

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/270/2013

In the matter between:-

‘MATJOTJI LEKOLOANE

APPLICANT

AND

‘MAKHIBA TŠOEU
LESOTHO FUNERAL SERVICES
MASTER OF THE HIGH COURT
ATTORNEY GENERAL

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

JUDGMENT

Coram : Hon. Mahase J.
Date of hearing : 19th and 26th June 2013
Date of Judgment : 26th June 2013

Summary

Civil Procedure – Right to bury deceased – Whether by Applicant or by maternal cousin of the deceased – Customary marriage of applicant by deceased – Whether in existence – Declaration of an heir by this Court – Whether applicant sole beneficiary to deceased’s estate.

ANNOTATIONS

CITED CASES:

- Room Hire Co (PTY) LTD v. Jeppe Street Mansions (PTY) LTD 1955 (2) S.A. 1155 at 1162
- Apaphia Mabona v. Khiba Mabona CIV/APN/280/1986 (Unreported)
- Ramootsi v. Ramootsi and Others C of A (CIV) No. 14 of 2008
- Ramaisa v. Mphulenyane 1977 LLR 138 (HC)
- Commador of Lesotho Defence Force v. Matela LAC (1995 – 99) at 804 I – J – 805
- Vice Chancellor of N.U.L and Another v. Putsoa LAC (2000 – 2004) 458 at 464 D.F

- **Rafiri v. Rafiri C of A (CIV) No. 42 of 2000**

STATUTES:

BOOKS: **None**

- [1] The facts of this case are very brief. The applicant has approached this Court on urgent basis seeking to be granted prayers which are spelt out in the notice of motion. In a nutshell, she is claiming a release of the deceased's body to her for burial by her and other reliefs against the first up to the fourth respondents.
- [2] The second up to the fourth respondents did not oppose the matter. When on the 19th June 2013 her counsel appeared before court only prayers 1 (a), (b) (c) and (d) were granted as interim orders which operated with immediate effect.
- [3] The first respondent was also ordered to hand over items mentioned in prayer 1(e) to the Registrar of this Court for safe-keeping pending finalization of this matter.
- [4] Applicant claims that she was married to the late Motlohelo Lekobane by custom on the 31st December 2000. She says that she had eloped with the deceased and that subsequently her mother sued the deceased for payment of six head of cattle or alternatively the sum of M2,500.00 per cattle as damages for the abduction and or seduction of her daughter.

- [5] The applicant and her late husband then lived together as husband and wife since the 31st December 2000, two children, namely Tjotji and Mokekolo Lekoloane were born out of the parties union. The applicant and her late husband had lived together at Ha Simone in the Leribe district.
- [6] The applicant and her late husband were both working in the Republic of South Africa but they always spend the holidays together there or at their home at Ha Simone where they lived at the home of her husband's parents, together with their said children.
- [7] Her husband died on the 6th June 2013 in a car accident which occurred at or near Rosendal in the R.S.A. Having been informed about her husband's death she proceeded home at Ha Simone to prepare for her husband's burial.
- [8] The first respondent had also been informed about the death of her cousin; the applicant's husband. She had obviously been able to meet the investigating officer who handed to her the items which appear in item 1(c) in the notice of motion.
- [9] The applicant was however chased away from her parent's in laws home where the burial of her husband was to take place. She was chased away from these by the first respondent, together with her children Tjotji and Mokekolo. The first respondent and other members of the Lekoloane family are saying that the applicant was never married to the deceased, Motlohelo Lekoloane, and so she was not his wife. They chased away the applicant from there together with her children even though they do not deny that the deceased Motlohelo was the biological father of the said children and that

these children had at all material times, prior to their father's death been residing thereat with their parents.

- [10] The applicant is challenging the fact that she is said not to be the lawful wife of her late husband and says further that, her expulsion from the said home renders her and her children destitute because they have no other place to go to and that in fact, the first respondent and those other members of the Lekoloane family who support the first respondent are bastardising the children. The said children are aged between 12 and 10 years respectively.
- [11] The first respondent who is opposing this application contents that she is the martenal cousin of the deceased, Motlohelo Lekoloane and that she and the deceased grew up together under the care of the deceased's father since when she was two years old. She says that as such she was regarded as a daughter of the parents of the late parents of the deceased in this case, and that also, during her marriage to her late husband, the father of the deceased (her uncle) assumed a role of her father; which fact she says is well known to the applicant as well.
- [12] The first respondent contents that there was never any formal marriage between the applicant and the deceased, Motlohelo Lekoloane. She says applicant and Motlohelo only cohabited and stayed together as husband and wife without any formalities for a lawful, valid customary marriage having been conducted. She says she is supported in this regard by the fact that only six head of cattle were paid to applicant's mother as damages following her elopement with her late cousin. She says these were not bohali payment

and as such applicant cannot claim to have been formally married to the late Motlohelo Lokoaloane.

[13] The first respondent and those who support her do not deny that the applicant and Motlohelo have been staying as husband and wife for well over thirteen years from December 2000 until when Motlohelo met his death in June 2013; neither do they deny that two children were born of the union between the applicant and the deceased herein.

[14] In a nutshell, the only basis upon which the first respondent claims that she is the one who is entitled to bury the deceased, Motlohelo is because she claims to have grown up in the same homestead with the deceased after her own mother got married and left her in the care of the uncle and aunt (the late parents of the deceased). There is no other ground upon which she claims to be the one entitled to bury the deceased and probably to inherit his property.

[15] She further denies that there is urgency in this case due to the fact that the applicant arrived at Ha Simone for burial of the deceased at the eleventh hour while the family had already made preparations to bury the deceased. She also denies that she had expelled the applicant and her children from their parental home.

[16] I note that neither the first respondent nor those of the Lekoloane family who have supported her say that they had promptly notified nor informed the applicant about the death of her husband. They only deny that there is

urgency in the matter launched by the applicant without saying why they deny urgency.

[17] On the other hand, the applicant says when she got to know about the death of her husband she came home on the 9th June 2013 for burial but that she was expelled from her parents in laws home by the first respondent. Refer to applicant's founding affidavit, paragraph 8 thereof. Her allegations therein have not been denied. The first respondent has in fact not pleaded issuably to most of the contents herein.

[18] The applicant has also spelt out in great detail the measures she took and embarked upon before she finally decided to approach this Court when all else had failed. The first respondent has not denied same. In fact the applicant could not be expected to go back to the Lekoloane family which had already expelled her on the basis that she had not been married to their son. The only option now left was for her to approach a Court of law for relief. The deceased was to be laid to rest on the 22nd June 2013 so that when on the 19th June 2013, the applicant obtain an interim order of an interdict, it was only some two and half days left before his burial. This in itself justified her filing of this application on urgent basis moreso because all the efforts she had embarked upon to persuade the Lekoloane family to have the matter amicably resolved out of court had failed. Refer to her replying affidavit, paragraph 3.2.

[19] This Court ultimately made a ruling dated the 26th June 2013, after it had heard both counsel for parties herein. In that ruling, this Court observed, without considering all issues raised by the applicant and the first respondent

pertaining to the legality or not of the marriage between the applicant and the deceased herein as well as to the relationship between first respondent and deceased; that neither of them has an exclusive right to bury the deceased.

[20] The reason for that kind of approach was based on the fact that it is now clear that legal practitioners in this country have not heeded the order and or a call by the Court of Appeal of Lesotho to the effect that deceased persons should be buried with decency and that the practice of making dead bodies pawns by the surviving family members for a benefit and gain should desist.

[21] In the instant applicant, the basis upon which the applicant is denied the right to bury the deceased is that she has not been married to the said deceased although the use by her of the Lekoloane name is not being challenged. Also none of those who support the first respondent deny that the applicant and the deceased have been staying together as husband and wife since 2000; and most importantly that two children have been born out of their union and that those children are biological children of the deceased hence why they stayed with him at all material times and they too have assumed the surname of Lekoloane.

[22] In fact, even assuming without conceding that indeed the applicant has never been formally married to the deceased whether by custom or not; equally, the relationship of the first respondent with the deceased; that of being his cousin, does not and cannot give her a better title than any members of the Lekoloane family to bury the deceased. It is a matter of common cause that

the first respondent has since been married to the Ts'oeu family even though she says she has since been widowed.

[23] Most importantly too, none of the parties herein, the applicant and the first respondent seem to care about the feeling of the biological children of the deceased. It does not seem to occur to both of them that these children are already traumatized by their father's death, nor do they consider that these children also have to be taken into consideration.

[24] Until when the issues herein raised have been properly and finally determined, none of the applicant and the first respondent can claim as of right, and in total exclusion of the other one, to have a superior right to bury the deceased.

In the circumstances and until when full argument has been heard, it is the considered view of this Court that none of the parties herein has the exclusive right to bury the deceased and due regard being had to the fact that the burial date which had been set has long elapsed, with this corpse being in the mortuary for close to three weeks, and also realizing that both parties are eager and have the means to bury the deceased it is ordered as follows:

1. That both the applicant and the first respondent should and are ordered to cooperate, maintain peace and both be equally involved in the burial of the deceased person. This includes even the Makenete as well as the Ts'oeu family.

2. The second respondent is ordered to release the remains of the deceased to both applicant and the first respondent for them to go and peacefully bury same, at the deceased's parental home where he has been residing at all material times.
3. None of the applicant and the first respondent should take away the property belonging to the deceased wherever it might be until after the Court has made a final determination on this application.
4. The property listed or mentioned in prayer 1(e) should be handed by the first respondent in whose custody it is currently, to the Registrar of this Court for safe-keeping until after the court has finalized this matter. That is, it should be so kept by the Registrar of this Court pending finalization of this application.
5. The first respondent and the other Lekoloane family members should not and are ordered to desist from expelling the applicant and her children from the place of applicant's in-laws referred to at paragraph 9 of the founding affidavit pending final determination of this application.
6. Parties herein are ordered to come back to court on the 1st August 2013 to pursue their case should they not have amicably settled same.

I make no order as to costs.

M. Mahase

Judge

For Applicant : Adv. T. Taaso
For first respondent: Adv. M.T. Khiba
For second up to third
Respondents : No appearance.