IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) NO. 47/2016

CIV/APN/295/16

In the matter between:

MOHAU PETROSE MOLIBELI	**1ST APPELLANT**
'MALESOLE MOLIBELI	**2ND APPELLANT**

And

'MAMONAHENG MOLIBELI	**1ST RESPONDENT**
LESOTHO FUNERAL SERVICE	**2ND RESPONDENT**
MASTER OF THE HIGH COURT	**3RD RESPONDENT**
ATTORNEY GENERAL	**4TH RESPONDENT**

CORAM : DR. K. E. MOSITO P.
S.N.PEETE JA
N.T. MTSHIYA AJA

HEARD : 28 November 2018

DELIVERED : 07 December 2018

SUMMARY

Customary law - Whether chobeliso is a form of marriage –- Court holding that chobeliso is a not a form of marriage - Application - dispute of fact on affidavit - respondent's affidavit evidence not

satisfactorily challenged by applicants in replying affidavits judge's discretion under rule 8(14) - application dismissed.

JUDGMENT

DR. K. E. MOSITO P

BACKGROUND

[1] This matter commenced in the High Court by way of a notice of motion launched by the 1st respondent against the appellants and the 2nd to the 4th respondents. The 1st respondent sought an order in the following terms:-

1. That a rule nisi be issued and be returnable on the date and time to be determined by this Honourable Court, calling upon Respondents to come and show cause, if any, why:

   a) The rules of this Honourable Court pertaining to service and form shall not be dispensed with and the matter be heard as of urgent.

   b) 1st and 2nd Respondents herein shall not be restrained from releasing the remains of the late Maleke Molibeli from 3rd Respondent pending determination of this Application.

   c) 3rd Respondent shall not be restrained from releasing the remains of the late Maleke Molibeli to 1st and 2nd Respondents herein pending the outcome of this Application.

   d) 1st and 2nd Respondent herein shall not be barred from alienating, disposing and/or interfere with the rights over the estate of the deceased Maleke Molibeli at Thetsane Lesia pending the outcome of this Application.

   e) Applicant herein shall not be declared the rightful heir of the deceased Maleke Molibeli.

   f) 1st and 2nd Respondents shall not be ordered to release to Applicant the mortuary certificate, deceased Id, work related documents, Deed of sale of the estate at Thetsane

Lesia and such necessary documents of the deceased Maleke Molibeli to enable his decent burial.

g) 3rd Respondent shall not be ordered to release the remains of the late Maleke Molibeli to Applicant herein for burial at Ha 'Maloela in the district of Berea.

h) 1st and 2nd Respondent be ordered to surrender/return to Applicant all properties in the estate of the late Maleke Molibeli at Ha Thetsane Lesia and the deceased personal clothes.

i) This Honourable Court shall not grant such further and/or alternative relief.

2. That prayers 1(a),(b),(c), and (d) shall not operate with immediate effect as an interim relief pending finalisation of this matter.

[2] The matter was heard by the High Court (**Hlajoane J**) on 6 September 2016 and judgment was handed down on 19 September 2016. The learned Judge granted the application in terms of prayers (e),(f),(g) and (h).

[3] Dissatisfied with the judgment and order of the Court a quo, the appellants approached this Court complaining that 'the learned judge erred in finding that *chobeliso* is a form of customary marriage in total disregard of the dictates and/or elements which constitute customary marriage as enshrined in the Laws of Lerotholi.'

THE FACTUAL FRAMEWORK

[4] The first respondent brought the matter as an urgent *ex parte* application for the relief as outlined in paragraph [1] above. Her case as pleaded was that she, as the customary law wife of the late Maleke Molibeli, had a primary legal right to bury the deceased

and inherit all his properties. She deposed in an affidavit that she had gone through an elopement (chobeliso) with the deceased and all Sesotho "rituals" were performed at the home of the 1st and 2nd appellants, to accept her as married to the late Maleke Molibeli. By the Sesotho "rituals" she clarified that, a sheep was slaughtered and she was given the names 'Mamonaheng Molibeli.

[5] After they eloped, she was collected by her parents who demanded that six head of cattle be paid in respect of the elopement. He attached a letter which reveals that M800.00 (eight hundred Maloti was paid for elopement (chobeliso). In her founding affidavit, there was no evidence that *bohali* was ever paid thereafter. She goes on to say that she and the late Maleke Molibeli procreated four (4) children together.

[6] The appellants' case was that the deceased was not customarily married to the first respondent in as much as there was never an agreement between the appellants and the first respondent's parents on both the marriage and the bohali. In her replying affidavit, the first respondent deposed that, later on, her mother and the appellants "renegotiated and construed [*concluded* may be] an agreement of my marriage." She maintained that her marriage to the deceased was all along valid and she had been accepted and treated by first and second appellants. The learned judge held in her judgment that:

> [5] The issue for determination here is whether under the circumstances of this case the Court can say the Applicant was indeed married to the deceased thus giving her the right to bury the deceased? Elopement (chobeliso) is another form of our customary marriage. But elopement alone in the absence of other rituals going with it does not conclude marriage.

[7] On the above basis, the learned judge granted the application in terms of prayers (e),(f),(g) and (h).Dissatisfied with the judgment of the court a quo, the appellants approached this court on appeal.

THE ISSUE

[8] Thus, according to the parties, the only issue before us was whether *chobeliso* is a form of customary marriage. However, properly characterised, the real dispute is about the duty to bury and the dispute over the property of the estate of the late Maleke Molibeli. The question which has to be decided is therefore, is whether when Maleke Molibeli died there was a valid Sesotho customary marriage which had been concluded between him and the first respondent.

THE LAW

[9] This appeal falls to be decided with the following legal principles in mind. Section 34 (1) of ***the Laws of Lerotholi (1959 edition)*** reads as follows:

> "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 parents' house the bohali shall be returned and the marriage shall be null and void."

[10] As Ramodibedi, P correctly observed in **Motake v Moqhoai and Others**[1], despite a strongly worded warning by this Court

[1] Motake v Moqhoai and Others (C of A (Civ) 5/2009) at para 1.

in **Ntloana And Another v Rafiri**[2], deprecating the use of corpses as pawns or test cases for disputes over inheritance of the deceased's estates, the instant matter is a typical example of this mischief which the Court sought to prevent in the first place.

[11] In **Serage and Another v Taioe**[3] this Court remarked as follows:

> [8] It is regrettably necessary to once again comment on the growing tendency by some judicial officers to decide disputes of fact on papers. That is to be regretted as this practice may often lead to a miscarriage of justice. See for example such cases as **Central Bank of Lesotho v Maputsoe 1995 – 1999 LAC 292; Ntloana And Another v Rafiri 2000 – 2004 LAC 279; Vice Chancellor of The National University of Lesotho And Another v Putsoa 2000 – 2004 LAC 458; Mahlakeng And Others v Southern Sky (Pty) Ltd And Another 2000 – 2004 LAC 742.**
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> In the **Vice – Chancellor** case this Court expressed itself in paragraph [18] of its judgment in the following terms which bear repeating:-
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> > "*[18] Too many matters are brought on motion in the High Court despite glaring factual disputes. Too many orders are sough ex parte. Too often inadequate notice is given, with a vague and general reliance on urgency. All this is harmful to the proper functioning of the courts, and unfair to those practitioners and litigants who do seek to adhere to the Rules. The purpose of the judgments cited in paragraph [16], and this one, is to make that clear. The passages in question in these judgments constitute practice directions by this court, which are to be appropriately enforced by the High Court and this court, and which are binding on litigants and their legal representative."*

[2] Ntloana And Another v Rafiri 2000 – 2004 LAC 279 at 284,
[3] Serage and Another v Taioe C OF A (CIV) N0.34/2010.

[12] As has been repeatedly said time and again, it is undesirable for courts to resolve disputes of fact purely on the basis of believing one typewriter as against the other.

[13] Another legal aspect relevant to the determination of this appeal is *chobeliso*. In his book, **The Roman-Dutch and Sesotho Law of Delict, 1970**, at p157 to 158, Professor V.V. Palmer, writes that 'chobeliso or abduction[4] at customary law is the wrong of removing a girl or a woman from the control of her parents, guardians or husband without their consent.' As Hoexter, J.A pointed out in **R *v* *Churchill***[5] it is clear that the definition of *abduction*, has been accepted and acted upon by our Courts for a very long period. It is clear that one of the essential elements of that crime is knowledge on the part of the accused that the complainant is under 21 years of age. Hoexter, J.A further points out that, although the crime of abduction was well known in Roman-Dutch Law, it presumably applied only to those cases where the minor was, against the will of her parents or guardians, removed from their custody and control with the intention that the accused or someone else should marry her: but where the minor was so removed with the intention that the accused or someone

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[4] In my opinion, the term abduction is not correctly used in the translation. While the the maxim *actus non facit reum nisi mens sit rea* is applicable in the case of abduction, it certainly does not apply in the case of elopement. In the case of "elopement", the intention is to marry. Early authorities on the Roman-Dutch law do not afford a satisfactory guide as "abduction" at the time was not limited to girls under twenty-one years but applied equally to all women in *potestate*; see *Voet, 48.6.6; see further R v Schut, 1 B.A.C. 37; R v Matati, 6 Sheil 175. The question of knowledge of the girl's age was raised in R v Jorgenson, 1935 E.D.L. at pp. 219, 223, and R v Sita, 1954 (4) SA at pp. 20, 23; see also de Wet and Swanepoel, Strafreg, p. 236. R v Prince, 13 C.C.R. 154, was followed in R v Booth, 12 C.C.R. 231, R v Olifier, 10 C.C.R. 402, but distinguished in R v Tolson, 23 Q.B. 168. and the question is what degree of mens rea must be proved.*

[5] R v Churchill 1959 (2) SA 575 (A) p. 580.

else should have sexual intercourse with her, it was merely seduction which did not constitute a crime.[6] As *abduction* is a crime at common law, it follows that the *onus* is on the Crown to prove such knowledge, a proposition which was not really contested by counsel for the Crown. In my opinion therefore, *abduction* is not the same thing as *elopement*.

Professor Sebatian Poulter in his book. **Family Law and Litigation in Basotho Society, 1976,** at p84, writes that: '[i]n the technical language of the law, an elopement constitutes an abduction of the girl by the man for which compensation is due, regardless of the girls consent.' It follows that chobeliso is not a marriage, but a civil wrong. In ***Thamae v Moteo***,[7] Monapathi J threw some light on this issue when he said that, '[i]ndeed, I recognize other debate of erudition and depth from writings of eminent authors. These constitute a broad analysis of the customs and concepts such as chobeliso and bohali especially the helpful **Contemporary Family Law of Lesotho** at page 81-83.' In **Khojane v Mokatsanyane and Another**[8]said:

> Before I come to the conclusion as to the nature of the marriage negotiation I am concerned now as to whether or not the Applicant and deceased eloped or not. P.W.I felt that there was no elopement (chobeliso) but a mutual handing over by agreement of the deceased between the deceased's mother and P.W.1. P.W.2 (Rarikhala Tenei) even went on to say that elopement (properly speaking) needs to be accompanied by threats, force or violence. Indeed in some instances there is even forced sexual intercourse along the way. These witnesses cannot be correct that merely because there was no violence in the removal of the deceased from her home it can only mean that there was no elopement.

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[6] Supra, p580.

[7] Thamae v Moteo (CIV/APN/159/2003 at p.8.

[8] Khojane v Mokatsanyane and Another CIV\APN\206\95 at p.6.

[14] The above pronouncements are a living testimony that, chobeliso (elopement) is not a marriage but a civil wrong at Sesotho customary law.

EVALUATION OF THE APPEAL

[15] I turn now to the merits of the appeal. According to the first Respondent, she was married to the late Maleke Molibeli through elopement in 1990. She attached Annexure MM1, a document purportedly proving marriage. However, upon perusal of the document, the parties therein have recorded that, eight hundred Maloti was paid for chobeliso. It is also reported that the first appellant left the sum of two hundred Maloti with a request that, he would return to top it up with five hundred Maloti to make it seven hundred. The agreement was that all the sums would then count towards two head of cattle for chobeliso. It is also reported that he would then be left with four head of cattle towards chobeliso. The document is then signed by the parties and their witnesses.

[16] In the present case, I am inclined to find that there was an agreement between the parties to the marriage because the first respondent agreed to elope with the deceased Maleke Molibeli. They even bore four children together. It is common cause that they even accumulated their estate property together. I am however, of the opinion that there was no agreement between the parents of the first respondent and that of the deceased as to the marriage of the couple. I am fortified in this view by the fact that, even the first respondent's parents demanded the return of his

daughter with six cattle as compensation for abduction. Part of the six head of cattle were agreed upon and paid. According to the first respondent M800.00 (eight hundred Maloti) was paid. The sum of M200.00 (two hundred Maloti) was paid.

[17] I am not inclined to the view that to attach any value to the first respondent's averments in her replying affidavit that her mother and the appellants "renegotiated and construed an agreement of my marriage." Significantly the paragraph is dealt with in the replying affidavit but the particular assertion is not met in point of substance. As Plewman, J.A.correctly remarked in ***Attorney-General and Others v Tekateka and Others[9]:***

> It is trite that an applicant must make out his or her case in the founding affidavit and that a court will not allow an applicant to make out a different case in reply or, still less, in argument.

[17] As to the issue forming the basis of this appeal whether under the circumstances of this case the Court can say the first respondent was indeed married to the deceased by reason of her elopement (chobeliso) with him, the answer is that, chobeliso is not a form of our customary marriage. Even if such elopement (chobeliso) were to stand alone or with other rituals going with it, it is not a form of our customary marriage. It constitutes an abduction of the girl by the man for which compensation is due, regardless of the girls consent.

[18] In the present case, there were irresoluble conflicts of fact on whether or not the first respondent had been duly married regard

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[9] Attorney-General and Others v Tekateka and Others C OF A (CIV) NO. 7/2000. At p.12.

being had to the conflicting factual versions pertaining to the satisfaction of the three requisites of a valid Sesotho customary law marriage. As Hurt JA pointed out in **Seitlheko and Others v Nkole and Others**[10]**:**

> It is trite that a party who proceeds by way of motion and who asks for final relief, does so in peril of having the application refused if the papers reveal an irresoluble conflict of fact. In such a situation the judge has a discretion, under rule 8(14) of the High Court Rules, to refer the matter to oral evidence if he considers that such referral will lead to a "just and expeditious" result.

[19] We were not addressed on the properties that the first respondent avers she has accumulated with the deceased during their stay together, as well as the rights of the children of the deceased with the first respondent to such properties. For avoidance of doubt, this judgment should not be construed as awarding the said property to any of the

COSTS

Regard being had to the fact that the first respondent is a beneficiary of legal aid, there will be no order as to costs.

COURT ORDER

[21] The following order is made:

(a) The appeal succeeds.

(b) The order in the court below is altered to read that “the application is dismissed.”

(c) There will be no order as to costs in both courts.

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[10] Seitlheko and Others v Nkole and Others (C of A (CIV) No. 17A/2012) at para 14.

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DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:

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S.N. PEETE
ACTING JUSTICE OF APPEAL

I agree:

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N.T. MTSHIYA
ACTING JUSTICE OF APPEAL

For the Applicant : Advocate M.P. Khatleli

For Respondents : Advocate L.T. Maleke.