IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/337/2021**

In the matter between: -

`MAKOETLE MOFOLO-NTŠIHLELE	**1ST APPLICANT**
LEBOHANG MOFOLO	**2ND APPLICANT**
'MALEBOHANG MOFOLO	**3RD APPLICANT**
KARABO MOFOLO	**4TH APPLICANT**

AND

QAMO MATELA	**1ST RESPONDENT**
MALOI MATELA	**2ND RESPONDENT**
`MAMATELA MATELA	**3RD RESPONDENT**
LESOTHO FUNERAL SERVICES	**4TH RESPONDENT**
MASTER OF THE HIGH COURT	**5TH RESPONDENT**
OFFICER COMMANDING MABOTE POLICE STATION	**6TH RESPONDENT**
COMMISSIONER OF POLICE	**7TH RESPONDENT**
ATTORNEY GENERAL	**8TH RESPONDENT**

Neutral Citation: `Makoetle Mofolo-Ntšihlele & 3 Others v Qamo Matela & 7 Others (CIV/APN/337/2021) [2021] LSHC 115 (22 OCTOBER 2021)

JUDGMENT

CORAM: **MOKHESI J**

DATE OF HEARING: **30 SEPTEMBER 2021**

DATE OF JUDGMENT: **22 OCTOBER 2021**

SUMMARY

BIRTHS AND DEATHS: *Right and Duty to bury- when the heir can be deprived of it- the husband having assaulted his wife leading to her death more than a week later- the deceased's blood relatives lodging an urgent application to have the heir declared unworthy of burying the deceased- Held, on account of having caused the deceased's death, the heir could not be allowed to bury her on the basis of public policy which frowns upon domestic violence and brutalisation of women.*

ANNOTATIONS:

Legislation:

Children's Protection and Welfare Act, 2011

BOOKS:

Baxter ***Administrative Law*** (1984) Juta

Herbstein & Van Winsen ***The Civil Practice of the High Courts of South Africa (2009) 5ed. vol 1***

Harms ***Civil Procedure in the Superior Courts***

Manfred Nathan ***The Common Law of South Africa. A Treatise Based on VOET'S COMMENTARIES ON THE PANDECTS, VOL. III (1906, Juta)***

P.Q.R. Boberg ***The Law of Person and the Family with illustrative cases (1977, Juta)***

CASES:

Lesotho Cases:

Lethunya and Another v Thejane and Another (CIV/APN/178/87) [1987] LSCA 88 (05 June 1987)

Masakale v Masakale and others LLR 1999 – 2001

Ntloana and Another v Rafiri LAC (2000 – 200) 279

Sello v Semamola and others (Duplicate of A0770026) (CIV/APN/319/96 [1996] LSHC 85 (30 August 1996)

Lesoli v Morojele, C of A (CIV) No. 29/2011 (21 October 2011) at para. 5 (unreported):

Tlhoriso Makenete v Mookho Motanya (C of A (CIV) No. 53/13) [2014] LSCA 9 (17 April 2014)

South African cases:

Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd (237/2004) [2005] ZASCA 50; [2006] ALL SA 103 (SCA)

Decro Paint v Plascon-Evans Paints 1982 (4) SA 213 (O.P.D)

Yona v Rakotsoane (1177/2004) [2004] ZA FSHC 84 (5 August 2004)

W and others v S and others (360/16) [2016] ZAWCHC 49 (4 May 2016)

Vulindlela Furniture Manufacturers v MEC, Department of Education and Culture, EC 1998 (4) SA 908

Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and Others (172/11) [2011] ZASCA 238, 2012 (3) SA 325 (SCA) (1 December 2011)

Plascon-Evans Paints (Pty) Ltd 1984 (3) SA 623 (A)

Rumdel Cape v South Africa Roads Agency Soc Ltd (234/2015)[2016] ZASCA 23 (18 March 2016)

Spence–Liversidge v Byne 1947 (1) SA 192 (N.P.D)

United Watch & Diamond Co. (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409 (C)

English cases:

Hollington v Hewthon & Co. Ltd [1943] 2 ALL ER 35

Introduction

[1] In this matter the Mofolo and Matela families are pitted against each other over the burial of the deceased, 'Mahlompho Matela, who passed away at Pelonomi Private Hospital in Bloemfontein in the Republic of South Africa on the 11 September 2021. The application was lodged on an urgent basis by the deceased's maiden family members on the 27 September 2021 seeking the following reliefs:

> *"1. That the rules of this Honourable Court pertaining to normal modes and periods of the service be dispensed with on account of the urgency hereof.*
>
> *2. A rule nisi be and it is hereby issued returnable on the date and time to be determined by this Honourable Court calling upon the respondents to show cause (if any) why, an order in these terms shall not be made absolute: -*
>
> *a) That pending finalization of this application, the fourth respondent is ordered not to release the corpse of the late 'Mahlompho Matela to the first respondent, his family and or his agents.*
>
> *b) That pending the finalization of this application all parties should not access, use or interfere with any funds belonging to the late 'Mahlompho Matela born Rethabile Christina Mofolo.*
>
> *c) That the first respondent be declared unfit to bury the corpse of his late wife the (sic) 'Mahlompho Matela born Rethabile Christina Mofolo or to benefit from proceeds accruing out of her part of the joint estate.*
>
> *d) That the applicants and the Mofolo family be and are hereby authorised and allowed to bury the corpse of the late 'Mahlompho Matela born Rethabile Christina Mofolo.*

e) That the corpse of the late 'Mahlompho Matela born Rethabile Christina Mofolo be released to the applicants for burial at Maqhaka in the district of Maseru.

f) That Vodacom Lesotho be allowed and authorised to release or facilitate the release of the funds for purposes of burial of the (sic) 'Mahlompho Matela born Rethabile Christina Mofolo to the applicants.

g) That all parties involved in this litigation are, save as stated in prayer (d) above, interdicted from accessing or administering any funds connected with the deceased, the late 'Mahlompho Matela born or her estate.

h) That the Maser of the High Court should administer the estate of the late 'Mahlompho Matela born Rethabile Christina Mofolo on behalf of her minor children.

i) That the first respondent be declared unfit to raise and have custody of the minor children Hlompho Matela and Tlhoriso Matela.

j) That the Master of the High Court should make a specific enquiry, involve a social worker and report to court accordingly in respect of what is the best interest of the children regarding their custody and the proper place of their abode.

k) That the police be ordered to keep order during the burial and exercise such power they have per law.

l) That the respondents pay costs of suit only in the event of opposition.

m) That applicants be granted further and/or alternative relief.

3. That Prayers 1, 2, 2(a) and (b) should operate with immediate effect as0 interim relief."

[2] The application is opposed. On the 30 September 2021, the matter was argued holistically. No interim reliefs were issued as the court got an assurance from both counsel that the matters will stay in abeyance until the final judgment is delivered. In their opposition, the 1st respondent raised a point in *limine* of *locus standi*, in relation to all the applicants. I deal with the point in *limine* raised in due course.

[3] **The Parties**

The first applicant is the deceased's biological elder sister. The second applicant is the deceased's uncle, for the reason of him being the younger brother to the deceased's father. The third applicant is the deceased's paternal grandmother. She raised the deceased interchangeably with her late mother. The fourth applicant is the deceased's cousin as their parents are siblings born of the same parents. Essentially, the applicants are blood relatives of the deceased.

[4] The first respondent is the deceased's husband and has been formally charged with her murder and is now out on bail. The second and third respondents are the 1st respondent's relatives. The fourth respondent is the mortuary wherein the body of the body of the deceased is kept. The fifth respondent the Master of the High Court. Sixth and seventh respondents are the Officer Commanding Mabote Police Station and the Commissioner of Police respectively. The eighth respondent is the Attorney General of Lesotho, cited nominally in these proceedings.

[5] **Factual Background**

The deceased and first respondent were married by civil rites on the 06 October 2012. They lived together until the passing on of the deceased on

the 11 September 2021. It is common cause that the deceased has always been with the 1st respondent all the time until she developed complications which led to her being transferred to Pelonomi Hospital in Bloemfontein Republic of South Africa. As to what led to the deceased's death, is a contested terrain, depending through whose prism one is looking at it. The applicants allege that the deceased was assaulted so badly by her husband that she developed complications which led to her death. On the one hand, relying on the medical report of the doctor who took care of the deceased, the applicant alleges that the deceased died of natural causes.

[6] Before everything else I would like to deal with the point in *limine* raised by the 1st respondent that the applicants do not have *locus standi* to institute these proceedings. It is the 1st respondent's argument that the applicants lack *locus standi* to institute these proceedings as they lack a direct and substantial interest in the reliefs they seek from this court. The argument goes on to say, because they are not the parents or heirs of the deceased as the latter is survived by her husband and is an heir, their interest is merely derivative, not direct and substantial. I will deal with this issue not holistically but by assessing it in relation to the main reliefs sought, to determine whether indeed they do not have the standing as alleged. This is because not all the reliefs sought are necessarily homogeneous.

[7] **The law on *locus standi***

Locus standi has two very important facets to it: It relates to the capacity of a litigant to sue or institute proceedings. Secondly, it refers to the interest that a party or litigant has in the reliefs he/she is seeking. As it is commonly said, the litigant must a direct and substantial interest in the reliefs she/he is seeking, not just a mere interest (see: **Herbstein & Van Winsen the Civil Practice of the High Courts of South Africa (2009) 5ed. vol 1 p.**

143). In the founding affidavit, the litigant has a duty cast upon it to allege that she has *locus standi*, and this duty is placed on her shoulders throughout the proceedings (**Harms Civil Procedure in the Superior Courts at A – 55).** However, the duty to allege *locus standi* in specific terms is not cast on granite if the facts which are averred in the founding affidavit prove that the litigant has *locus standi*. I turn to deal with *locus standi* in relation to the main issue.

a) **Duty/Right to bury the Deceased.**

To determine who has to bury the deceased resort must be made to the common law, and the applicable principles as stated by Voet: 11.7.7 **Commentary on the Pandects**, thus:

> *"1. Person chosen by the deceased must bury:*
>
> *"The funeral besides must be carried out by him whom the person departing this life has chosen."*
>
> *2. Who may bury if none chosen? If the deceased did not impose the duty of burial on anyone, the matter will affect those who have been named in the last will as the heirs.*
>
> *3. Who may bury if none chosen? If no one has been named, it affects the legitimate children or <u>blood relations</u> each in their order of succession." (emphasis added0* (quoted in **Yona v Rakotsoane (1177/2004) [2004] ZA FSHC 84 (5 August 2004)** at para. 22); See also, Manfred Nathan **The Common Law of South Africa. A Treatise Based on VOET'S COMMENTARIES ON THE PANDECTS, VOL. III (1906, Juta)** at p. 1208, where the learned author states:

"If the deceased has appointed no one to perform them [funeral rites], the duty falls to the heirs nominated by the 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…." (emphasis added).

[8] Quite clearly, in terms of the common law, the deceased's blood relatives have a direct and substantial interest in her burial. It does not matter that her husband as the heir is still alive. The same approach was adopted in the case to which this court was referred to by Adv. Molati, for the applicants, wherein the brother of the deceased's *locus standi* to sue was affirmed. The case is **W and others v S and others (360/16) [2016] ZAWCHC 49 (4 May 2016) at para. 30.** I am in respectful agreement with the approach on locus standi which was adopted in that case. It follows, therefore that in relation to the main issue, the applicants being the deceased's blood relatives have a *locus standi.*

[9] **b) That the Master of the High Court should administer the estate of the deceased on behalf of the Minor Children.**

The point of departure to dealing with this issue are the provisions of the **Children's Protection and Welfare Act, 2011 (the "Act").** In terms of ss. 38, 40, 42 provides:

"38. Where parent is survived by minor children, the surviving parent, guardian, closest relative, or any member of the community shall report the estate to the office of the Master of the High Court within two months of the death of the parent.

……

Duties of the Master of the High Court

40. The Master of the High Court shall –

(a) in administering a child's share of parental property, ensure that the best interests of the child are met;

(b) ……..

(c) have power to administer or confiscate property belonging to children and to delegate such powers to any person or institution,

(d) ……..

(e) ……..

(f) ……..

(g) have power to invest money brought to his office with any financial institution.

……..

Duty of employer in relation to property belonging to children

42 (1) An employer shall, after the death of his employee who has minor children, send all monies to the office of the Master of the High Court who will administer and invest such monies where necessary.

(2) An employer who fails to comply with the provisions of this section commits an offence and is liable on conviction to a fine not exceeding ten thousand Maloti or to imprisonment for a period not exceeding ten months."

[10] The common law approach to dealing with the issue of *locus standi* when *mandamus* is sought was aptly articulated by **Baxter Administrative Law (1984) Juta** at 411, the learned author puts the position thus:

"(i) Although public powers are always coupled with some duty, this does not necessarily imply that it is a duty owed to specific Individuals: it might only be owed to the legislature or to the 'public in general'. Only where the statute may be construed in such a way that it is clear that the duty is one which is owed not only to the public but also to specific individuals will an individual right to demand its performance arise. If this is not the case, the complainant

> *will have no standing (locus standi) to challenge the breach of duty in court."(See also:* ***Vulindlela Furniture Manufacturers v MEC, Department of Education and Culture, EC 1998 (4) SA 908*** *at 929C-E)*

Apparent from the above-quoted excerpts of the Act, is an over-arching principle of the best interest of children, and that principle is the soul behind the provisions which govern matters which affect minor children. The Act makes it peremptory for every member of the community to report the deceased's estates to the Master of High Court. In this regard the Act has removed the strictures of standing or *locus standi* requirements which might conveniently be raised by surviving spouses who are unwilling to report such estate for reasons which might redound not to the benefit of the minor children. The requirement for reporting of the deceased's estate is to allow the Master of the High Court to trigger his/her mandatory administrative duties in terms of S.40 above. In terms of s.42 of the Act above, even the employers of the deceased who is survived by minor children, is obliged to send all the deceased's monies to the Master of the High Court to invest for the benefit of the minor children. Failure to do so carries with the threat of criminal sanction for the employer concerned. All this is geared towards safeguarding the best interests of minor children. Put differently, the Master of the High Court owes a duty to minor children to act to protect their best interests. In order to deal with this obvious vulnerability of minor children being incapable of acting on their own to protect their interests, the lawgiver has granted a broad spectrum of actors a standing to act to safeguard their best interests. Seen in this light, what the applicants are seeking is an order that the Master of the High Court does what the law mandates her to do. In short, they are asking for a *writ*

of mandamus. In my view the applicants do have *locus standi* to seek this prayer.

[11] (c) **That the Master of the High Court should make an enquiry regarding custody of the minor children.**

I would not necessarily deal with this prayer from the perspective of the applicants' *locus standi* but rather from the angle which rather questions whether this court's order in that regard will be effectual. The office of the Master of the High Court is a creature of statute. Its powers are clearly circumscribed and is concerned solely with the administration of estates of the deceased. Matters relating to custody of children is one which falls exclusively within the statutory of the Magistrates' Court (Children's Court) in terms of the Act and this court as the upper guardian of the interests of the minor children. It is my considered view that the order which the applicants are seeking in this regard will be ineffectual and unenforceable (see: **Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and Others (172/11) [2011] ZASCA 238, 2012 (3) SA 325 (SCA) (1 December 2011) para. 11).**

[12] (d) **That the first respondent be declared unfit to raise and have custody of the minor children.**

For reasons which will become apparent in due course, the applicants have *locus standi* to seek this relief.

[13] **(e) Declarator that the 1st respondent unworthy of benefitting from the proceeds accruing out of the deceased's estate**

The applicants' claim in this regard represent a classic example of litigants having an interest in the relief, but which is not direct and substantial.

Obviously, because they are aggrieved by the loss of their daughter/sister at the hands of her husband, their interest is that he should not benefit financially from her death. In my considered view the applicants do not have any legally enforceable interest in who succeeds to the estate of their married daughter/sister. There are persons who may be substantially interested in seeing that the 1st respondent does not benefit from the financial proceeds occasioned by her death, but certainly not the current cohort of applicants. I do not intend to act in an advisory role of who is better placed to challenge the worthiness of the 1st respondent to benefit from the financial proceeds consequent upon the deceased's death. It is apposite to re-state what it means that a party must have a direct and a substantial interest in the relief he is seeking: In the oft-quoted decision in **United Watch & Diamond Co. (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409 (C) at 415** E – H, Corbett J., said:

> *"In Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O) Horwitz AJP (with whom Van Blerk J concurred) analysed the concept of such a 'direct and substantial interest' and after an exhaustive review of the authorities came to the conclusion that it connoted (see at 169) –*
>
> *"... an interest in the right which is the subject-matter of the litigation and .... not merely a financial interest which is only an indirect interest in such litigation."*
>
> *This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions ..... and it is generally accepted that what is required is a legal interest in the subject-matter of the action ...."*

It follows that the applicants do not have *locus standi* to seek this prayer.

[14] **THE MERITS:**

(e) That the first respondent be declared unfit to bury the corpse of his late wife or to benefit from proceeds accruing out to her part of the joint estate.

Given that there are two aspects to this question I propose to deal first with unfitness to bury the deceased's corpse. It is the applicants' contention that the 1st respondent is unfit to bury the deceased because he assaulted her to death. By "unfitness" I understood the applicants to be referring to "unworthiness". I revert to this concept in due course. The applicants' averment that the 1st respondent murdered his wife is based on the findings made by the pathologist in the port-mortem report, in which he records that the deceased had a lot of blood collected in the thoracic cavity; she had bruises; blood in the subdural space of the brain; collection of blood in the peritoneal cavity; and the conclusion that the deceased died as a result of traumatic internal bleeding. To augment their assertion the applicants attached a supporting affidavit of one Matšeliso Bulane-Monaleli who was the deceased's friend. She attached to her supporting affidavit, extracts of what she termed her communication with the deceased on the WhatsApp platform in terms of which the latter was pouring her heart out about the horrific treatment she was receiving from the 1st respondent. However, since the origin source of that communication had not been authenticated, it cannot be relied upon to prove the truthfulness of what it says.

[15] On the other hand the 1st respondent contents that in as much as he has been charged with the murder of his wife, he however, enjoys the constitutional protection of being presumed innocent until proven guilty by a court of law. He denies ever assaulting the deceased. He, however, posits a version

that the deceased died of natural causes: At para. 21 of his opposing affidavit, he avers that:

> *"I have been living harmoniously and in peace with my late wife and children, the blue eye she had was from falling as she fainted around those dates and I rushed her to Willies Hospital where was diagnosed with depression before her short sickness which led her to her death….."*

He further found support for his version in the 'medical report' of Dr Mosese who cared for the deceased while she was admitted at Pelonomi Hospital. In the said report Dr Mosese opined that the deceased died of natural causes. The applicant further argued that as the heir, he is entitled to bury his wife, and that the Mofolo family has no right to bury the deceased. This last point was jettisoned above when dealing with the applicants' *locus standi*, therefore, there is no need to revisit it.

[16] **The law**

As already stated above the Roman-Dutch law approach to the question of who has a right/duty to bury the deceased hinges on heirship, in the absence of the deceased's instructions pointing in a different direction. In this jurisdiction there are two decisions which I am aware of, which dealt with the right of the husband/wife to bury the husband/wife she/he is suspected of having killed. In the matter of **Lethunya and Another v Thejane and Another (CIV/APN/178/87) [1987] LSCA 88 (05 June 1987),** Lehohla A.J, (as he then was) was dealing with the application by the brother of the husband of the deceased wife he was suspected of having assaulted to death. The wife had consequent to the assaults, *'ngalaed'* and died at her maiden home. At the time the application was lodged the suspect husband was in jail having been remanded in custody on the charge of having

murdered her. In that application the brother of the jailed husband was suing the deceased's father to release her body for burial at her marital home. The learned Judge approached the matter based on the customary law and reasoned that:

> *"But dealing as we are here with a matter of custom I have resolved to take the view that in as much as a matter of customary law marriage denotes not merely a union between the parties to that marriage but also their respective parents' families' interest and right in the marriage, there does not seem to be any grave danger is assuming that Lesesa's elder brother as head of the Lethunya family as he avers deceased would return to her maiden-home, to some significant degree tends to tip the scales in favour of the view…. that deceased had not been released by her maiden parents after she had 'ngalaed' was resolved at that meeting …"*

The learned judge reasoned, based on the Sesotho saying that death brooks no disputations, that the burial should proceed within the shortest time of the death. He then ordered that the body of the deceased be released to her brother-in-law for burial.

[17] In the matter of **Masakale v Masakale and others LLR 1999 – 2001**, Maqutu J., dealt with a case more analogous to the ***Lethunya*** matter above, only that this time, it was the deceased's wife who had been remanded custody on the charge of murdering her husband. The brother of the deceased had brought an urgent application claiming a right to bury the deceased. The learned judge approached the matter on the basis of Roman – Dutch law prism of heirship. His finding was that there was no *prima facie* evidence that the deceased's wife murdered him, and at p. 740 A – B says:

"There is no direct authority on questions of burial where one of the parties who claim the right to bury is charged with murder of the deceased. The duty to bury where deceased has left no instructions devolves on the heir…."

[18] In the matter of **Sello v Semamola and others (Duplicate of A0770026) (CIV/APN/319/96 [1996] LSHC 85 (30 August 1996),** *orbiter*, Ramodibedi, A.J, (as he then was) at para.9, said:

"I would caution, therefore, against the air of self-righteousness as demonstrated by the applicant in this case, simply based on the fact that he is the deceased's husband and heir. In my view each case must be decided on its own merits and the court must not be bound by any inflexible rules when determining the question as to who has the right to bury. It is true 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 such as for example where he has not lived with the deceased for a very inordinate length of time and has actually killed the latter in circumstances repugnant to public morality such as for ritual purposes. 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."

I quoted these *orbiter* remarks because the same learned judge who expressed them, gave them an imprimatur of binding precedence in **Ntloana and Another v Rafiri LAC (2000 – 200) 279.** In that matter the court was not concerned with spousal murder, but rather a claim by a wife to a right to bury her deceased husband even though they lived apart for an inordinate length of time. Ramodibedi, J.A., writing for the majority adopted the reasoning he advanced *orbiter* in **Sello v Semamola and others** (above). The net effect of **Ntloana and Another v Rafiri** (above)

is that the right of an heir to bury the deceased, is not absolute, as in appropriate cases it may be disregarded by the court where public policy and a sense of what is right dictates such a course of action.

[19] As already seen, the 1st respondent contends that he should be presumed innocent until proven guilty. This line of argument presupposes that this court is hamstrung from determining whether he is responsible for the death of his wife, put differently, that this court should await the verdict of the criminal court for the determination of his guilt before his responsibility for his wife's death can be attributed. There were the undertones of this line of reasoning even in **Masakale v Masakale (above)** from Maqutu J. With all due respect, that approach is wrong. Where evidence is available as to whether the spouse is responsible for the death of another, a civil court should not shy away from making a determination of responsibility for the such death. It will be a different scenario where there is no evidence upon which responsibility may be attributed. The argument which is based on the presumption of innocence until a criminal court has made or passed a verdict, flies in the face of a controversial and yet time-honoured evidentiary rule of common law espoused in **Hollington v Hewthon & Co. Ltd [1943] 2 ALL ER 35-F** that criminal conviction of the 1st respondent will not be evidence in the civil court that he indeed murdered his wife. In all fairness to the learned judge in **Masakale v Masakale** (above), he ultimately found that there was no *prima facie* evidence that the wife was responsible for the murder of her husband. I only have a problem with the undercurrence of his reasoning that got him to conclude that there was no evidence that the wife murdered the husband.

[20] I now revert to the facts of the instant matter. As already seen the 1st respondent contends that the deceased fainted and as a result sustained

bruising around the eye (blue eye) and was consequently diagnosed with depression and died of natural causes. In the said medical report, Dr Mosese (in relevant parts) states that:

> *" MEDICAL REPORT*
>
> *MRS MAHLOMPHO MATELA (BORN 06/06/1991 – PASSPORT NO. RC 479474)*
>
> *Referred from: Maseru Private Hospital*
>
> *Referred by: Dr Thabiso Kolobe.*
>
> *Mrs Matela was admitted to Pelonomi Hospital on 10 September 2021.*
>
> *History: (As given in the referral letter and confirmed by Patient). She was admitted assaulted by her husband on Friday 3 September, hit with fists and throttled. Subsequently she had been weak and feeling dizzy. She fainted three times and vomited several times. She also complained of pain in her upper chest on the left.*
>
> *She had no history of fainting or convulsing. Physical examination revealed no external injuries, but for bruising around the left eye. She was fully conscious.*
>
> *Examination to her chest, abdomen and limbs was normal. Her heart rate was 100 beats per minute. Her blood tests were essentially normal for raised liver enzymes.*
>
> *She was treated with pain relief medication (Rayzon and Perfalgan) and planned for CT scan of her brain for the following day.*
>
> *In the early hours of 11th September 2021 she collapsed and died despite efforts at resuscitation by nursing staff and hospital doctor on duty.*
>
> *Thank you*
>
> *<u>Signed</u>*

Dr MOSESE"

The report is marked exhibit "QM1."

[21] In my view, this 'medical report' by Dr Mosese represents a superficial observation of the deceased when she was admitted at Pelonomi Hospital until she finally passed on. I found it rather odd that the 1st respondent wholeheartedly embraces this superficial findings of Dr Mosese that the deceased died of natural causes but, conveniently, omits to deal with what the same doctor recorded in the same medical report that he was told by the deceased that she had been referred due to assault meted out on her by the 1st respondent on the 03 September 2021. Although at face value, this record may convey give an impression that what is recorded to have been said by the deceased to Dr Mosese is hearsay, that conclusion would not be the correct, one as that recordal merely serves the purpose of explaining why the deceased got to be referred to Pelonomi Hospital. A credible report of what caused the deceased's death, is the post-mortem examination report by Dr L. F. Phakoana. He attributes the deceased's cause of death to traumatic internal bleeding. The said post-mortem report, it must be stated, lays bare the gory details of the extent of the deceased's traumatic internal bleeding and her external appearance. It records that (in relevant parts):

> *"External appearance (a) presenting with multiple bruises on the chest. Bruise on the face left eye ("blue eye"), bruises and scratches on the neck. Subcutaneous bleeding in the muscle of the neck and scalp.*
>
> *……*
> *Skull and its contents (10) collection of blood in the subdural space of the brain.*

.....

Plurae, Pleural sacs, and lungs:

Right: massive collection of blood in the thoracic cavity.

.....

Peritoneum and peritoneal sac (14) collected blood in the peritoneal cavity - lot of blood.

…….

Liver (17), Gall bladder and Bile ducts: laceration of the liver with a lot of blood in the peritoneal cavity.

....."

[22] It will be observed that the 1st respondent, by relying on the version which says the deceased died of natural causes in contradistinction to a post-mortem report which attributes her death to traumatic internal bleeding, this raises a dispute of fact. The 1st respondent denies that he assaulted his wife leading to her death. In motion proceedings the applicants can only get the order they are praying for if the facts justify such an order. However, whenever dispute of facts arises, the version of the respondent should be the preferred one, unless his version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers (**Plascon-Evans Paints (Pty) Ltd 1984 (3) SA 623 (A) 634 – 5**). Both the applicants and the 1st respondent did not apply for referral of these two issues to evidence. I also did not find it necessary to exercise my discretion to order the referral to *viva voce* evidence these issues in terms of Rule 8(14) of the rules of this court. The reason for this approach is that I did not think that such a referral would affect or disturb the apparent probabilities in this case as will be

demonstrated below. This approach was stated in **Decro Paint v Plascon-Evans Paints 1982 (4) SA 213 (O.P.D) 223A-B,** where the court said:

> *"…The situation may therefore easily arise that, unless the relevant witness are seen and heard, a court cannot with any accuracy conclude that the probabilities should be accorded more weight than an assertion under oath to the contrary. If there is a reasonable possibility that viva voce will disturb the effect of the apparent probabilities (citation omitted) the dispute cannot be satisfactorily determined without the advantage of viva voce evidence (citations omitted) and the inadvisability of deciding on papers remains…"*

From the outset it should be stated that the 1st respondent's version that the deceased died of natural causes, is clearly untenable when seen in the light of the post-mortem examination report and I accordingly reject it. The 1st respondent's version ignores the finding of a post-mortem examination in favour of a superficial examination of the deceased.

[23] What remains as a sticking point of much contestation is what led to the deceased sustaining the injuries she sustained. In order to determine whether the 1st respondent is responsible for the deceased's death the following the common cause facts are crucial: the 1st respondent and the deceased lived under the same roof at all material times; the deceased was transferred to Bloemfontein and the reason for such transfer as recorded in the medical report by Dr Mosese was that she had been assaulted and throttled. When this information is taken together with what is recorded in the post-mortem examination by Dr L. F. Phakoana, that upon examination of the external appearance of the deceased's corpse, she had bruises on the chest, bruises on the face left eye "blue-eye"; bruises and scratches on the neck; subcutaneous bleeding in the muscle of the neck and scalp; her skull had collected blood in the subdural space of the brain; there was "massive"

collection of blood in the thoracic cavity; a lot of blood in the peritoneal cavity; laceration of the liver and a lot of blood in the peritoneal cavity, a clear picture of what transpired emerges.

[24] When the version of the 1st respondent is assessed against these common cause facts, it will be seen it is curious and pales into the state which beggars belief: Firstly, his religious reliance on the medical report of Dr Mosese that the deceased died of natural causes, in total disregard to post mortem report, is opportunistic and ridiculous. Curiously, he does not even make a fleeting mention of it when he protests his innocence. He is conveniently being apathetic and indifferent to the said post-mortem report because it paints a rather disturbing state of internal haemorrhaging which befell the deceased, and for the simple fact that he has always been with the deceased, he has a serious explaining to do. It is highly improbable that the extent of the deceased's traumatic internal bleeding would have its source in her fainting and hurting her face. The 1st responded does not even say on what surface if any the deceased fell which could have resulted in such a traumatic activity. All these findings by Dr L. F. Phakoana are uncontroverted: The question needs to be asked how the deceased got to have all these multiple bruises on the chest, on the face, bruises and scratches on the neck, subcutaneous bleeding in the muscle on the neck and sculp and all these are not consistent with the version the deceased fainted and fell and died of natural causes. The answer to this question could not be more glaring: the deceased was assaulted on the 3rd September 2021 and was only taken for medical observation more than a week later where she later succumbed to internal bleeding resulting from the same assault. The 1st respondent is responsible for the death of his wife. In my judgment, there is nothing natural about the way the deceased met her death. She met her death in a violent way, and that violence could only

have been meted out by the 1st respondent. I find it unnecessary to determine whether he is guilty of culpable homicide or murder as such a call only rightly be made by a criminal court. What matters for present purposes is whether by his conduct he brought about the deceased's death.

[25] The above conclusion leads to the next question, and it is the following: should the 1st respondent be deprived of his right to bury the deceased? The answer, in my view, should be in the affirmative. The deceased was brutalised by her husband in what is plainly a callous act of domestic violence. This type of act offends public policy which frowns upon women being abused and brutalised in this fashion. The world over and even in this country there is a loud outcry against domestic violence particularly gender-based violence. In my considered view it would offend a sense of what is right to allow him to bury the deceased merely because he is the heir (**Ntloana v Rafiri above)**. It is true that the deceased lived together with the 1st respondent under the same roof until she met her death, but that should fade into the background, given the repugnant manner in which she met her death. Saying the 1st respondent's parents should be the ones to bury the deceased amounts to saying the 1st respondent should bury her. The only reasonable and fair thing to do is to authorise the deceased's blood relatives to bury her, but in consultation with the heir and his family.

[26] **That the Master of the High Court should administer the estate of the deceased on behalf of the Minor Children (*writ of mandamus*).**

In my judgment, in view of the discussion already made on the locus standi of the applicants to seek this prayer, the applicants should be granted the order in this regard.

[27] **That the first respondent be declared unfit to raise and have custody of the minor children.**

In terms of S. 2(1) (c) of the High Court Act 1978 (as Amended by the Act No.34 1984) the High Court has jurisdiction.

> *"2(21) ....*
>
> *(a) ……..*
>
> *(b) …….*
>
> *(c) in its discretion and at the instance of any interested person, power to inquire into and determine any existing, future or contingent right or obligation notwithstanding that such person cannot claim any relief consequential upon the determination; and ...."*

[28] For the reason that the courts do not like to act in advisory roles on issues which are abstract, when a party seeks a declarator, such a party has to satisfy the court that she is interested in existing future and contingent right or obligation that be determined by the issuing of a declarator.

> *"[15] ..... The mere fact that parties are locked in dispute on a point of law or fact does not necessarily entitle either of them to an order declaring which standpoint is correct. Generally speaking, a court does not act in an advisory capacity by pronouncing upon hypothetical, abstract or academic issue. Instead, in order to entertain an application for declaratory relief, a court must be persuaded that the applicant has an interest in an existing, future and contingent right or obligation that will be determined by the declarator and that its order will be binding upon other interested parties. If it is so satisfied, the court then exercises a discretion whether to grant or refuse the order sought. In doing so the court may decline to deal with the matter where there is no actual dispute, where the question raised is, in truth hypothetical, abstract or academic, or where the declarator sought have no practical effect."* **(Rumdel**

Cape v South Africa Roads Agency Soc Ltd (234/2015)[2016] ZASCA 23 (18 March 2016) at para. 15).

[29] The determination of the question whether the applicants have an interest in existing, future or contingent right to custody of the deceased's minor children will only be made once it is understood in which context a parent may be deprived of his child's custody. As the upper guardian of all minor children, this court can deprive a parent of custody of his minor children where those children's interest cries out for such intervention. Custody may even be awarded to third parties such as aunts and uncles where necessary, provided it be in the best interests of the said minor children to do so. The following statement by the learned author **P.Q.R. Boberg The Law of Person and the Family with illustrative cases (1977, Juta)** at pp. 412 – 413, is worth repeating:

> *"In the exercise of its inherent jurisdiction as the upper guardian of all minors, the Supreme Court will intervene between parent and child where the inherent of the child require that it do so. Thus, a father may be deprived of guardianship or custody (an aspect of the parental power) of his child, and his authority vested in the mother or even, in appropriate circumstances, a third party. In the absence of a divorce or separation authorizing the parents to live apart, however, the common law regards the father as prima facie entitled to natural guardianship with all its incidents. Judicial interference with this right is therefore justified only in exceptional circumstances, such as those arising where the father's conduct endangers the life, health or morals of the child. But these are not the only grounds upon which the court may act: each case must be considered on its merits in determining whether 'good cause' for interference has been shown."*

[30] This dictum makes it clear that when it comes to matters affecting minor children the courts grant broader standing to persons seeking ventilation of such issues. The applicants being the blood relatives of the deceased certainly fall into this mould of persons who are given a standing to pursue matters relating to custody of the minor children of their deceased daughter and sister. Whether the deceased was a married woman or not could not loom large in matters involving best interests of minor children nor does it matter that the applicants are not from the marital family of the deceased. In matters involving minor children such a regimented approach is discouraged and frowned upon. **(Lesala v Morojele, C of A (CIV) No. 29/2011 (21 October 2011) at para. 5 (unreported): see also Tlhoriso Makenete v Mookho Motanya (C of A (CIV) No. 53/13) [2014] LSCA 9 (17 April 2014) at para. 9).**

[31] As already said the applicants have an interest in existing, future or contingent right in the custody of the deceased's minor children. However, this is not the end of the enquiry as this court has to move to the second leg in terms of which it exercises its discretion whether to issue a declarator (**Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd (237/2004) [2005] ZASCA 50; [2006] ALL SA 103 (SCA) (30 May 2005)** at paras. 15 – 19). In the present matter the deponent to the founding affidavit alleges that the deceased was assaulted in full view of the minor children by the 1st respondent and that for this reason the latter should be declared unfit to have custody of these minor children. The 1st respondent denies that the assaults were meted on the deceased by him at all, he alleges that the deceased fell or collapsed due to stress and was rushed to hospital. It is indeed true that when the deceased met her death, she was at all material times living together with the 1st respondent and the minor

children. The circumstances surrounding the manner in which the deceased met her death- in relation to the minor children- not being detailed out to the extent of showing whether the minor children bore witness thereto. This court is not in a position to issue a declarator in the absence of a cogent evidence showing how the 1st respondent exposed the minor children to violent conduct and for how long, such as to render him a fit candidate to be deprived of custody of the minor children. A strong case should be made out that it would not be in the best interest of the minor children that the 1st respondent should be allowed to retain his parental power and all its incidents on the minor children (**Spence–Liversidge v Byne 1947 (1) SA 192 (N.P.D)** at 194). I, therefore, in the exercise of my discretion refuse to issue a declarator that the 1st respondent should be deprived of his parental power over the minor children.

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

a) The 1st respondent is declared unworthy to bury the corpse of his late wife 'Mahlompho Matela born Rethabile Christina Mofolo.

b) The applicants and Mofolo family are hereby authorised to bury the corpse of the late 'Mahlompho Matela in consultation with the heir and his family.

c) The corpse of the late 'Mahlompho Matela born Rethabile Christina Mofolo should be released to the applicants for burial at Maqhaka in the district of Maseru.

d) Vodacom Lesotho is authorized to release or facilitate the release of the funds for purposes of burial of the late 'Mahlompho Matela born

Rethabile Christina Mofolo to the 3rd applicant or her duly authorised representative.

e) The Master of the High Court should administer the estate of the late 'Mahlompho Matela born Rethabile Christina Mofolo on behalf of the minor children in terms of the prescripts of the Children's Protection and Welfare Act 2011.

f) The Mabote Police is ordered to keep law and order during the burial and to exercise all such powers as are bestowed on them by the law.

g) There is no order as to costs.

MOKHESI J

For the Applicants: **ADV. L. A. MOLATI instructed by M. W. Mukhawana Attorneys**

For the 1st to 3rd Respondents: **ADV. L. D. MOLAPO instructed by P. Masoabi Attorneys**

For 4th to 8th Respondents: **No Appearance**