IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/212/2021**

In the matter between:

MOLEFI THEKO	**1ST APPLICANT**
MACHABE THEKO	**2ND APPLICANT**

AND

LEBOHANG MAKATLA	**1ST RESPONDENT**
THE COMMISSIONER OF POLICE	**2ND RESPONDENT**
THE DIRECTOR OF PUBLIC PROSECUTIONS	**3RD RESPONDENT**
MINISTRY OF HEALTH	**4TH RESPONDENT**
THE ATTORNEY GENERAL	**5TH RESPONDENT**

Neutral Citation: Molefi Theko & Another v Lebohang Makatla & 4 Others (CIV/APN/212/2021) [2021] LSHC 89 (24 AUGUST 2021)

JUDGMENT

CORAM:	**MOKHESI J**
DATE OF HEARING:	**20 JULY 2021**
DATE OF JUDGMENT:	**24 AUGUST 2021**

SUMMARY

BIRTHS AND DEATHS: *Applicants instituting an urgent application for exhumation of the deceased's body for purposes of conducting postmortem examination barely a month after agreeing that the deceased should be buried- Application dismissed on a punitive scale for lack of urgency.*

ANNOTATIONS

Cases:

Ramahloko v The Learned Magistrate Mr. Kolobe (CIV/APN/77/19) [2019] LSHC 55 (12 September 2019)

Commander LDF, and Another v Matela LAC (1995 – 1999) 799

Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 292 (SCA)

Ntloana and Another v Rafiri LAC (2000-2004) 279

[1] **Introduction**

The applicants are seeking an urgent relief for exhumation of the body of the deceased, 'Makatleho Makatla, for purposes of conducting autopsy examination thereon, to determine the cause of her death, and other interdictory reliefs.

[2] **The Parties**

The applicants are the deceased's blood brothers. The deceased was legally married to the 1st respondent, Lebohang Makatla.

[3] **Factual Background**

On the 25th May 2021 the deceased 'Makatleho Makatla died unexpectedly. It is common cause that, hitherto, she had not been known to suffer from any life-threatening ailment, and so, her passing away in the circumstances, evoked serious emotions of disbelief from all quarters, but more so, from her maiden family members. They suspected foul play on the part of her husband. In the immediate aftermath of the deceased death, several meetings between Theko and Makatla families pertaining to the question whether autopsy examination should be conducted, yielded no results. The deceased's husband (1st respondent) and his family members refused to accede to the suggestion as they felt that the deceased had died a natural death.

[4] It is apposite to record that the said meetings took place from the 25th to the 28th May 2021. On the eve of the deceased's burial, i.e. on the 28th May 2021, the applicant's attended the last meeting at the 1st respondent's place geared towards the same purpose, mentioned above. Even on that day, the 1st respondent was not amenable to post-mortem examination being conducted on the deceased's remains. Crucially, for purposes of this case,

the two families (applicants present) agreed that the burial of the deceased should go ahead as scheduled and reduced their agreement into writing. In the said letter, they agreed that:

> *"Friday May, 2021*
>
> *Meeting of families of Theko and Makatla in relation to the burial of Bokang Theko [the deceased]*
>
> *The agreement is that the both (sic) families should work the issues of burial together on Saturday. The Theko family wished that post-mortem be conducted concerning the death.*
>
> *The Makatla family refuses to make post-mortem ascertaining the cause of death.*
>
> *The family of Theko owing to its dissatisfaction of non-holding of post-mortem will still proceed to follow this (sic)issues even if the merits of the follow up are not revealed.*
>
> *Those present in the meeting*

The family of Makatla	*The family of Theko*
1. Lebo Makatla	*1. Lebo*
2. Mpho Makatla	*2. Molefi Theko*
3. Jane Makatla	*3. Machabe Theko*
4. Mapulane Makatla	*4. Machabe Theko*
5. Mapitso Makatla	*5. Makaliseng Theko*
6. Makatleho Makatla	*6. J M Kolobe*
	7. Salang Shongwe
	8. 'Mabataung Theko"

[5] This application is opposed. In his opposition, the 1st respondent raised a number of points in *limine*, *viz*; (i) Lack of urgency (ii) No cause of action (iii) Lack of *locus standi in judicio.* I now turn to deal with the points in *limine* so raised.

[6] **Urgency**

Regarding urgency of this matter, the 1st respondent contend that the urgency on the strength of which the applicants approached this court was self-created, in view of the fact that they agreed to have the deceased buried even though they harboured a strong feeling that postmortem should have been conducted on her body.

Rule 8 (22) of the rules of this court provides for a procedure for lodgement of cases on an urgent basis. The said sub-rule provides that:

> *"(22) (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure as the court or judge may deem fit.*
>
> *(b) In my petition or affidavit filed in support of an urgent application the applicant shall set forth in detail the circumstances which he avers render the application urgent and also the reasons why he claims that he could not be afforded substantial relief in an hearing in due course if the periods presented by this Rule were followed.*
>
> *(c) Every urgent application must be accompanied by a certificate of an advocate or attorney which sets out that he has considered the matter and that he bona fide believes it to be a matter for urgent relief."*

[7] Among the many resources that the judiciary does not have in abundance, is time. This is even more critical in this jurisdiction where the judiciary has human resource challenges. Matters queue up in a long line for each judge's attention and disposal. In the ordinary scheme of things, litigants should patiently join this queue and await their turn to have their matters dealt with by the judges. Urgent matters, by their nature, are meant to jump this queue, and so, potentially, present issues of disrepute in the administration of justice if strict gatekeeping is not ensured by the courts. The above sub-rule is meant to aid in the case management in order to avoid the judicial administration being brought into disrepute. In order to facilitate the orderly management of cases, this sub-rule place duties on the applicant's counsel and by implication, on the court seized with the matter which is purportedly urgent. This court had an occasion to comment on the gate-keeping roles of the court and that of counsel, embodied in this sub-rule, in **Ramahloko v The Learned Magistrate Mr. Kolobe (CIV/APN/77/19) [2019] LSHC 55 (12 September 2019)** at para. 15, wherein the court said:

> ***"…..****Rule 8(22) (c) is a gatekeeping mechanism in the case flow management duties of the court. It has to be borne in mind that by their very nature, urgent matters are placed ahead of other matters which would have been awaiting their turn to be disposed of. So that the administration of justice is not plunged into disrepute, judges and applicants' counsel have a critical role to perform when it comes to dealing with urgent matters. The applicant's counsel is enjoined to certify that indeed the matter is merited to be placed ahead of others which would have been queuing, by placing evidence on the certificate evincing this reality, and by further giving his opinion that, based on the alluded facts, he bona fide believes the matter to be worthy of such urgent treatment. This is a very important, for if it is not carried out responsibly, it has the real potential to imperil the administration of justice. The court on the one hand when faced with a certificate of urgency should not adopt a supine and mechanical attitude*

to it. It has *to carefully scrutinize the certificate to determine whether it is laden with evidence evincing urgency. The court must not be a passive umpire in these matters…."*

[8] Despite this noble idea embodied in this sub-rule, counsel continue to abuse the urgency procedure. The apex court (and this court) has on numerous occasions admonished counsel for doing so, but despite this, the practice does not seem to want to come to an end. In **Commander LDF, and Another v Matela LAC (1995 – 1999) 799** at 805, the Court of Appeal expressed a view that an abuse of this procedure, in appropriate cases, may warrant dismissal of the application merely on this ground. I am fully alive to the fact that urgency relates only to form, not the substance of the matter, and therefore, not a prerequisite for granting substantive relief (**Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 292 (SCA) at 299 f – G**).

[9] Now, reverting to the facts of this case, it is abundantly clear that, from the moment the deceased's death was publicized, the applicants and the Theko family harboured strong feelings that the 1st respondent was a prime suspect in her death. Over a period of four days, the two families were involved in unfruitful negotiations to have the deceased's body subjected to post-mortem examination. The applicants were part of these meetings, with the last one culminating an agreement to allow for the smooth burial of the deceased on the 29th May 2021. The applicants were signatories to the said agreement. Over the period of the said these negotiations, it was clear that the 1st respondent would not cave in to the Theko family's demands for autopsy, but nonetheless, the applicants did not deem it necessary to approach the courts on an urgent basis for reliefs aimed at ensuring that the autopsy is conducted. It was only after the deceased's

burial, some three weeks later that they approached this court on the so-called urgent basis for an order for her body's exhumation. This is a classic example of an abuse of urgency procedure justifying the dismissal of the application, as I hereby do. This conclusion renders it unnecessary to consider other points in *limine* raised.

[10] Assuming I am wrong to dismiss this application on the basis of abuse of urgency procedure, there is a more fundamental reason why this case was stillborn from the outset. This application offends against the established principles that the dead must be respected and not tempered with unjustifiably. These principles were embraced by Maqutu J in **Ramahloli v Ramahloli (CIV/APN/479/93) [1993] LSHC 119 (23 December 1993)** wherein the learned Judge followed with approval the two decisions of this court dealing with respect for the dead, and the public interest in the burial of the deceased:

> *"The second question [respect for the dead] was answered by Lehohla J. in **Sechaba Mokhothu v 'Malebusa Matloha and Ors. CIV/APN/222/93** (unreported) as follows –*
>
> > *'This is an urgent application involving the final and important need to lay the deceased's remains to rest. It should be brought home to litigants that this court will always view with disfavour any attitude that litigation involving disposal of dead bodies should be conducted at leisure with unwholesome assurance that such bodies need not be laid to rest within a reasonable time because refrigeration in the funeral parlours prevents them from discomposing (sic)'*
>
> *The third question [public interest in the burial of the deceased] is unanswered by Cullinanan C. J, in **Chimane Mokoatle v Senatsi Senatsi** and Another CIV/APN/163/91 (unreported where he said –*

> *'There is also a question of public policy .... I consider the application an unhappy one, ghoulish in places, and contrary to a custom common to all mankind .... namely respect for dead.'"*

[11] In the present matter, the applicants, despite harbouring a nagging feeling that their sister could have been murdered by her husband, nonetheless sat on their rights to judicially stop her burial until an autopsy was conducted. Instead, they decided, rather bizarrely, to allow the burial to go ahead, only to emerge three weeks later to request for her exhumation. It is not right that the deceased should be treated in this manner. Equally important is the 1st respondent's emotional wellbeing, for in all likelihood, exhuming the deceased's body would occasion terrible distress to him as the husband, to see her body being extracted from the ground where she has been laid to rest, at the time when he would be starting a painful journey to heal and move on from having lost her. In the light of the factual conspectus of this matter, one cannot resist the temptation to conclude that the deceased's body is being used as a pawn in the squabbles between the two families. The deceased should, as a matter of public policy, be allowed to rest peacefully. The applicants' behaviour will never be countenanced by the courts (**Ntloana and Another v Rafiri LAC (2000-2004) 279 at 285D-H**)

[12] In the result the following order is made –

a) The application is dismissed with costs on attorney and client scale.

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MOKHESI J

For the Applicant: **ADV. F. SEHAPI**
Instructed by K. J. Nthontho Attorneys

For the 1st Respondent: **ADV. T. D. THEJANE**
Instructed by K. D Mabulu & Co. Attorneys