CIV/APN/185/2011

IN THE HIGH COURT OF LESOTHO

In the matter between:-

'MANTHABISENG MARETLANE APPLICANT

AND

TŠELISO MORRIS NTŠASA 1ST RESPONDENT
MKM MORTUARY 2ND RESPONDENT

JUDGMENT

CORAM : HON. MR JUSTICE S.N. PEETE

DATE : 4TH MARCH 2011

Summary

***Burial** – Customary marriage – payment of money as bohali where a girl has been impregnated (seduced) twice. A purported written agreement soon repudiated and rescinded by the man's family on same day – Res Gestae and Contemporaneity. Onus to establish existence of marriage on respondent for him to have a right to bury the deceased.*

***Where** a man impregnates an unmarried woman twice, a later payment of money is made purportedly towards marriage and a written agreement is soon repudiated and rescinded by the man's family, no*

customary marriage can be deemed to exist and the man has no right to bury the woman upon her death.

***In cases** of burial, the court has a moral and sacred duty towards the dead. A man must establish a **clear right** emanating from existence of a lawful marriage and that right is not absolute.*

***Obiter**: Issues of **res gestae** and **contemporaneity** of repudiation and rescission discussed in deciding the existence or otherwise of an agreement of a customary marriage. Absence of **consensus ad idem** also discussesd.*

PEETE J.:

[1] Very late in the evening of the 4th March 2011 at about 7.30 pm, I gave an ***ex tempore*** judgment in applicant's favour to the effect that she be entitled to bury the corpse of her daughter, whom the first respondent was claiming to be married to her customarily in 1993. I indicated that my written reasons would follow soon. The following are these my reasons:-

[2] Urgent as the matter was – and the body lying in the MKM Funeral Services morgue since March 2011– I directed – with consent of both counsel – that the matter be heard without any answering affidavit from respondent provided the respondent gave formal evidence *viva voce*. The Court had also directed that the respondent bore the primary *onus* to establish the existence of a customary marriage between himself and the deceased, whose corpse he sought be allowed to bury.

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[3] In her founding affidavit to a notice of motion filed on 7th April 2011 the applicant had sought an order of court couched thus:-

"1. Rules pertaining to the period and mode of service be dispensed with on account of urgency.

2. Rule Nisi be issued and be returnable on .....of April 2011 at 9.30am that being the time detainable by this Court, calling upon the Respondents to show cause why;

(a) First Respondent shall not be interdicted from interfering with the burial of the late Matšeliso Maretlane except by process of Law.

(b) Applicant shall not be ordered to bury the deceased Matšeliso Lucilla Maretlane at Qoaling Ha Letlatsa in accordance with the request of the deceased during her life time.

(c) Applicant shall not be declared Lucilla Maretlane regard being taken that she was the one pointed by the deceased.

(d) First Respondent shall not be stopped from uttering threats to the family of Maretlane.

(e) Second Respondent shall not be interdicted from handing over the body of the late Matšeliso Lucilla Maretlane to Ntšasa family pending the outcome of this application.

(f) Any other alternative relief."

[4] On very same day I ordered that a rule nisi issue returnable on the following day – 8th April 2011. This interim order was couched thus:-

"*1. Rules pertaining to periods and mode of service are dispensed on account of urgency.*

2. Rule Nisi is herein granted and is returnable on the 8th day of April at 10.30 am. when 1st Respondent is expected to appear before this Court on the 8th day of April, 2011 at 10.30 am.

Calling upon the respondents to show cause why:-

(a) First Respondent shall not be interdicted from interfering with the burial of the late Matseliso Maretlane except by process of Law.

(b) Applicant shall not be ordered to bury the deceased Matseliso Lucilla Maretlane at Qoaling Ha Letlatsa in accordance with the request of the deceased during her life time.

(c) Applicant shall not not be declared the rightful person to bury the remains of the late Matseliso Lucilla Maretlane regard being taken that she was the one pointed by the deceased.

(d) First Respondent shall not be stopped from uttering threats to the family of Maretlane.

(e) Second Respondent shall not be interdicted from handing over the body of the late Matseliso Lucilla Maretlane to Ntsasa family pending the outcome of the application.

FURTHER TAKE NOTICE THAT PRAYERS 1, and 2 (e) to operate with immediate effect as an interdict."

[5] In her affidavit, the applicant informed court that she was the biological mother of the deceased *Matšeliso Lucilla Maretlane* (born in 1962)

[6] She went further to state that in 1986 Lucilla was impregnated by the respondent – whom she described as of a very violent in nature and that respondent again impregnated Lucilla in 1991.

[7] She says that on the 3rd April 1993 the Ntšasa family brought some M3,000; and a letter (document) was subsequently Fairly translated the letter reads:-

"TN1"

"*Litumellano tsa lenyalo pakeng tsa malapa a latelang:*

Lelapa la 'M'e 'Manthabiseng Maretlane le Lelapa la Ntate Sechaba Ntšasa ka bana ba bona e leng:- Matšeliso Maretlane le Tšeliso Ntšasa. Lelapa la Maretlane le amohetse chelete e likete tse tharo (3) e bopang likhomo tse peli (2) ea boraro ha e eea fella.

Ba neng ba le teng morerong ona ke ba latelang:-

Ka ha Maretlane:-

1. Tahlo Shale
2. 'Manthabiseng Maretlane
3. Thomas L. Manyeli

Ka ha Ntšasa:-

1. Sechaba Ntšasa
2. Lebona Ntšasa
3. Motlatsi Nthonyana"

Fairly translated it reads:-

Agreement on marriage between the following families.

Family of 'Manthabiseng Maretlane and family of Sechaba Ntsasa about the marriage of their children Matseliso Maretlane and Tseliso Ntsasa.

The family of Maretlane has received an amount of money of three thousand maloti (M3,000) which constitutes two head of cattle – the third cow is not complete.

Present at this meeting were the following:-

1. *Tahlo Shale*
2. *'Manthabiseng Maretlane*
3. *Thomas L. Manyeli*

On Ntsasa's side were

1. *Sechaba Ntšasa*
2. *Lebona Ntšasa*
3. *Motlatsi Nthonyana"*

The letter is date stamped by acting Chief of Qoaling on 6th April 1993.

[8] In her affidavit, applicant states at para 14:-

"The Ntšasa family insisted that the M3,000 and the two children while I insisted that it was part-payment of seduction I was disappointed that they had not written what we have agreed upon.

-15-

They demanded transfer of the late Matšeliso to Ntšasa family and I refused.

-16-

Ntšasa family demanded the return of M3,000 and I refused because the amount was too little to meet the seduction compensation.

-17-

As a result of the said misunderstanding at the time the so called Bohali was contracted the First Respondent lodged a case at Ha Matala Local Court demanding the delivery of the late Matšeliso to Ntšasa family CC81/93.

-18-

First Respondent lost the case on the grounds that Matšeliso was not his wife.

-19-

He pursued the case up to the High Court of Lesotho and he lost in two Applications namely CIV/APN/472/93 and CIV/APN/10/94.

-20-

Thereafter he violently kidnapped his two children from the Maretlane family to Ntsasa family.

-21-

The mother of the two boys being concerned about the safety of her children had to follow them and stayed with First Respondent for the sake of safety of her children.

-22-

He impregnated her again and another baby was born by the name of Thabiso at the place of First Respondent.

[9] She went on to say that upon her death on 28th March 2011, the deceased had stated that she – applicant – being her mother should bury her if she died. When she died at Kroonstad in the Free State she

had also given instructions that even the insurance monies of respondent should not be used for her burial and that respondent could spend it as he pleased after all it was his money.

[10] The respondent gave evidence to discharge the *onus* that rested on him. He did not deny having impregnated the deceased twice but sought to rely on the document *TNI*. Noteworthy is the stark difference between the signing of "'Manthabiseng Maretlane" in the *TN1* and in her founding affidavit. The court is not convinced she signed *TN1* – her name was written in the document.

[11] To the utter surprise of the court another document was presented to the court. It's fair translation reads:-

"Ha Pshatlella,
P.O. Box 15

03/04/1993

Mrs 'Manthabiseng,

As children of Ntšasa, we regret that you do not agree that we marry your daughter so that we rectify past wrongs we have caused you.

*In Sesotho custom, bohali can be constituted by two cattle "**Monyala – ka peli o nyala oa hae**" – but these words are not always true. The balance which you demand before marriage seems too heavy, so much so that we feel you are disappointing us.*

Things being what they are, we want you to return our money which we having given you because our intention from the beginning was not to support them (children) or to pay for seduction. We were

intending to reach an agreement between you over your daughter Matšeliso and our son Tšeliso. As soon as possible, we want our money to be returned so that we can bank (keep) it where it can earn interest.

We
Tšeliso Ntšasa
Sechaba Ntšasa

P.S. You will conver this to Ntate Moruti and Ntate Shale about the final decision of Ntšasa family I will appreciate your assistance to avoid further problems." (my underline)

[12] It is my considered view that where a party to a verbal orwritten agreement soon thereafter rescinds and repudiates[1] that agreement thereby discharging his obligation, there is a no agreement or contract enforceable under common law or under customary law. Contemporaneity of the repudiation goes to the root of the contract and vitiates it. To hold otherwise would be a grave injustice to hold the party bound by a repudiated agreement.

[13] Having been repudiated and rescinded on the very same day – the close connection of the repudiatory letter in time and being part of a same continuing transaction on the 3rd April 1993 is in fact inextricably bound by factors of time, place and circumstance of same fact in issue.[2]

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[1] **Hoffman and Zeffert** – *The South African Law of Evidence – 4th Ed page 313*.
[2] Ibid – page 156 **Phipson,** Evidence where he says – "*There are many incidents which though not strictly constituting a fact in issue may yet be regarded as forming part of it in the sense that they explain and tend to explain main act."*

[14] I firmly hold that it would be very wrong to enforce a non-existing agreement. There was no agreement and if any there was, it was soon repudiated and rescinded by the respondent himself. That the applicant refused to return the M3,000.00, she had a valid ground to hold on to the money because the deceased her daughter had twice been seduced by respondent and the applicant was at least entitled to damages for seduction of six cattle (first seduction) and three cattle (second seduction) before the bohali cattle could be negotiated upon. This is in accordance with the Laws of Lerotholi. I ordered that M3,000 be returned to respondent without in anyway absolving respondent from a claim for damages for two seductions.

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[15] Being a fully bred Mosotho judge, I have no good reason to disbelieve or doubt the evidence of the applicant (deceased's mother) as to the last wishes of the deceased before she passed away in Kroonstad in the Free State directing that after her death the applicant should bury her and that no insurance monies of respondent should be used towards her burial.

[16] As a Mosotho who respects the ancestral deity of the Basotho, I give those wishes full respect they deserve – no judge in Lesotho worth his salt would do otherwise. These last wishes were not made gratuitously and in vain.

[17] In concluding this judgment, I wish to express my utter discomfort at the monotonous frequency of applications bringing about an acrimonious and often venomous tug-of-wars over dead bodies in our mortuaries. **Cullinan C.J** (as he then was) once described these applications as *"bordering on the morbid, if not ghoulish ..."* It often fills one with repulsion and revulsion.

[18] I feel deeply that the court has a moral duty and inner discretion to exercise over and above whatever facts of the case may be. The revolting facts of the case of **Marinakhoe** vs **Mpakanyane**[3] are apposite. It was alleged in the founding affidavit that **Marinakhoe** *"...had quarreled 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 her children..."* No doubt, applicant was not awarded the corpse for him bury!

[19] In conclusion I hold that the effect of letter – dated same day on 3rd April 1993 – was to repudiate and annual whatever purported agreement had been reached. The contemporaneity of the purported agreement and its annulment can only indicate one thing – that there was not *consensus ad idem* as regard bohali and marriage. No meaningful and enforceable agreement at law was ever concluded – even if concluded under any pretext it was soon repudiated by the respondent himself.

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[3] *1997-1998 LLR 52* per **Lehohla J.** (as he then was)

[20] I therefore hold that there was no agreement on bohali concluded on the 3rd April 1993 and hence no customary marriage ever came into existence.

[21] As a result, I find that respondent has failed to discharge the *onus* that rested on him – The applicant prayers are therefore granted.

[22] I also ordered that the M3,000 be returned to respondent. I make no order as to costs.

S.N. PEETE
JUDGE

For Applicant : **Mr Lesuthu**
For Respondent : **Mr Potsane**