

**CIV/APN/397/2012**

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**‘MATEMOSO MOKHOTHU**

**Applicant**

**vs**

**JOYCE ‘MAMOELETSI MANYAAPELO**

**1<sup>st</sup> Respondent**

**MOEKETSI MOKHOTHU**

**2<sup>nd</sup> Respondent**

**MKM BURIAL SOCIETY**

**3<sup>rd</sup> Respondent**

**JUDGMENT**

**Coram:** **Hon. Hlajoane J**

**Dates of Hearing:** **20<sup>th</sup> August, 2012 and 21<sup>st</sup> August, 2012.**

**Date of Judgment:** **24<sup>th</sup> August, 2012.**

**Summary**

*Applicant asking the Court to declare her as the rightful person to bury her husband – Applicant and deceased having been living in separation*

*– Second Respondent as the son of the deceased, but born out of wedlock also claiming the right to bury based on deceased’s verbal instruction – Meaning of making ‘known’ of such instructions. Application succeeds and no order for costs.*

[1] The prayers as set out in the Notice of Motion were the following:

- (1) Rules of Court on modes and service be dispensed with on account of the urgency of the matter.
- (2) Rule nisi be issued calling upon respondents to show cause if any why:
  - (a) Applicant shall not be declared as the rightful person to bury the deceased Moeketsi Bartholomew Mokhothu.
  - (b) First and second respondents shall not be ordered to *omne ante* release to applicant, third respondent’s (MKM) mortuary papers pertaining to the deceased Moeketsi B. Mokhothu.
- © Pending the outcome of this application first and second respondents shall not be restrained from removing the body of the deceased Moeketsi B. Mokhothu from MKM mortuary or any other mortuary whereat the deceased may be lying.

- (d) Pending the outcome of this application, first and second respondents should not be restrained from burying the deceased Moeketsi B. Mokhothu.
- (e) First and second respondents shall not be ordered to *omne ante* vacate the home of Moeketsi B. Mokhothu and applicant situated at Upper Thamae.
- (f) First and second respondents shall not be ordered to restore *omne ante* to applicant the deceased Moeketsi B. Mokhothu's four (4) cameras and photographs.
- (g) First and second respondents shall not be ordered to restore *omne ante* to applicant the deceased Moeketsi B. Mokhothu's Bank Books, Passport, two cell phones and lease to the properties at Upper Thamae, Ha Hoohlo and Borokhoaneng.
- (h) Third respondent be ordered to release the body of the deceased Moeketsi B. Mokhothu to applicant.
- (i) Further and alternative release.

[2] There may have been many prayers sought to be granted by this Court, but as I see it the main issue for determination would remain as who has the right to bury the deceased Bartholomew Moeketsi Mokhothu, under the circumstances of this case.

- [3] There has been no dispute that applicant is the widow of the deceased Moeketsi B. Mokhothu who died on the 9<sup>th</sup> August, 2012.
- [4] Applicant and the deceased having been married by civil rites in 1980. During July in 2011 applicant had received divorce papers from the deceased Moeketsi B. Mokhothu. The divorce was contested and when applicant's husband died the divorce proceedings were still pending.
- [5] Applicant has not denied that she left the matrimonial home during 2008, so that when the deceased passed on, they were four years in separation, but yet not legally divorced.
- [6] Applicant has also attached to her papers a judgment by the Court of Appeal, **C of A (CIV) No.1 of 1976** which involved the deceased Moeketsi B. Mokhothu and the first respondent. The deceased had purported to marry the first respondent by custom during the subsistence of his marriage by civil rites to one Margaret Mamosheli Mokhothu.
- [7] It was when the relations between the deceased and first respondent soured that, the first respondent approached the Court to ask amongst other prayers, to declare their marriage null and void as it was contracted during the subsistence of a valid civil rites marriage.

- [8] The trial Court found for the first respondent and even decided that the children of that invalid marriage belonged to the first respondent. The first respondent was even ordered to cease using the Mokhothu surname. The second respondent is one of those children whom the decision of the Court showed was born out of wedlock.
- [9] But in these proceedings we are not so much concerned about whether or not 2<sup>nd</sup> respondent is the legitimate son of the deceased Moeketsi Mokhothu, but concerned mainly on who under the circumstances of this case, has the right to bury the deceased.
- [10] The second respondent has in his answering affidavit deposed to what could be taken as deceased's wishes. At paragraph 6.3.2 of the answering affidavit, second respondent intimated that in their conversation with the deceased Moeketsi Mokhothu, whom he referred to as his father, the deceased had asked him to take responsibility of burying him decently at Matholeng Mafeteng, where deceased said his parents and siblings are buried. Second respondent said he promised his father that he would do as he requested.
- [11] Both parties showed that where deceased has given directions as to his burial be it verbally or in writing, such have to be followed, unless the family for a good reason finds itself unable to comply;

this was said by **W.C.M. Maqutu** in his book<sup>1</sup>. It was also the decision by **Rampai AJ** in the case of **Ndlovu v Ramochela**<sup>2</sup>.

- [12] Applicant has not denied that the deceased Moeketsi declared he wanted to be buried at Matholeng, what she strenuously denied was that he asked to be buried by the second respondent.
- [13] Second respondent's counsel felt that this case is simply about his father having given him instructions to bury him. He argued it is not about legitimacy, inheritance or succession. He further submitted that applicant had unnecessarily burdened this application with irrelevant matters and dispute of facts which have no place in this application. That applicant came up with new matters in reply thus denying him the opportunity to respond to them.
- [14] On the other hand applicant has argued that the prayers in the founding affidavit called for dealing with issues of legitimacy, inheritance and succession. She also argued there could be no dispute of fact as applicant remains being the heir since their divorce proceedings were never finalized till Moeketsi's demise.
- [15] The second respondent in emphasizing his point about deceased's wishes showed that what he said has been confirmed in the

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<sup>1</sup> Contemporary Family Law p.297

<sup>2</sup> Case No.4144/2000 (unreported)

supporting affidavit of Lesoeu Mokhothu. To quote what Lesoeu has deposed to in his affidavit, I will only extract words from para 3 of the affidavit.

*“I confirm as true and correct the allegations of second respondent in as far as they relate to the Mokhothu family as I was present at my grandfather’s house after his death and we had been doing burial preparations with second respondent -----“.*

[16] The above line of argument was attacked by applicant’s counsel in that though the wishes of the deceased have to be respected, there still has to be proof that in fact those were the wishes of the deceased. There will be proof if the deceased’s words were made known not only by the person who is given the responsibility but other people who would assist where there is a dispute to confirm that such are the deceased’s wishes.

[17] Applicant’s counsel referred the Court to the book by **W.C.M. Maqutu**<sup>3</sup> where it was said the problem with wishes of the deceased would be proof. The reason being people in the absence of any proof would tend to allege what in fact the deceased never said, hence the need to have proof of such instructions.

[18] Visiting once again the supporting affidavit of Lesoeu Mokhothu, he has not said that he had personal knowledge that those were the

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<sup>3</sup> P.299

wishes of the deceased as alleged by second respondent. He merely said he was confirming as true and correct allegations of second respondent as he was present at deceased's place after his death. That would clearly be hearsay as he has no first hand knowledge, but only came to know about it after deceased's demise.

[19] Applicant's counsel referred to para 5.2 of second respondent's heads where counsel has stated the cardinal principle regarding the wishes of the deceased as was held in **Ndlovu v Ramochela** *supra*. The cardinal principle being that the known wishes of the deceased must be observed, respected and given effect to no matter how they are embodied or expressed.

[20] The above principle called for a debate on what should be the known wishes. Applicant's counsel in her argument even gave the dictionary meaning of the word 'known'. From Oxford Learner's Advanced Dictionary Page 658 the meaning of 'known' is given as;

*"Making sure that people are informed about something especially by getting someone else to tell them."*

[21] From Concise English Dictionary the meaning of known is,  
*"Publicly acknowledge to be, recognized, familiar or within the scope of knowledge."*

[22] Can it then in the circumstances of this case be said the deceased's wishes were made known? It has not been said the wishes were made known to the public, public in this case would include members of the Mokhothu family. The person who seeks to support the second respondent only came to know of such desires when they were already preparing for deceased's funeral.

[23] This brings us, after determining that it cannot be said the deceased left any instructions as to who has to bury him, to the issue of the heir. Applicant is the surviving spouse of the deceased and therefore entitled to bury her husband as their divorce was yet not finalized when her husband passed on.

[24] The application succeeds, but there will be no order for costs.

**A. M. HLAJOANE**  
**JUDGE**

For Applicant:           Mrs Kotelo

For Respondents:       Mr Ntlhoki