

IN THE HIGH COURT OF LESOTHO

CIV/APN/135/2010

In the matter between;

'MANEO MOREMOHOLO

APPLICANT

AND

**'MANTSUPI FLORY MOREMOHOLO
KOKOLIA MOREMOHOLO
MASTER OF THE HIGH COURT
COMMISSIONER OF POLICE
ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT**

JUDGMENT

**Coram : Hon. K.J. Mafoso-Guni
Date of Hearing : 21 February 2012
Date of Judgment : 5th March 2012**

Summary

The applicant claims death benefits of the deceased on the grounds that she has a right to be declared the wife and heiress because there was a customary law marriage between her and the deceased - The civil marriage between the deceased and his wife who is the respondent in the application should be declared null and void.

Customary law marriage – what constitutes – elements

- (1) agreement between the parties to be married*
- (2) Agreement of their parents on “bohali”*
- (3) Payment of “bohali”*

ANNOTATIONS

CITED CASES

1. **Mokhothu v Mayaapelo 1976 LLR - 281**
2. **Theresia Makopano Leoma v Makhang Leoma CIV/APN/465/99**
3. **Setlogelo v Setlogelo 1914 AD 221 at 227**
4. **Machake v Machake and Another CIV/APN/230/99**

BOOKS: **Contemporary Family Law of Lesotho: WCM MAQUTU**
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ACTS: **Laws of Lerotholi Part II**

PARTICULARS OF THE PARTIES

- [1] The Applicant is MANEO MOREMOHOLO, a female adult of HA LEQELE in the MASERU district.

The 1st Respondent is MANTSUPI FLORY MOREMOHOLO commonly know as 'MAMOREMOHOLO MOREMOHOLO a female adult widow of BELA-BELA HA MATOOANE in the district of BEREA.

The 2nd Respondent is KOKOLIA MOREMOHOLO a male Mosotho adult residing at HA RATJOMOSE BARRACKS in MASERU City in the district of MASERU.

The 3rd Respondent is the MASTER OF THE HIGH COURT. The 4th Respondent is the Commissioner of Police. The 5th Respondent is the Attorney General. These are functionaries sited in their official capacities as

such. Their interest in the matter is nominal. They have filed no papers. This being the indication of their readiness to abide by this court's decision.

FACTS

- [2] The deceased in this matter is Matooane ESAIA MOREMOHOLO. He died on the 3rd February 2009. There are two wives claiming to have been married to the deceased MATOOANE ESAIA MOREMOHOLO. The deceased was a police officer during his lifetime. He worked at THABA-TSEKA and BOKONG POLICE STATIONS. He allegedly married Maneo Moremoholo – present applicant in 1983 by customary rites according to Maneo.

He apparently married again by civil rites and in community of property Florina Mantsupi Moremoholo on the 2nd December 2006. Before marriage she was Florina Mantsupi Mathabela. Marriage certificate evidencing the said marriage is attached marked Annexure C . On the 26th January 2007 – deceased Matooane EISAIA Moremoholo made an application for registration of his wife with whom he has one child namely, Moremoholo Moremoholo – whose birth certificate – Annexure B is attached to the Answering Affidavit. His family was introduced to his employer by him for the purpose of being known thereat in case any untimely and unplanned event such as death, occurs. Those are his next of kin and beneficiaries. Before 2006 there was nothing in the Police Force – that could indicate that he was a married man. Presently there is still nothing there to show that he was ever married to this applicant.

It is him who took steps to show in police records that he is now a married man.

Why did he not give the information of his marital status to the Police force in 1983 regarding the alleged marriage by custom to this applicant? He is now silent permanently. He cannot answer this question. But the surrounding circumstances of this case provide an answer. He was not married. He did not regard himself as a married man. In 2006 when he married Florina Mantsope Mathabele, he presented himself as a bachelor. This is written on the marriage certificate. What could have happened to his Sesotho Customary law marriage? If there was an existing marriage it should have been an impediment to the subsequent civil marriage. No valid marriage contract by custom or civil rites, can be contracted during the subsistence of a valid civil or customary marriage during the subsistence of a valid marriage.

MOKHOTHU V MANYAAPELO 1976 LLR 281

**THERESIA MAKOPANO LEOMA V MAKHANG LEOMA
CIV/APN/465/99**

If that marriage by civil rite was solemnised without any objection by the person claiming to have been previously married to and still married at that time to Isaiah Matooane Moremoholo that marriage by civil rites is a valid marriage. It cannot be declared unlawful as requested by this applicant in prayer (c) on the Notice of Motion. The applicant failed in her previous application - [CIV/APN/100/2009] to be declared the sole wife and heir. She failed to prove before that court that she was legally married to Matooane Moremoholo. If the deceased Isaiah Matooane Moremoholo presented

himself as a bachelor when he married Florina Mantsupi Mathabela by civil rites on the 2/12/2006, he was competent to marry. It is his marriage by civil rites that is legal. It is his wife by civil rites marriage that is the sole wife and heir.

This applicant therefore cannot be declared the widow of Matooane Moremoholo. This applicant cannot be Matooane Moremoholo's widow and heiress.

BACKGROUND HISTORY OF THE CASE

[3] This applicant filed with this court an ex-parte application on the 17th March 2010. She moved this application on the same date of filing with this court. In the said application the applicant sought and obtained on the same day the rule *Nisi* issued out in the following terms:-

“KINDLY TAKE NOTICE THAT an application will be made to the above honourable Court on behalf of applicant on the 17th day of March 2010 at 9.30 a.m. or so soon thereafter as the matter may conveniently be heard for an order in the following terms:

- 1. Dispensing with the normal periods and forms on account of urgency of this matter.*
- 2. Rule Nisi be issued returnable on the date and time to be determined by this Honourable Court calling upon the respondents to show cause why:-*
 - (a) The 1st and 2nd respondents may not be interdicted from distributing the death gratuity benefits of the Late Ntsu*

Matooane Moremoholo pending the determination of this matter.

*(b) The applicant be declared as the lawful widow of the late **Matooane Moremoholo** and heiress to his estate.*

*(c) That 1st respondent's marriage to the late **Matooane Moremoholo** be declared unlawful.*

(d) Costs of this application

(e) Further and/or alternative relief.

***AND THAT** prayer 1 and 2 (a) to operate with immediate effect as interim relief pending the determination of this matter.”*

[4] The interim court order so obtained against the respondents was made returnable on the 9th April 2010. According to the return of service, it appears the deputy sheriff served on the 16th March 2010, only the last three respondents i.e. 3rd respondent – Master of the High Court, 4th respondent – Commissioner of Police and the 5th respondent – The Attorney General. None of them filed any Answering Affidavits. None of them filed a Notice of Intention to oppose the said application. This is a clear indication that they have no or very little interest if at all in this matter. Their attitudes towards these proceedings seem to show their readiness to accept whatever the decision this court makes.

[5] The Notice of INTENTION TO OPPOSE was filed on behalf of the 1st and 2nd Respondents on the 8th April 2010. The Answering Affidavit was filed on the 27th May 2010. It is not easily noticeable from the papers filed of record, when and how these two respondents were served with the interim court order obtained together with the Notice of this application. Be that it may.

[6] There are a number of Legal questions raised on behalf of the respondents. If I may at this stage, I should point out that this matter is heard by this court for the second time. This applicant came to this court urgently and by means of an ex-parte application – in CIV/APN/100/2009. In this application MANEO had sued four respondents, namely NTLAMA MOREMOHOLO as the 1st respondent, MKM BURIAL Society as the 2nd respondent, Commissioner of Police and Attorney General as the 3rd and 4th respondents respectively. This present applicant sought and obtained an interim court order in the following terms:-

1. *Dispensing with rules and modes of service of this Honourable Court due to the urgency of this matter.*
2. *Rule nisi be and is hereby issued returnable on the date and time to be determined by this Honourable Court calling upon the Respondents to show cause (if any) why:-*
 - (a) *Declaring as the sole wife and heir of the deceased Matooane Moremoholo and therefore having the burial rights.*
 - (b) *Declaring the deceased's second wife whose further particulars are unknown to me be declared null and void ab initio.*
 - (c) *2nd Respondent shall not be ordered to release the corpse of Matooane Moremoholo to anybody pending finalization of this application.*
 - (d) *3rd Respondent shall not be ordered to pay deceased Matooane Moremoholo terminal benefits to applicant.*
 - (e) *1st Respondent shall not be ordered to release the mortuary documents to applicant.*
 - (f) *Deceased Matooane Moremoholo shall not be buried at his matrimonial home at Thaba-Tseka.*

3. *Cost of suit*
4. *Further and/or alternative relief.*

[7] In that previous application, the respondents therein raised points in *limine* before opposing and disputing the matter on the merits. Because of the urgency of the matter and the confined space of time within which the decision was required to be made in order to dispose off the case, the matter was decided and the application dismissed on those points in *limine* only without making the decision on the merits. Once again the points in *limine* have been raised by the respondents in this present application. The points of law so raised are more or less similar to questions of law as in that previous application. The prayers sought by this applicant are also nearly the same as in the previous application. The facts on which this applicant relies are, with a few variations and additions here and there the same as in the previous application. The persistence of this particular litigant to keep coming back to the same court on the same matter may be understood as a demand or a cry for help to have the matter decided on its merits as well. Because at the first instance this matter came as an urgent matter requesting amongst other prayers, the declaration of a right to bury the deceased who at that time was waiting at the mortuary for his burial, there was real urgency to dispose off the matter quickly. Amongst the prayers in that previous application which was dismissed by Hon Mrs Justice A M Hlajoane were:

“(a) Declaring the applicant the sole wife and heir.

(b) Declaring the deceased’s second wife’s marriage null and void ab initio”

These two prayers are repeated as prayers (b) and (c) in the present application. This court has already decided these questions in that previous application referred to above - [CIV/APN/100/2009].

Points of Law raised in the present application at paragraph 2 of the ANSWERING AFFIDAVIT are:-

2.1 Hearsay Evidence

2.2 Urgency

2.3 Impossibility of Performance

2.4 *Stipulatio Alteri*

2.5 Requirement of Interdict

2.6 No-Disclosure of Material Facts and Dispute of Facts

The legal questions that were well take and succinctly decided by the Hon. Mrs Justice A.M. Hlajoane on the 14th March 2009, will not be dealt with again in this judgment. Those points of law were: urgency and dispute of facts. Impossibility of performance as far as concerns 2(a) on the Notice of Motion, an appropriate concession has been made by the applicant – that is to say she accepts that 1st and 2nd respondents do not have in their possession any portion of the estate of the late Matooane Moremoholo for distribution. The point of law raised at Paragraph 2.1 merely skirts at the periphery of the matter, without touching at the heart. The defect complained of can be readily remedied without undue delay and/or prejudice. Therefore it is not a well taken point in *limine*.

[8] Because the deceased died on duty as a police officer, this applicant wants from his employer, the deceased's terminal or death benefits. The 1st and 2nd respondents opposed the claim of right made by the applicant on the death benefits of the deceased on two grounds: Firstly, the deceased is legally married to the 1st respondent who should legally be his heiress. Secondly the deceased has a son whom he introduced to his employer. His first born

child is his heir. Thirdly, immediately after his civil marriage to the 1st respondent, the deceased introduced 1st respondent as his wife and beneficiary. It is most probable that when the deceased introduced his wife and child to his employer, he wanted them to be known by his employer so that when the question of who is his heir, it can be determined with regard to those he has himself introduced to his employer. The applicant is unknown to the deceased's employers. She failed to prove her claim of marriage to the deceased in CIV/APN/100/2009. There is no evidence of any right of claim of the estate of the deceased or portion thereof, by this applicant.

It is appropriate that I deal immediately with the point in *limine* at paragraph 2.6 [Non-Disclosure of Material Facts].

The applicant has not disclosed that she failed in CIV/APN/100/2009. In that application this applicant failed to prove that she was married to the deceased MATOOANE MOREMOHOLO by Sesotho Customary rites. She did not appeal against that judgment. She made a fresh application as if nothing had happened before. The court in CIV/APN/100/2009 held that she failed to prove her customary marriage to the deceased. She cannot after that Judgment in this application continue to call herself married to Matooane Moremoholo by customary rites, until and unless that decision has been set aside. It was therefore very material that she discloses before this court that she has already failed to prove her marriage by custom to Matooane Moremoholo. This point of non-disclosure of material facts has been well raised and must succeed.

The last point of law that I deal with is the requirements of an interdict. There are three essential elements that must be established in order to succeed and obtain a final interdict. The applicant in this matter is seeking a final interdict – restraining the 1st and 2nd respondents from distributing the death gratuity and death benefits of the late Ntsu Matooane Moremoholo.

In order to succeed to obtain this final interdict as she requests, the applicant must satisfy the following essential elements:-

- (1) That she has a clear prima facie right over the benefits which she claims
- (2) That there is actual or reasonable apprehension of injury or harm that she may suffer.
- (3) That there is no alternative remedy which may give her redress.

SETLOGELO V SETLOGELO 1914 AD 221 AT 227. The applicant having failed to prove that she was legally married to the deceased in CIV/APN/100/2009, well knew that she has no right on the deceased's estate. She has produced no evidence before this court to prove that she is entitled to the deceased's death benefits.

ON THE MERITS OF THIS APPLICATION

APPLICANT'S CASE

- [9] It is this applicant's case that she is the legal wife of the late Matooane Moremoholo whom she married by customary rites in 1983. Matooane died on the 3rd February 2009.

The parties' customary law marriage subsisted until then according to the applicants claim.

The deceased Matooane Moremoholo joined the police force in 1990.

He was stationed at THABA TSEKA Police Station.

They have two adult children Tšepo and Libuseng Moremoholo. It is not disclosed when and where they were born.

Tšepo is a deponent of the supporting Affidavit in which he claims he lived with the deceased from birth till 1999 when he left on transfer to Bokong.

It is not impossible that the applicant got married in 1983 as she alleges. But it is improbable that she married Matooane Esaiiah Moremoholo. In 1983 as appears on his educational certificates Matooane Esaiiah Moremoholo was still at school. He passed primary school examination in order to proceed to the secondary school in the same year when this applicant claims she married him. In 1983 he was primary school pupil. He therefore should have proceeded to LERIBE HIGH SCHOOL for his junior certificate. He was a pupil at the school and resident thereat. Could he have been already a policeman and married to the applicant at this time? It is impossible. He wrote and passed Junior Certificate examination in 1986, there at LERIBE HIGH SCHOOL. He had not yet finished with his school. He was to continue for farther more years still at school. He remained at LERIBE HIGH SCHOOL until November 1988 when he sat for examination for UNIVERSITY OF CAMBRIDGE, LOCAL EXAMINATIONS SYNDICATE INTERNATIONAL EXAMINATIONS for GENERAL CERTIFICATE OF EDUCATION.

This applicant has not been given an opportunity to comment on the evidence that this deceased was in fact still a pupil at primary school at the time she claims he married her. It is possible that the applicant and her children met him for the first time at THABA-TSEKA POLICE STATION as the police officer. There is nowhere in their papers where they show this court that they lived either in Bela-Bela or Leribe High School with him during his schooling thereat. In their affidavits they do not talk of meeting or living with him else where except THABA TSEKA.

In these circumstances, it cannot be correct that Eisaiah Matooane Moremoholo married this applicant in 1983. There is no one in Moremoholo's family who supports this alleged Sesotho Customary law marriage of their son to this applicant or anyone in 1983. She does not disclose the dates of birth of the children she claim to have been born of that alleged customary law marriage. Is it possible that they were not fathered by the deceased? Even the one – Tšepo Moremoholo who claims he had known the deceased since his birth he does not venture to mention where and when he was born. They – [those alleged children] appear to be unknown to the family of the deceased – Moremoholos, despite having adopted their name.

CUSTOMARY LAW MARRIAGE

Essentials of a customary law marriage. There are four essential elements which must be established in order to prove the existence of customary law marriage:

- These are: (1) Agreement between parties to be married
(2) Agreement between Parents

- (3) Agreement on the amount of *bohali*
- (4) Handing over of *bohali* or part thereof

(1) LAWS OF LEROTHOLI – PART II.

**(2) CONTEMPORARY FAMILY LAW OF LESOTHO WCM MAQUTU
at page 76**

(3) MACHAKE V MACHAKE and Another CIV/APN/230/99

(4) THERESIA LEOMA V MAKHANG LEOMA CIV/APN/465/99

[10] There is no evidence of agreement between the parties to be married. There is no evidence that the families of the groom and the bride ever agreed that their children should be married. There is a supporting affidavit by MATSOKOLO MOFOLO, that this applicant is her daughter who was married at Bela-Bela Ha Matooane in 1983. Eight (8) herd of cattle were tendered for her daughter's hand in marriage [perhaps as full *bohali*, because there is no evidence to show the court whether or not this was part payment or full payment]. There is no evidence of discussion and agreement between the two families as regards the amount of total *bohali* that was to be paid.

There is no allegation and or proof that the parties had entered into an irregular customary law marriage where there were no prior arrangements and/or formalities such as the giving of *koae* etc when the bride arrives for the first time at bridegroom's place. This practice takes place at the husband's place where the parties will meet and cohabit for the first time. There is no evidence that this applicant was ever taken or escorted to HA MATOOANE BELA-BELA and given "*koae*" thereat.

There is no evidence that after Josephine 'Mantlama Moremoholo and Libe Moremoholo had taken the *bohali* cattle to Thaba-Tseka which should be the place of residence of the girl – [this applicant] there was subsequently “*tlhabiso*”. That is to say the acceptance of the “*bohali*”.

On the facts alleged there is not sufficient evidence to establish the essential requirements of the Sesotho customary law marriage.

On the merits of this case there is no customary law marriage. This is a final judgment. This applicant should not come back to this court.

K.J. GUNI
JUDGE

For Applicant : **Mr Rasekoai**
For 1st & 2nd Respondents : **Mr Makholela**