

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/165/18

In the Matter Between:-

CHARLES RANTINA MOHASI	1ST APPLICANT
RAPHAEL MOHASI MOHASI	2ND APPLICANT
NTIMISI MOLEFE MOHASI	3RD APPLICANT
TSIMATSI MICHAEL MOHASI	4TH APPLICANT
AND	
MOSIAKO PHILLIP MODISE	1ST RESPONDENT
MASTER OF THE HIGH COURT	2ND RESPONDENT
'MATHEKO MOHASI	3RD RESPONDENT
LESOTHO FUNERAL SERVICE (PTY) LTD	4TH RESPONDENT
CHIEF MAJARA THEKO	5TH RESPONDENT
ATTORNEY GENERAL	6TH RESPONDENT

JUDGMENT

CORAM	:	HON. M. MOKHESI AJ
DATE OF HEARING	:	31 MAY 2018
DATE OF JUDGMENT	:	04 JUNE 2018

CASE SUMMARY

Duty to bury rests on heirs where no one has been chosen by the deceased for that purpose – Application granted with no order as to costs.

ANNOTATIONS:

STATUTES: *Administration of Estates Proclamation 19 1935*

BOOKS: *Manfred Nathan: The Common Law of South Africa (vol. III
Butterworth, 1906)*

W.C.M. Maqutu “Contemporary Family Law of Lesotho”

CASES: *Hepner v Roodepoort – Maraisburg Town Council 1962 (4) SA 772(AD)*
Mothibeli v Chabalala CIV/APN/75/85 (Unreported)

PER MOKHESI AJ

[1] INTRODUCTION

The Applicant launched this application seeking relief in the following terms:

- “(1) Dispensing with the normal periods and modes of service of the application due to the urgency of this matter.
- (2) Rule Nisi be issued and returnable on the date to be determined by this Honourable Court to call upon 1st and 3rd Respondents to show cause, why, if any;
 - (a) They cannot be interdicted and ordered to stop burial preparations and any final activity pertaining to the now deceased, Sheila Sophia Mohasi pending the finalization of this application.
- (3) 4th Respondent cannot be ordered to release the corpse of Sheila Sophia Mohasi to Applicants.
- (4) 2nd Respondent cannot be ordered to cancel and revoke the administration letters issued to 1st Respondent in respect of the deceased’s estate.
- (5) That 5th Respondent cannot be interdicted in interfering with the affairs of Mohasi family in collusion with 1st and 3rd Respondents.
- (6) 1st Respondent cannot be ordered to release death certificate, post mortem certificate, insurance policies and bank book to applicants.
- (7) That Applicants should be declared the legitimate persons to bury the deceased Sheila Sophia Mohasi.
- (8) Costs of suit party and party on in the event of opposition of this application.

- (9) Granting such further and/or alternative relief that this Honourable Court may deem fit.
- (10) Prayers 1, 2 and 2(a) to operate with immediate effect as an interim order.”

[2] This case, sadly, is about the relatives of the deceased person fighting over who has the right to bury her. It is common cause that the 1st applicant is the rightful heir to the estate of the late Sheila Sophia Mohasi. The deceased never got married and had no children. It is common cause also that she had mental problems. The 1st applicant is the brother of the deceased through their fathers. The 1st Applicant’s father was the eldest followed by the 2nd applicant’s father. The deceased’s father was the youngest. The deceased was the only child in her family. On 08th May 2018 the said Sheila Sophia Mohasi was involved in a fatal car accident. It is common cause that the 3rd Respondent had at all material time after the passing away of the deceased’s mother, (3rd respondent) lived with the deceased. The 1st Respondent, though, not related to the deceased at all, was a close family friend. His closeness to the deceased’s family was so strong that he was even made the executor of the deceased mother’s will. It made a lot of sense, then, that in the wake of untimely death of the deceased he took it upon himself together with the 3rd Respondent to report the death of the deceased to the office of the Master of the High Court. Consequent upon the deceased’s death being reported to the Master of the High in terms of **section 30(1) of the Administration of Estates Proclamation, 19 of 1935 volume 11 1960 Laws of Lesotho**, the Master of High Court appointed the 1st Respondent curator *bonis* until 19th June 2018. The Letters of Administration were issued to this effect.

[3] This matter is opposed. The 2nd and 3rd Respondents had raised a number of the so-called points in *limine*, but during oral submissions it was agreed that those in *limine* points be discarded and the case be decided on its merits. On the merits it was argued that notwithstanding the fact that the 1st applicant is the heir, he should be taken to have waived his right as an heir to bury the deceased. It was argued that this should be the position regard being had to the fact that the 3rd Respondent and her husband had moved in with the deceased since her mother passed away more than twenty years ago. The 3rd Respondent and her husband had been caring for the deceased all this time as her guardian.

[4] Duty to bury: The Law

The Learned author Manfred Nathan in

“The Common law of South Africa (Volume III, Butterworth, 1906) at p. 1207 para. 1252, had the following to say:

“Voet lays down, following the Roman Law, but not suggesting any abrogation under the Roman-Dutch Law, that that person ought to perform the funeral rites whom the deceased has chosen for the purpose. If the person appointed does not carry out the wishes of the deceased, he forfeits whatever has been left to him by the deceased. And if he has already received the bequest, and does not carry out the funeral rites, he may be compelled to restore the property received by him by an *actio doli*.... If nothing has been left to the mandatory, he cannot suffer any penalty for failing to perform funeral rites. If the deceased has appointed no one to perform them, the duty will; if no heir is nominated, the legitimate or cognate heirs who succeed must do so. Failing these, the duty of burying the deceased falls on the civil authorities, at the expense of his estate. Any stranger, if no one else buries the deceased, may do to prevent the corpse remaining unburied, and he has the right to claim the expenses incurred for the funeral by action (*actio funeraria*).”

(For general discussion on the duty to bury, see **W.C.M. Maqutu “Contemporary Family Law of Lesotho**).

[5] Given that it is common cause that the 1st Applicant is the heir, what remains to be considered is whether he has waived his right to bury the deceased by not living with her. In **Hepner v Roodepoort - Maraisburg Town Council, 1962 (4) SA 772 (A.D) at p. 778 D - G** it was said:

“The *onus* is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.” (See also **Feinstein v Niggli and Another 1981 (2) S.A (AD) 684 at 6989 G - H**)

[6] In the present case 3rd Respondent argues that for the fact she and her husband lived with the deceased after her mother's demise, is clear evidence the 1st Applicant waived his right to bury the deceased. In my view this assertion is problematic for the reasons that the 3rd Respondent does not state how she and her husband came to stay with the deceased, at whose instruction did they do so, or was it because the 1st applicant refused to take care of the deceased? All these questions have not been answered by the 3rd Respondent in her answering papers. In my considered view the 3rd Respondent has failed to discharge the onus resting on her to show that 1st Applicant waived his right to bury the deceased.

[7] The 3rd Respondent had further argued that I should apply the concept of "a sense of what is right" as espoused in **Mothibeli v Chabalala CIV/APN/75/85 (unreported)** in view of the fact that she lived with the deceased until her death In order to arrive at the conclusion that she is the rightful person to bury the deceased. In my view it has not been stated in what way the 1st applicant is unsuited to bury the deceased despite being the heir. In the same vein the fact that 1st Applicant did not live with the deceased, in the circumstances of this case cannot be decisive. This court has not been told why the 3rd Respondent and her husband left their home, if they had any, to come and live with the deceased; was it a situation where the 3rd Respondent and her husband were the only people available to live with the deceased after her mother's demise without at **all implying that** the applicants were not interested in helping? Like in the above issue all these questions have not been answered.

[8] **APPOINTMENT OF 1ST RESPONDENT AS CURATOR**

BONIS UNPROCEDURAL?

The applicants are seeking, further, to assail the appointment of Mr. Molise as the Curator bonis, and this is done in terms of **section 109 of the Administration of Estate Proclamation 19/1935**. It provides:

“Every appointment by the Master of an executor, tutor or curator,
and every order or decision of or taxation by the Master under this
Proclamation shall be subject to appeal to or review by the
court upon motion at the instance of any person aggrieved thereby and
thereupon the court may confirm, set aside, or vary the
appointment, order, decision or taxation, as they may be.”

[9] Other than merely contending themselves with stating that 1st Respondent is not related to the deceased, nothing was stated which could lead this court to say his appointment was unprocedural. If by saying he is not related to the deceased, the applicants are saying, for the 1st Respondent to be appointed a curator *bonis*, the basis thereof should be blood relations, nothing could be further from the actual legal position. The factual context of the 1st Respondent's involvement in this matter was highlighted earlier; he was a close family friend to the extent that the deceased's late mother trusted him with being the executor of her will. Little wonder, then, that in the aftermath of the passing on of the deceased he and 3rd Respondent took it upon themselves to report her death to the office of the Master of High Court. It is consequent to that reportage that the Master of High Court, finding 1st Respondent to be fit and proper person appointed him a curator *bonis*. For one to be appointed a curator *bonis*, blood relation with the deceased whose estate is the subject to which an appointment is made, is not a requirement. All that a Master of High Court needs to satisfy herself or himself is that a person is fit and proper. In the present case no legally sound basis has been laid to assail 1st Respondent's appointment as the curator *bonis*. In the result this prayer is dismissed. The net effect of this is to confirm his appointment as curator *bonis* until the 19th June 2018 when the executor will be appointed.

[10] In the result the following order is made:

1. 4th Respondent is ordered to release the corpse of Sheila Sophia Mohasi to Applicants.
2. Letters of Administration issued to 1st Respondent are not cancelled.
3. 5th Respondent is interdicted from interfering in the affairs of Mohasi family
4. 1st Respondent is ordered to release all necessary documents for the burial of the deceased.

5. Applicants are declared legitimate persons to bury the deceased Sheila Sophia Mohasi.
6. There is no order as to costs.

M. MOKHESI (MR)
ACTING JUDGE

FOR APPLICANT : ADV. SEKATLE
FOR RESPONDENTS : ADV. MATHE
DELIVERED JUDGMENT : 04 MAY 2018