

IN THE HIGH COURT OF LESOTHO

CIV/APN/76/2013

In the matter between:

‘MATEBOHO ‘MABATHOANA

APPLICANT

And

MAKALO ‘MABATHOANA

1ST RESPONDENT

LESOTHO FUNERAL SERVICES MASERU

2ND RESPONDENT

JUDGMENT

Coram :Honourable Acting Justice E.F.M. Makara

Dates of Hearing :26 February, 2013

Date of Judgment :26 February, 2013

Summary

The widow or the male heir’s right and duty to bury – The limitations of the right – The application of the right and reason approach in determining the parameters of the right – The relevance of the deceased’s socio-cultural environment in the determinations.

CITED CASES

Ramaisa v Ramaisa CIV/APN/5/93 (unreported), Zuma v Zuma CIV/APN/60/88 (unreported), Ntloana & Ano vs Rafino LAC 2000 – 04, Manthabiseng Maretlane v Morris Ntšasa & Ano CIV/APN/185/2011 (Unreported), Lebohang Sello v Mamotlatsi Semamola & Ano CIV/APN/319/96

MAKARA A.J

[1] The applicant brought motion proceedings in which she sought for a *rule nisi* order directing the respondents in particular the 1st respondent to show cause (if any) why:

- (a) The period of notice and forms of service of process provided for by the Court Rules shall not be dispensed with on the grounds of the urgency of this Application.
- (b) The 1st Respondent or any one else acting in his authority shall not be restrained and interdicted forthwith from removing from the 2nd Respondent or its agents the body of the late HLALELE 'MABATHOANA pending the finalization of this application.
- (c) The 1st Respondent shall not be restrained and interdicted forthwith from burying or causing the burial of the remains of the late HLALELE 'MABATHOANA at HA MAKAFANE – Roma in the district of Maseru or at any other place of his choice pending the outcome of this application.
- (d) The 2nd Respondent shall not be restrained and interdicted from releasing to the 1st Respondent and/or his agents the body of the late HLALELE 'MABATHOANA pending the finalization of these proceedings.
- (e) The applicant shall not be declared the undisputed heiress to the late HLALELE 'MABATHOANA's estate.
- (f) An order shall not be made declaring that the applicant's wishes as to the date and place of the burial of late HLALELE 'MABATHOANA should prevail over the wishes of the 1st Respondent or any other member of the 'MABATHOANA family in the event of disagreement over this matter.
- (g) The 2nd Respondent shall not be directed to release the body of the late HLALELE 'MABATHOANA to the applicant or to her duly authorized agents and to nobody else.
- (h) The 1st Respondent shall not be directed to pay costs of this application only in the event of opposing same.
- (i) The applicant shall not be granted such further and/or alternative relief this Honourable Court shall deem fit, just and proper.

[2] She concluded her application by praying that prayers 1 (a)(b)(c) and (d) should operate with immediate effect as an interim relief.

[3] The court having perused the papers and considered the grounds advanced by Mr. Fosa in motivating the application, ruled that the respondents should have been served with the application before the applicant rushed to court. It accordingly directed that they be served before any one of the merits related prayers could be considered.

[4] Notwithstanding the expressed reservation by the court regarding the manner in which it had been approached, it nevertheless, granted the prayer 1 (a) and rendered it to operate with immediate effect. The return date for the respondents to file their counter papers, if any, was scheduled for the 27th February 2013.

[5] The 1st respondent then filed his intention to oppose on the 22nd February 2013. He, subsequently, anticipated the return date by filing his notice of anticipation and the answering affidavit. He then declared his readiness to argue the matter on the 25th February 2013 at 15:30 hrs and featured together with the applicant's counsel on that day and time for the prosecution of his case before court. The court, however, postponed the hearing of the arguments to the 26th February 2013.

[6] Prior to the commencement of arguments by both counsel, the court expressed a view that *ex facie* the pleadings, it transpires that the dispute in consideration is intrinsically a domestic issue which could be resolved through the exploration of the alternative justice avenues particularly the restorative

justice intervention. The philosophy here being an endeavour to have the seemingly broken relationship between the applicant and the 1st respondent to be healed for the sake of the prevalence of the atmosphere of mutual respect, discipline and harmony between the two and in the background with the 1st respondent's wife. The reality here being that in essence, the dispute exists between the applicant who is a daughter in law of the 1st respondent and the 1st respondent himself. The 1st respondent's wife is behind the scene supporting the applicant. The two are collaboratively pursuing the idea that the deceased should be laid to rest at the place where his mother has *ngalaed*¹ to and has established her own independent homestead.

[7] The counsel advised the court that the suggested alternative means of resolving the dispute have failed because the applicant and the 1st respondent have throughout maintained uncompromising belligerencies in the matter. The 1st respondent who was before court readily confirmed the situation. Thus, the court directed that the issues be interrogated in the normal manner as it had been originally planned.

[8] The court and the counsel had on the previous day designed a road map by agreeing that given the facts presented before it, the emphasis of the addresses would be on **the right and duty to bury, who in the circumstances would have that right and**

¹ This is a verb which has for decades been anglicized. It is usually used to be descriptive of an act by a married woman to leave her matrimonial home as a protest against ill-treatment by her husband. It may also describe the act of quitting from a discussion in the event of a disagreement.

who should determine the place and time for the burial of the deceased.

[9] The basic facts which are common cause in this case are that the applicant Mateboho Mabathoana, was married to the late Hlalele Mabathoana who met his tragic death on the 29th January 2013 at Likhaseng Ha Sekautu Roma where he was a night watchman. He had passed away as a result of the fatal gun wound which he sustained during the robbery committed at the shop on the night of his death.

[10] The 1st respondent Makalo Mabathoana is the father in law of the applicant Mateboho who is now the widow of the late Hlalele and is the father of the deceased. It has further emerged from the papers and from the arguments by counsel that the 1st respondent's wife Mahlalele Mabathoana has had long strained relations with her husband and that as a result, she has for years not been living at her matrimonial home. She has, instead, been living at her own established home at Popa Ha Maama, Roma. The applicant acting with the support of her mother in law Mahlalele were locked in a dispute with the 1st respondent over the question of who between the applicant and himself should make a decision on the date of the burial and where the deceased should be buried. The applicant maintains that she, as the widow, has **a right and duty to bury the deceased and to determine when and where the burial should take place.** *(emphasis supplied by the court)*

[11] The 1st respondent, though a head of the family finally gave the last minute instructions to his counsel that his daughter in law could determine the date of the burial and has expressed his readiness to accommodate the applicant's chosen new date of burial which is the 8th March 2013. He, however, remained consistently adamant that the deceased should be buried at Ha Makafane Roma which is the deceased's home village. The reasoning which he advanced in support of this position, is that the deceased who is his eldest son had throughout his lifetime, been living at his parental home and had not established his own independent homestead.

[12] Mr. Fosa argued the applicant's case from a foundational premise that she has the requisite credentials to have the right and the duty to bury the deceased. On that reasoning, he maintained that the applicant would, logically, have the incidental right to chose the date and the place of the burial of the deceased. He emphatically and repetitively drew it to the attention of the court that the applicant is the widow of the deceased and, therefore, by operation of law his heir particularly when there is no male issue in their family. He then hastily referred the court to the case of **Ramaisa v Ramaisa CIV/APN/5/93**(unreported) in which Lehohla J (as then was) had quoted with approval the direction given in **Zuma v Zuma CIV/APN/60/88** (unreported) where it was stated that:

It is laid down and it has become trite that where a husband dies living no male heir, the wishes of his widow as to how, when and where to bury the deceased must be given preference.

[13] The impression which is gathered from the quotation is that the widow who does not have a male heir commands an absolute right to have her wishes regarding how, when and where to bury the deceased to be given preference.

[14] Advocate Molati for the 1st respondent introduced his argument by advising the court that whilst it is true in law that, in principle, a widow has a right and duty to bury the deceased and correspondingly to identify the burial date, the place and the manner of burying the deceased; the court should be aware that these rights are not absolute. He in support of this proposition referred the court to the words of wisdom expressed by Ramodibedi J.A. in **Ntloana and Ano vs Rafiri LAC 2000 - 04 @ p284-285²** that:

It is true that the heir must always be given first preference whenever it is just to do so, but there may well be cases where even the heir himself is unsuited to bury the deceased this court subscribes to the view that in determining the duty to bury, the court must be guided by a **sense of what is right as well as public policy**.³(emphasis introduced by the court).

[16] The part of the judgment referred to above, cautions against a conception that the heir has unqualified rights regarding duty to bury and on other ancillary decisions. It advocates for the burial processes to be rationalized in harmony with the public policy. This denotes that the religious and the customary beliefs of the deceased or those of his or her family would have to be honoured. Thus, it may not be right and acceptable for a male

² This is at page 284-285 para I-J. The impression here is that the right is circumscribed by the right and reason based reasons which are dictated by the socio-cultural realities on the ground.

³ The learned Judge had re-affirmed the same message which he had earlier articulated in **Lebohang Sello v Mamotlatsi Semamola & Anor CIV/APN/319/96** (unreported)

heir or a widow to ignore the sociological environment of the deceased during his or her lifetime.

[17] Peete J in **Manthabiseng Maretlane v Morris Ntšasa & Ano CIV/APN/185/2011** (unreported) innovatively introduced into our jurisprudence on the subject, what he termed **a right and reason based perception**. In that thinking, he cautioned that notwithstanding the rights of the heir in burial matters, what is of paramount importance is that the deceased must be accorded a decent burial and that all must be guided by the consideration of the dictates of right and reason. The court associates itself with the words of wisdom expressed in this case and acknowledges their significance as the tools of justice in similar challenges.

[18] To this end, the facts and the law already traversed, present a scenario that the court must interface the rights of the heir with the societal values and that in that balancing approach, the imperatives of right and reason would have to prevail. It subscribes to the position that in principle, the heir has a right and duty to bury, and incidentally, therefore, a right to identify the time, the place and how the deceased would be buried. The courts have nevertheless, as it has been indicated, progressively assigned limitation qualifications to this right and thereby rendering it not absolute.

[19] The deceased is a male person who hadn't established his independent homestead upon his death. The court in this

regard, boldly takes a judicial notice of a Basotho culture established from time **in memorial** that a dead body of a male person who hadn't built his own house in a different village which has its own cemetery, would normally have to be laid to rest at the cemetery of his parental home village. The same would apply to the body of an unmarried woman. This explains the customary saying that:

A married woman would be disposed off in accordance with the traditions of others. ⁴ (*Mosetsana ea nyetsoeng o lahloa ka lelahlo la basele*)

[20] The Basotho custom considers it a disgraceful thing for a man to be seen to have *ngalaed* with his mother. It is regarded as an act of rebellion against oneself. Such a man would have no seat at the *khotla*. The objection against the illegibility of such a man to have audience at the *khotla* could be upheld notwithstanding the customary, principle that even the most humble man has the audience at that forum. Thus, the court should be careful not allow the deceased to be perceived in that degrading manner at the moment of his burial. This would be in rhythm with the direction detailed by Peete J in **M. Maretlane v Nšasa and Ano (supra)** that:

...what is of paramount importance is that the deceased must be accorded a decent burial.

[21] The deceased's grave must throughout command dignity and be recognize as a sacred place for reference during times dictated by cultural needs.

⁴ *Others* in this context refers to the family which has married someone's daughter and therefore, having assumed the authority to bury her according to its traditions and customs.

[22] The 1st respondent who is admittedly a head of the family would have to be accorded his customary role and status at the burial ceremony.

[23] The final logicity of having synthesized the law, the facts and the applicable socio – cultural realities is that:

1. Prayers 1 (a) is confirmed as prayed.
2. Prayer (c) is not granted. It is instead ordered that the deceased should be buried at Ha-Makafane in Roma. This being his home village and in accordance with the burial customs of the Basotho to which the family may subscribe.
3. Prayer (d) and (e) succeeds as prayed. For clarity sake, the applicant is, by operation of law declared as heiress of her deceased husband's estate.
4. Prayer (f) succeeds in so far as declaring that the applicant has a right to determine a date for the burial of the deceased and that this right should prevail over the family wishes in that regard. In the same vein, it is declared that the applicant is free to bury the deceased on the 8th March 2013.
5. The applicant, the 1st respondent and his wife are encouraged to consider approaching the Chambers of the

Victims of Crime and Restorative Justice which are situated at the Maseru Magistrate Court for the healing of the relational damage occasioned by the long standing conflicts between the parties. This could be done after the burial of the deceased.

6. There is no order as to costs.

The court has noted with warm appreciation the counsel co-operation and demonstrated commitment for the hearing to be expedited and concluded on the same day and for their patience throughout the dictation of the judgment and for the efficient electronic recording by Advocate Molati.

**E.F.M. MAKARA
ACTING JUDGE**

For the Applicant : Mr. T. Fosa

For the 1st Respondent : Adv. L.A. Molati