey and three goats being driven by Mahlomola, Tsekiso, Mahooana, Lephethesang and she says these animals were for bohali because she saw the “*tlakana-tsooana*” (a letter written to the bewys writer requesting him to issue a bewys) that had been issued before they were driven to Matukeng.
- [18] To interpolate – “*tlakana-tsooana*” or a bewys can never amount to an agreement that the cattle are for *bohali*. At most, it can be an offer to the girl’s parents. But where there has been a “**chobeliso**”, the compensation of six head of cattle for the **chobeliso** must be dealt with first before the negotiations for bohali can begin or as it sometimes happen, both parents can agree that the six head of cattle form part of *bohali*. But all these must be agreed upon by the respective parents.

- [19] Next called was *Tsekiso Moiloa* whose testimony was to the effect that after the deceased's abduction *Lephethesang Ramosebetsi* had been sent to the deceased's home and that upon his return *Lephethesang* reported that deceased's parents had agreed and that customary rites had to be performed. Though still alive, *Lephethesang Ramosebetsi* was not called on this crucial aspect. *Tsekiso Moiloa* says he was amongst the men who drove the animals to deceased's home at Matukeng. He says they were welcomed and were even given "*Mafielo*" and "*Likotlolo*", as symbols of acceptance.
- [20] It became clear that on the first occasion the animals were turned back because the necessary bewys were not produced and that the "*tlakana-tsooana*" described the cattle as "*bohali*". It is not clear upon what terms the animals remained with the applicants upon the second occasion.
- [21] On this crucial point, two stories are mutually destructive and before the *onus* resting upon the respondents is discharged, the court must be satisfied upon adequate grounds that the story of the respondents upon whom the *onus* rests is true and the other false³.
- [22] In the absence of evidence indicating probability that an agreement came about, and the fact that compensation cattle had not been paid for deceased's abduction, the Court cannot find on all probabilities

³ *BT Wholesalers vs Lesoma* – 1985-1990 LLR 276; *National Employers Mutual General Insurance Association vs Gany* – 1931 A.D. 187 at 189; See also *Selamolele v Makhado* 1988 (2) SA 372; *Ramakulukusha* – 1989 (2) SA 420.

that the respondent has succeeded in weighting the scales in his favour.⁴

[23] In rebuttal, the evidence of first applicant – deceased’s father – was to the effect deceased was abducted in 2007 and he demanded six head of cattle plus his daughter. He said *Tlhokomelo Moiloa* and not *Lephetesang Ramosebetsi* was sent to Matukeng to report about the deceased’s *chobeliso*.

He maintains that he never entered into any bohali agreement with the respondents. Indeed if such agreement had been reached, it could have been reduced to writing as is the common practice in Lesotho. If a *tlakana-tsooana* was written for the cattle, goats and a donkey. One could ask : what more about an agreement on bohali something so important in the Basotho custom and culture?

[24] *Boi Letuka* – first applicant father – confirmed that after the deceased had been abducted by first respondent and when Tlhokomelo arrived. he says he told Tlhokomelo thus “...*I want six head plus my child ...*” and that when the two cows, three goats and a donkey were brought on the second occasion, he accepted them upon the promise that the Moiloas would again come back to complete the compensation for *chobeliso*.

⁴ **Ramakulukusha** (supra)

- [25] Where *chobeliso* has taken place, payment of cattle even if described by the man's family in the "*tlakana-tsooana*" or in the bewys as being for bohali (*ho nyalla*), cannot give rise, in the absence to a clear agreement, that the cattle were being accepted as *bohali* cattle. The parents of a girl who has been abducted have all the right to refuse to accept the cattle as *bohali part-payment* and can insist on payment of six head of cattle as penalty for *chobeliso*.
- [26] Where a *chobeliso* has taken place the fact that the girl's parents accepted the cattle (less than six head) raises no inference that the cattle were being accepted as partment for bohali. It is for the man's family to convince the court that the cattle were being accepted as *bohali* cattle. There is no convincing evidence that an agreement on bohali as required by the *Laws of Lerotholi* was ever reached between the Letuka and Moiloa families. What is clear is that on the first occasion the animals were not accepted by the Letukas because the messengers only had a "*tlakana-tsooana*" and no bewys; on the second occasion the animals were accepted upon condition that their description was such that two more cows would be brought and *chobeliso* settled at once. I fail to understand why the messengers having been given food, beer, "*mafielo le likotlolo*" that this important agreement was never reduced to writing as a customary practice of the Basotho – this could even have been done well after the second visit.
- [27] The *onus* is clearly upon the respondents to have presented a clear evidence that the two families reached an agreement that *chobeliso* cattle be "converted" so to speak into *bohali*.

In my view the fact that prior to the eruption of the volatile personal troubles between the 1st respondent and deceased, the two lived together even begetting two children does not establish a customary marriage by repute.

[28] To “*bipisa*” is a Sesotho customary in ceremony in which a pregnant woman undergoes a ritual at her maiden home. The deceased’s father denied ever receiving deceased in his family or permitting her to be smeared with ochre and to don a leather skirt. The couple could have been heavily in love at the time – negotiations over *chobeliso* were still afoot and the Letuka’s had all the right to insist on *chobeliso* cattle; and it cannot be said the girl’s family is unreasonable or cheeky in refusing to accept the cattle as *bohali* even when their daughter and the man continue to cohabit openly. Indeed even the boy’s parents may refuse to enter into *bohali* negotiations if they have other plans for their boy; they may elect to pay *chobeliso* penalty and even seduction cattle and cause the girl to be returned to her maiden home even against wishes of their son.

[29] A Sesotho customary marriage is a process that can be concluded in a day or may extend over a period if *chobeliso* or seduction precede the payment of *bohali* cattle – one cow can constitute partpayment over and above *chobeliso* and seduction cattle and if a child has been born, its being “married” along with the mother or remaining at its mother’s maiden home may be a thorny issue for negotiation.

[30] If the two cattle, four goats and a donkey were to be regarded as bohali, both parties (being Bafokeng and Bakuena knew what to do) did not do what had to be done. The Court cannot impute an agreement between the families (who knew each other well) in the face of very antagonistic attitude of the applicants; and whether an agreement exist is principally a question of fact.

[31] **Mr Maqutu** former Judge of this Court, discusses “**chobeliso**” concept in his book “**Contemporary Family Law of Lesotho**” (1992) (NUL) – p.78⁵ and states correctly that *chobeliso* is a delict under Sesotho customary law for which damages of six head of cattle are payable before any negotiation for bohali can begin. Chobeliso in my view does not constitute a marriage

[32] Where after a *chobeliso*, cattle are accepted as *bohali* by the girl’s parents no marriage exists as **Maqutu** states:

*“In these irregular marriages such as **chobeliso**, those families with cattle could break social rules, pay the fine of six head and then proceed to marry the woman who had been abducted.”*

The fact that only two head of cattle, four goats and two donkeys were paid could indicate that the respondents had no cattle to offer either for *chobeliso* and for bohali!

⁵ See also **Rev Pascalis Mokhethe** – The Irregular Marital Unions

[33] At page 50-51 of his Book (supra) **Maqutu** says:-

*“Cohabitation validates an irregular marriage as chobeliso. **Chobeliso** is a marriage whereby the parties elope or the girl is abducted. In this form consummation of the marriage comes first, then the boys parents are forced to accept the girls and slaughter the sheep of acceptance, koae. The girl’s parents are then informed they also are forced to accept the fiat accomplice of marriage. Only after this do the parents enter into a bohali cattle agreement. ...**chobeliso** is a recognized but an irregular form of marriage. See generally section 34 of the Laws of Lerotholi; **Ramaisa v Mphulenyane** 1977 LLR 138; **Molemo Majara v Mamabela Maja** – CIV/APN/138/89 C of A CIV No.24/25 of 1989.”*

[34] In my view, it is a grave misconception to recognize *chobeliso* as a marriage at all – in fact, it is a delict. The abducted girl may in some cases be returned to her maiden home if her parents elect not to go into *bohali* negotiations. Take, for example, an abduction of a girl who is already engaged and betrothed to someone else?

[35] **Mr Mashaile** for the respondents relied mainly upon the Court of Appeal decision of *Ramootsi* for his submission that payment of bohali was not a *sine qua non* to a valid customary law marriage. He submitted that acceptance of the animals on the second occasion, *bipiso* and other factors such as cohabitation for about three years all point towards a customary law marriage. In rebuttal, **Mr Potomane**

stressed the absence of evidence indicating agreement of *bohali* and contended that the words “*ho nyalla*” in the “*tlakana-tsooana*” merely constituted a mere offer to pay *bohali*. This court is of the view that the fact that where *chobeliso* had taken place, payment of cattle cannot constitute *bohali* part payment in the absence of an agreement to that effect. Instead of an agreement, the stories to that of the applicants and of the respondents are mutually destructive and there is no redeeming factor to weigh the probabilities in favour of respondent upon whom the *onus* lay to establish existence of a customary law marriage. If at all it was found necessary to obtain a written “*tlakana-tsooana*,” it was all the more important to write down an agreement that despite *chobeliso*, the animals were being received as a part-payment of *bohali*. No presumption of law or fact operates in favour of respondent in this regard. Had there been no *chobeliso* this court would have had no hesitation at all but declare the existence of a customary law marriage.

- [36] In my view although *chobeliso* precedes and precipitates a lawful customary marriage, **chobeliso** itself is not a marriage – in fact, it is a delict; and if the abducted girl dies or her boyfriend dies after **chobeliso** but before conclusion or agreement between their respective families regarding *bohali* the girl’s parents can successfully claim her body for burial.

Conclusion

[37] In this case, it is not in dispute that a “*chobeliso*” occurred in December 2007 and that under Sesotho custom the respondents had a duty to pay a compensation of six head of cattle before *bohali* could be negotiated.

A primary *onus* rested squarely upon the respondents to convince the court that the animals were accepted as *bohali* and not as compensation for *chobeliso*.

[38] In *casu* there is no satisfactory evidence, that there existed an agreement to the marriage between the two families and that the animals were being accepted as part-payment of *bohali* and not for **chobeliso** – there is no written not in this.

[39] In the circumstances, I find that no valid customary marriage existed between the first respondent and the deceased.

Order: *The rule nisi is confirmed as follows:-*

(a) The fourth respondent is directed to release the corpse of Maleoanika Malillo Letuka to the first and second applicants for burial at Matukeng, Leribe.

(b) Costs to Applicants.

S.N. PEETE

JUDGE

For Applicant: **Mr Potomane**

For Respondents: **Mr Mashaile**