

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/APN/228/2020**

**In the matter between:**

**‘MAQENEHELO SEFATE-LIFERO**

**APPLICANT**

**AND**

**‘MAMOLEBOHENG LIFERO**

**1<sup>ST</sup> RESPONDENT**

**THUSO LIFERO**

**2<sup>ND</sup> RESPONDENT**

**MOLEBOHENG LIFERO**

**3<sup>RD</sup> RESPONDENT**

**SENTEBALE GAP FUNERAL SERVICES**

**4<sup>TH</sup> RESPONDENT**

**METROPOLITAN LESOTHO**

**5<sup>TH</sup> RESPONDENT**

**JP FINANCE**

**6<sup>TH</sup> RESPONDENT**

**POST BANK**

**7<sup>TH</sup> RESPONDENT**

**SMALL BUSINESS DEPARTMENT**

**8<sup>TH</sup> RESPONDENT**

**PENSION FUND**

**9<sup>TH</sup> RESPONDENT**

**MASTER OF THE HIGH COURT**

**10<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL**

**11<sup>TH</sup> RESPONDENT**

**Neutral Citation:** ‘Maqenehelo Sefate-Lifero v ‘Mamoleboheng Lifero & 10 Others (CIV/APN/228/2020) [2021] LSHC 79 (17 JUNE 2021)

## JUDGMENT

**CORAM:** MOKHESI J

**DATE OF HEARING:** 11 MAY 2021, 24 MAY 2021 and 03 JUNE 2021

**DATE OF JUDGMENT:** 17 JUNE 2021

### SUMMARY

**FAMILY LAW:** *The existence of marriage following elopement and in situation where there are no negotiations on marriage and amount of bohali to be paid having taken place- the parties having lived together for almost five years as husband and wife after the plaintiff's acceptance into the family per usual customary rituals- Held, on the conspectus of all the evidence, marriage exist and that the deceased's family are estopped from denying the existence of marriage.*

### **ANNOTATIONS:**

Laws of Lerotholi

#### **Books:**

W.C.M. Maqutu **Contemporary Family Law 2<sup>nd</sup> ed. 2005 (Morija Printing Works)**

#### **Cases:**

Ramootsi and Others v Ramootsi ((CIV) No.14/08) [2009] LSCA 30 (23 October 2009)

Ramaisa v Mphulenyane 1977 LLR 138 (HC)

[1] This matter concerns the determination of the existence of customary marriage between the applicant and the late Thabo Lifero. As it is always the case, issues regarding existence of marriage, conveniently, arose in the immediate aftermath of the deceased's passing on. One cannot resist the temptation to hazard an educated guess that this denial of the existence of marriage has a lot to do with the deceased's terminal benefits. This matter was initially lodged on the Notice of Motion and on an urgent basis, wherein the applicant was seeking a number of reliefs, among which at that time, called for immediate attention of the court, was the determination of the issue of who had the duty to bury the deceased. The parties reached a settlement on the burial. What remained for determination, chiefly, is the prayer for a declaration that the applicant was the deceased's lawful wife and heir, and other incidental reliefs. I then ordered that the question of the existence of marriage be referred to trial. The matter proceeded accordingly on the 24<sup>th</sup> May 2021.

[2] The plaintiff's case was anchored on the testimony of two witnesses, viz, that of the plaintiff herself and her mother, while the defence case was based on the evidence of three witnesses. 'Maqenehelo Lifero-Sefate detailed how she eloped with the deceased Thabo Lifero, on the 18<sup>th</sup> December 2018, to Taung in the district of Mohale'shoek. On approaching the village, as they were using public transport, they were met by DW2 (Rapoto Lifero) who gave plaintiff a blanket to put on. DW2 parted ways with the plaintiff and the deceased on entering the village. Both the deceased and the plaintiff went to the deceased's home whereat they met the deceased's mother (DW1), who called in other family members. DW1 even pointed a room for the couple to sleep in overnight.

[3] The following day, as the couple arrived late at night, a letter was written to the plaintiff's mother (PW2) informing her that her daughter had eloped to Taung. Rapoto was tasked with delivering the letter to the plaintiff's mother. PW1 said, because her home is far away from Taung, Rapoto telephoned to say he arrived safely, and that even when the latter left the plaintiff's home, he telephonically relayed a message that the plaintiff's mother had accepted that she be formally accepted into the Lifero family by the slaughtering of the sheep. The plaintiff was dressed in Seshoeshoe dress and other garb. She was taken outside where she was shown a sheep by DW1 and was named 'Maqenehelo Lifero. After the sheep had been slaughtered, another ritual of giving a bride a prepared portion of sheep ribs was performed. These are all customary acceptance rituals. The plaintiff was accompanied to the well by Ralifero's daughter 'Maseabata. On the third day the plaintiff and deceased went back to Maseru Ha-Matala where they lived together with one of the deceased's son from his previous marriage. As the plaintiff was already pregnant, further rituals were performed, and this time she had to be accompanied to her maiden home before she could give birth. This time she was accompanied by Rapelang (one of the deceased's sisters).

[4] The plaintiff gave birth to their only child and she says one of the deceased's sisters by the name of Moleboheng, gave her postnatal care at Ha-Matala where the couple stayed. After a week of childbirth, the plaintiff and the child were transported back to the plaintiff's maiden home, at Mpharane, Mohale'shoek. The child had already been christened, Qenehelo, by the deceased's mother. The plaintiff spent about two months at her maiden home and at the end of that period, the minor child fell ill, and this was brought to the attention of the deceased and his mother who both opined that the child fell ill because she wanted

“to go home.” In reaction to this message of the indisposed child, the deceased and his mother (DW1) decided to go and collect the plaintiff and minor child. They arrived at Mpharane at around 1900 hours, but the plaintiff’s mother did not allow them to take the child and its mother away as it was late at night. Consequently, a date was arranged for carrying out this exercise. Indeed, on the said date the plaintiff and the child were ferried back to her marital home, Taung, but this time the deceased’s mother was not in attendance. Upon arrival at Taung, the minor child was taken to every room and told that it was her home. That ritual was performed to ‘cure’ the minor child of the illness alluded to earlier. PW1 testified that she attended funerals of the deceased’s relatives and at times visited the deceased’s mother.

- [5] Under cross-examination, it was put to PW1 that Rapoto Lifero never met the Plaintiff and the deceased half-way on the night of elopement. But as will be seen, this is common cause, as the said Rapoto admits to having met the plaintiff and the deceased as alleged. It was further put to the plaintiff that the letter which was addressed to her mother was written by the deceased on his own volition as his mother (DW1) objected to the former getting married as he was irresponsible, and that Rapoto was sent to Mpharane at the instructions of the deceased not DW1. The plaintiff denied all these assertions. Under cross-examination it was put to PW1 that she was not given the marital name by the deceased’s mother nor was she shown the sheep by her before its slaughter, as she outrightly rejected the idea of the couple being married due to the deceased’s irresponsible behaviour of failing to maintain his children from his first marriage. It is common ground that the children’s mother is has been deceased at the time the plaintiff eloped.

[6] The plaintiff's mother, 'Maletlatsa Sefate, testified as the 2<sup>nd</sup> plaintiff's witness. She confirmed that indeed after the plaintiff had eloped with the deceased, she received a letter from DW1 (deceased's mother) notifying her of the incidence, as it is customary. She said her response to the letter was "As a Mosotho woman I responded by saying 'm'e [DW1] should bring back my daughter with 6 head of cattle." She confirmed that the letter was brought by Rapoto Lifero. She testified that she talked with DW1 when the latter was telling her that the plaintiff was pregnant and will be brought back home to give birth. She confirmed that her grandchild was taken ill, as a result of which DW1, the deceased and one Molise arrived late at night to come and fetch her. She did not release the child but instead arranged for her to be picked up at the later date. That on the scheduled date, the child and the mother were taken away. It was the first time PW2 met the deceased's mother when she had come to fetch the child.

[7] PW2 told the court that DW1 once sent one Lakabane (DW3), Molise and the deceased to negotiate marriage. She said an agreement was reduced into writing, and that in it, a provision was made for payment of 6 head of cattle for elopement and that negotiations about *bohali* payment would take place on a date to be arranged. PW2 was with Refuoe Sefate (her son) during these negotiations. She however, told the court that she could not produce the said agreement as the deceased took it away as it was needed at the rented house where he was staying with the plaintiff, as proof of marriage, and that the said letter was never returned to her. The letter got misplaced and could not be located. There was never a time when PW2 and DW1 deliberated over the payment of *bohali*.

[8] During cross-examination, it was put to the witness that the letter which was sent by Rapoto notifying the witness about her daughter's elopement, was written by the deceased not his mother, and it was written by the deceased to give an impression that it was his mother who penned it. DW2 was insistent that the letter was penned by DW1. It was also put to the witness that on the day Rapoto had brought the letter, the witness talked to the deceased's mother who informed her that her daughter (plaintiff) was being married to the deceased who was marrying for the third time. It was put to the witness that that made her furious, resulting in her demanding that her daughter be returned to her. The witness denied this assertion as being untrue. The witness admitted that for the whole year after her daughter's elopement she did not hold talks with DW1 about the marriage of their children. It was further put to the witness that on the occasion when DW1 came to PW2's home to pick up the sick child, the former went there unwillingly. The plaintiff closed its case after PW2's testimony.

[9] The defence case was based on the testimony of three witnesses. DW1, 'Mamoleboheng Lifero is the deceased's mother. She told the court that the deceased had telephoned her whilst in Maseru, to tell her that he had the intention of getting married, and that she objected to the idea as he was marrying for the third time. One day the deceased arrived with the plaintiff at night saying he was getting married. She informed the plaintiff that the deceased was getting married for the third time. The couple slept in her room for the night. She said the "following day Tseleng's mother called me. She said I should not accept the child as her child cannot be married by a man who has many wives. It was when I was about to slaughter the sheep." DW2 said it was the plaintiff who gave the deceased a go-ahead to slaughter the sheep as her mother could

not choose a partner for her. She denied ever pointing a sheep to the plaintiff, instead she said, it was the deceased who slaughtered the sheep and gave the plaintiff the name 'Maqenehelo. She admitted that the plaintiff was dressed up as a daughter-in-law and was given a portion of sheep ribs as part of acceptance rituals, though it was not with her blessing. The witness denied ever sending the deceased, Lakabane and Molise to discuss marriage with the plaintiff's mother. She denied ever writing a letter to PW2 to inform her about the presence of her daughter in her home. She said the deceased accepted the plaintiff as his wife against her will. She confirmed that the deceased's child was taken ill, and that the deceased telephoned her to ask that she accompany him to the plaintiff's place, which she did.

- [10] Under cross-examination DW1 admitted that the plaintiff attended family funerals. Asked whether she could dispute that the plaintiff attended those funerals as her daughter-in-law, the witness answer was in the affirmative. At some point during questioning, she said, because she disapproved of the relationship between her son and the plaintiff, she regarded her as his paramour. The witness maintained her line of argument that she regarded the plaintiff as her son's paramour while at the same time feeling obliged to go retrieve their child when she fell ill. She said she went to retrieve the child because her son (the deceased) had asked her for company. She later contradicted the assertion that she had been asked by the deceased for company, when she said she was never aware that they were going to the plaintiff's place until they got to the place called Takalatsa. She said when they got the plaintiff's place she did not talk to the latter's mother, only the deceased did. She only kept quiet. She admitted that after the deceased had passed away, she sent her daughter, Moleboheng, to go and fetch the plaintiff and to bring her to



Taung. Asked whether by this act she did not show that she regarded plaintiff as the deceased's wife, the witness answered that it was "because they had a child together."

[11] DW2, Isaka Ralifero (Rapoto) merely confirmed what was said by other witnesses regarding the role he played. DW3, Ralekhetho Phatšoane's (Lakabane) evidence was very short – he was brought in to deny that he was ever sent by DW1 to negotiate marriage with PW2.

[12] **Evaluation and discussion**

**Common cause facts:**

From the above evidence it is common cause that the deceased eloped with the plaintiff; the plaintiff's mother was notified in a letter delivered by Rapoto; her response to the news was the usual or customary way of demanding her daughter together with 6 head of cattle; acceptance rituals were performed on the plaintiff; After giving birth, the plaintiff's child was given the name and when she was taken ill, the deceased and his mother went to fetch her; even though they could not succeed on that day, she was ultimately fetched on the agreed date; the plaintiff and the child were taken straight to deceased's home for certain rituals to be performed; in the aftermath of the deceased's death, the latter's mother sent her daughter Moleboheng to the plaintiff's place to fetch her and to bring her to Taung for funeral preparations to be kickstarted.

[13] **Evaluation of evidence**

The plaintiff's evidence that she was accepted into the Lifero family as the deceased's wife is probable: the applicant was dressed in a Seshoeshoe dress after a *koa*e sheep had been slaughtered after the letter was sent to the plaintiff's informing her of the presence of the plaintiff's

at Lifero's. she was accompanied to the well. She wa christened `Maqenehelo. She attended Lifero family funerals without any demur from the deceased's family about her status in the family. The couple's only child bears Lifero family name, Qenehelo. I found PW1 to be credible and reliable witness. PW2's (plaintiff's mother) evidence in material respects mirror that of the plaintiff; she was informed about the applicant's elopement in a letter which was from the Lifero family. The letter appeared to be authored by the deceased's mother, in fact she had no way of presuming that the said letter was not written by the deceased's mother, when its tone conveyed a clear message that it was authored by her.

[14] I find that PW2 was entitled to assume that the letter was indeed written by the deceased's mother, this is so, coupled with the fact it is common cause that the deceased's mother spoke, telephonically, with PW2 telling her about the presence of her daughter at her place. PW2 had told the court that there was an agreement on marriage and payment of *bohali* was concluded between herself, the deceased and one Lakabane. There is no documentary proof this agreement, and the said Lakabane denies this. Apart from this, generally, this witness was credible and reliable.

[15] However, the description of reliability and credibility cannot be made in relation to testimony of the deceased's mother (DW1): She said it was the plaintiff who gave the deceased a go-ahead to accept her into his family by slaughtering the *koae* sheep as her mother was opposed to the marriage. I find this to be highly improbable in the light of the customary practice that it is the bride's family which gives a permission for acceptance after being notified of their daughter's elopement. It is probable that PW2 gave a go-ahead to have her daughter accepted into

Lifero family. DW1's assertion that the plaintiff's mother objected to the marriage does not tally with her behaviour and attitude, as she did not overtly seek the return of her daughter but instead dealt with the Lifero family as the family into which her daughter was married. She dealt with them on this basis for four years until the death of the deceased.

[16] DW1 denies that she performed acceptance rituals such as the naming of the plaintiff, however, she does not deny that the plaintiff's name is 'Maqenehelo Lifero and her daughter Qenehelo Lifero. The conspectus of evidence points to the fact that the Lifero family had accepted that the deceased was the plaintiff's husband. Even after the deceased's untimely death, DW1 sent her daughter to Maseru to fetch the plaintiff so that funeral preparations could be undertaken. If the impression DW1 wanted to create was that her son unilaterally – and against her will- accepted the plaintiff, I do not see, what in his absence, made her to feel obliged to confer with the plaintiff on the matter of the deceased's burial. Her behaviour is inconsistent with her assertions. I find that it is untrue that she did not accept the plaintiff as her son's wife but his paramour as she would have this court to belief.

[17] Under cross-examination, the true character of DW1 unravelled. In chief she had told this court that the deceased had telephoned her to ask for company to see the deceased's sickly child. But under cross-examination, she said, she was unaware where they were going. She only became aware when they were at the village of Takalatsa that they were going to Mpharane. This clearly contradicts what she said in chief. She further said when they got to Mpharane she did not talk to the plaintiff's mother (DW2), and that only the deceased did. This is clearly untrue. I do not understand how the witness would have agreed to accompany her

son to Mpharane only for her to remain dead silent and indifferent when she gets there. DW1 was clearly not credible and reliable. She seemed to be ready and willing to flirt with the truth for her own convenience.

[18] DW2's evidence is based on what is common cause as between the parties, while DW3's evidence was only relevant in so far as it refutes PW2's evidence that there was a meeting in which damages for elopement and payment of *bohali* were agreed upon.

[19] **THE LAW:**

This being a dispute over customary marriage, resort must be had to the **Laws of Lerotholi**. Section 34 thereof provides that:

*“34. (1) A marriage by Basuto custom in Basutoland shall be deemed to be completed when:*

*(a) there is agreement between the parties to the marriage;*

*(b) there is agreement between the parents of the parties or between those who stand in loco parentis to the parties as to the marriage and as to the amount of the bohali;*

*(c) there is payment of part or all of the bohali: provided that if the man dies before the woman goes to his parent's house the bohali shall be returned and the marriage shall be null and void.”*

[20] This case represents yet another instalment in the undying quest of some litigants to treat the **Laws of Lerotholi** as axiomatic and complete embodiment of the law on how customary marriages are concluded. **Ramootsi and Others v Ramootsi ((CIV) No.14/08) [2009] LSCA 30**

(23 October 2009) quoting with approval **Ramaisa v Mphulenyane 1977 LLR 138 (HC)** at para. 18. For example, S. 34 does not cater for a situation where a man is marrying for the second time. In that event, it is trite law in this country, that marriage emancipates a minor, such that his parents' consent is not needed for him to get married (**W.C.M. Maqutu Contemporary Family Law 2<sup>nd</sup> ed. 2005 (Moriya Printing Works)** at 176.)

[21] An further anomaly which is created by strict adherence to s.34 is evidenced by the facts of this case: The **Laws of Lerotholi** do not appear to cover a situation of *chobeliso* (elopement) where a bride and bridegroom live happily after the fact, with only the negotiations on the payment of the amount of *bohali* or for that matter negotiations on the *bohali* pending. In this scenario, should the 'marriage' be held to be invalid for not complying with the requirements of S.34 (b) that there must be agreement between the parents as to the marriage and payment of *bohali*. In my considered view that should not be the case. I am in agreement with the observations made by the learned author **Maqutu (ibid)** at p. 190, that customary marriages are too often, over-simplified and pigeon-holed into the s.34 requirements which are in themselves not a true encapsulation of customary marriage practices :

*“While the Basotho require that there should be a marriage before a woman can acquire the status of wife, I believe a Basotho customary marriage is often over-simplified into just compliance with a list of formalities. The correct approach to the Basotho customary marriage is found in **Phillips and Morris Marriage Laws in Africa (referred to by Collin Murray in Families Divided)** where he says:-*

*‘The marriage transaction is normally a long-drawn out process and there is often some doubt, both as to the exact point in that process at which the parties become husband and wife and also to which (if any) of the accompanying ceremonies and observances are strictly essential to the conclusion of a valid marriage.’”*

[22] It is important when dealing with these matters to recall the interpretation which Cotran CJ placed on S.34 in **Ramaisa v Mphulenyane** (supra) at p. 152, wherein the learned Chief Justice said:

*“(a) That s. 34 is not a comprehensive statement of all the Sotho customary marriage.*

*(b) That the words “deemed to be completed” appearing in the section mean only prima facie completed.*

*(c) That the words “agreement” of the parties and their parents to the marriage and “agreement” as to the amount of bohali, and payment thereof, should[not] be read in the abstract or in isolation of other terms, express or implied, as to the true intention of the parties and their parents at the time, this latter to be ascertained after examination of all the evidence and the surrounding circumstances.*

*(d) That where the parties live with each other as husband and wife – where this takes place and however briefly – the prima facie evidence of the marriage becomes and is effective retrospectively from the date of the agreement ...”*

[23] Reverting to the facts of the instant matter: I have already said that it is not true as the defendants would want to portray that the plaintiff was not accepted into the Lifero family. The version of the plaintiff is the most probable and in fact truthful; the plaintiff eloped with the deceased,

acceptance rituals were performed, such as the slaughtering of *koae* sheep, the plaintiff was dressed up as a bride; christening of the plaintiff and accompanying to the well; plaintiff's mother was notified of her presence at Lifero's; the plaintiff attended the Lifero family funerals; she lived together with the deceased as husband and wife for almost five years; even when her child was taken ill, the deceased's mother's felt compelled to help; after the deceased's untimely death, the deceased's mother felt compelled to sent her daughter to fetch the plaintiff for funeral preparations to be gotten underway.

[24] The conspectus of all this evidence points without any equivocation to the existence of a marriage between the plaintiff and the deceased. Even if it could be said that no negotiations ever took place about concluding marriage, I am prepared to come to the conclusion that, marriage was tacitly concluded by both families. It is true that both sides have not sat down to agree on the marriage, but the conspectus of the above factual scenario points only in the direction of a tacit conclusion of the marriage agreement. As indicated in the discussion of the law, given that the deceased was a major, there was even no need for his mother to have agreed to the marriage. This notwithstanding, in this case, there is ample evidence that the deceased's mother consented to the marriage.

[25] The remaining sticking point in this matter is S. 34 (b) requirement that there be "*agreement between the parents of the parties or between those who stand in loco parentis to the parties as to ..... the amount of bohali*" to be paid. The question to be answered is whether in the absence of the agreement about the amount of *bohali* to be paid, the 'marriage' between the deceased and the plaintiff should be declared as invalid. Mr. Chondile, for the defendants, argued that the absence of the agreement on

the amount of *bohali* to be paid is the Achilles heel of the plaintiff's case. I do not agree. This contention is advanced from a subconscious but faulty premise that the presence of this requirement is equivalent to the requirement in the law of sale of goods that the absence of an agreement on the purchase price of goods sold nullifies the agreement. I embrace wholeheartedly the comments of the learned author, **W.C.M. Maqutu** (*supra*) at p. 184, where he says:

*“George Tlali Moshoeshoe has correctly stated that Basotho customary marriages take place with or without payment of bohali cattle, but everything depends on the wishes of the girl's parents. Duncan a Judicial Commissioner of great experience says this statement of custom is correct. It seems to me that once the husband's family had accepted the woman as a daughter-in-law, the matter is out of their hands. Everything from that point depends on the girl's parents. The boy's parents and family should be barred or estopped from denying there is marriage. The reason being that the question of bohali, its amount and how the debt is to be liquidated is something that entirely rests on the decision of the girl's parents. The boy's family cannot or ought not to be allowed to deny the existence of marriage, when the girl's parents out of decency and generosity gave them time to prepare for marriage negotiations and thereby bring a portion of the bohali.”*

[26] In the present case, the absence of an agreement on the payment of *bohali* is not fatal to this marriage. From the evidence of PW2 (plaintiff's mother) it is clear that she expects payment of 6 heads of cattle for *chobeliso* and payment of *bohali*. It cannot be seriously be said that absence of the agreement on the payment of *bohali* nullifies this marriage. I am not prepared to say it does. As already said, there was a tacit agreement on the marriage between the deceased and the plaintiff.



That the plaintiff's parents gave the deceased parent's time to negotiate payment of *bohali*, cannot be held against the plaintiff's parents. The defendants, as it is apparent, are conveniently using the generosity and accommodation of the plaintiff's parents to their advantage. This, the defendants, should not be allowed to do. The defendants are estopped from denying that there was marriage between the plaintiff and the deceased.

[27] In the result, the following order is made:

(a) The plaintiff claim succeeds in the following terms:

- (i) Applicant is declared the deceased Thabo Lifero's lawful wife and heir.
- (ii) 8<sup>th</sup> and 9<sup>th</sup> defendants are ordered to release the death benefits/gratuities of the deceased Thabo Lifero to the plaintiff consistent with the laws applicable to paying out such benefits.
- (iii) The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants are directed to release from their custody to the plaintiff, birth certificate of Qenehelo Lifero; National Identity document of the deceased Thabo Lifero as well as his bank card.
- (iv) The 1<sup>st</sup> to 3<sup>rd</sup> defendants should pay the costs of suit.

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**MOKHESI J**

**For the plaintiff:**

**ADV. MALEKE from the Legal  
Aid Chambers**

**For the 1<sup>st</sup> and 3<sup>rd</sup> defendants:**

**ADV. N. CHONDILE instructed  
by K. Ndebele Attorneys**