IN THE HIGH COURT OF BOTSWANA
HELD AT LOBATSE

Misca No. 241/2003

In the matter between:

JACKSON DIILE	1st Applicant
GALETA SEFO (assisted by her husband, Mr Sefo)	2nd Applicant
KEHA MOKOBELA (assisted by her husband Mr Mokobela)	3rd Applicant
MMANDIBO BANTATSANG	4th Applicant
MOTHAEDI TIROYAMODIMO	5th Applicant
MMAMIKI KAMANAKAO	6th Applicant

And

BAGANETSI KAMANAKAO	1st Respondent
OTSILE KAMANAKAO	2nd Respondent
KAMANAKAO ASSOCIATION	3rd Respondent
LYDIA NYATI-RAMAHOBO	4th Respondent
LYN'S FUNERAL PARLOUR	5th Respondent

Mr M. Kadye with him Mr Rantao, Radipati for the Applicants
Mr Kanjabanga for the Respondents

JUDGMENT

DOW J:

These are reasons in a matter heard and decided as one of urgency on the 16th May 2003. The resultant order to which these reasons relate was as follows:

POINTS IN LIMINE

1. LOCUS STANDI

1.1 1st, 2nd, 3rd, 4th and 5th Applicants have locus standi for the reason that they are relatives of the deceased.

1.2 6th Applicant has no locus standi to litigate on her own behalf for the reason that her marriage to the deceased has been dissolved.

1.3 6th Applicant as the only surviving parent and custodian of the deceased's minor children has locus standi to litigate on behalf of the said children.

2. URGENCY

The matter is urgent, relating as it does, to the burial of a deceased person.

3. THE APPLICANTS' SUPPLEMENTARY AFFIDAVITS

The Applicants' filing of supplementary affidavits without requisite application is condoned by the court.

4. HEARSAY

It is adjudged that not all the information in the paragraphs complained of by Respondents constitute inadmissible hearsay evidence.

MERITS

5. The application is dismissed.

6. The dispute being as it is between members of the same family, amongst them a sister and the deceased's children on the one hand and two brothers on the other, the court has determined that the paramount consideration should be what the deceased himself would have wished as regards his burial. The court infers from the evidence that the deceased would have wished to be buried in Gumare.

7. Whether or not under the law as it stands the deceased was the Paramount Chief of the Wayei is not a matter for determination in this case.

8. First and Second Respondents representing as they do what the deceased would have wished, are hereby granted the right to make the necessary

arrangements for the burial of the deceased including the determination of the place of burial.

9. Fuller reasons to follow.

10. Costs to the respondents.

The matter was adjudged to be one of urgency for the reason that the body of the deceased lay in a funeral home as the parties argued over its fate. The Respondents had argued that there was no urgency and I am unable to see how that argument could possibly have had merit. I take judicial notice of the fact that burials in this country, barring some emergency, are generally on weekends within fourteen days of the death of the deceased. In terms of the rules, fourteen days is the bare minimum within which a respondent must file his answering affidavit. Thus a burial dispute of a deceased person will almost always be an urgent matter.

The main conflict between the parties was that the Applicants wished the remains of the deceased, Calvin Keene Kamanakao, to be laid to rest in Motlopi while the Respondents argued for Gumare. Each side claimed a greater right to the deceased's remains and on each side, there was at least one sibling of the deceased.

The 1st Applicant, is the deceased paternal uncle who claimed that not only was he the uncle but that the deceased had been 'born to him', as per a customary practice. I take judicial notice of the fact that such a practice indeed exists amongst many tribal groupings in Botswana. This however is not to make a decision that the deceased had indeed been 'born' to the 1st Applicant. It was argued that this applicant lacked locus standi to litigate in this matter and I concluded otherwise. The reason for such a holding is that an uncle of the deceased, especially in a case where the father is deceased, can be considered a close enough member of the family to have an interest in the burial arrangements of his nephew or niece. This

particular uncle was alleging an even closer relationship, arising from a special arrangement between his late brother and himself as related to the deceased. Whether he could actually prove such a relationship was a matter foe evidence. He definitely had locus standi.

The 2nd Applicant is a sister of the deceased and is a married woman. The latter fact has resulted in arguments by the Respondent that she lacks capacity to sue. For the reason that she had alleged assistance by her husband and for the reason that this was an urgent application in respect of which I allowed rules to be abridged, I found that she had locus standi.

The 3rd Applicant, 4th and Applicant and 5th Applicant are the deceased's paternal aunt, first paternal cousin and first maternal cousin, respectively and I found them to have locus standi for the same reasons I found the 1st and 2nd Applicants to have locus standi, that is, they were close enough relatives to have an interest in the burial arrangements of the deceased. None of those persons can be considered to be busy-bodies meddling in the affairs in which they lacked interest.

The 6th Applicant was the deceased's ex-wife and the mother to their two minor children. The 1st Applicant had tried to pass the 6th Applicant as the deceased's wife but this was a rather disingenuous position. Not only was the marriage between the parties dissolved a year before the death of the deceased, the ancillaries had been decided upon by the time of the deceased's death. It was for this reason that it was decided that the 6th Applicant could not litigate on her own behalf. This was not in any way to suggest the lack of importance and in some cases relevance of such customary practices as *go ribama* of a wife or former wife upon the death of a husband or ex-husband. The decision here was based on the fact that the 6th Applicant herself came out very clearly as saying she wished to be bound by the

decisions of the family members. She considered herself to be important enough to be consulted but not important enough to make a decision.

The 6th Applicant although suggested, rather tentatively, without coming out clearly to state that she was acting for the children, that her position was motivated by the interests of the children. Although I found that the 6th Applicant had a right to litigate on behalf of the children, I find that she, as a matter of fact has not so litigated. She fell into the same trap as the 1st Applicant, seeking to suggest that she was still married to the deceased at the time of his death, even citing the fact that she had not applied for a Decree Absolute as evidence. It was one thing for her to seek reliance on customary law for support of her position, but the reference to the non-issuance of a Decree Absolute is rather disingenuous.

Against these six Respondents, were the deceased's two brothers, [1st and 2nd Respondents], the deceased's life and passion, Kamanakao Association [3rd Respondent], the deceased's co-founder of 3rd Respondent, Lydia Nyati Ramahobo, [4th Respondent] and the funeral home at whose business the body of the deceased was kept [5th Respondent].

It is worthy of note that the 2nd to 5th Applicant's relations to the deceased were only clearly articulated in the supplementary affidavits the admission of which were challenged by the Applicants. In their founding papers, that is their Founding Affidavit and the Supporting Affidavit of the 6th Applicant, it had been rather difficult to appreciate who the parties were and what their interests where. The Applicants' application for the admission of the supplementary affidavits was granted. It is also worthy of note that not only was the Founding Affidavit rather silent on the particulars of most of the Applicants, it was rather uninformative on the particulars of the Respondents. It was only after the filing of the Respondent's papers that it clearly emerged that the Court was deciding a litigation essentially

between members of the same family. It is absolutely essential for founding papers to set out the interests of parties and a failure to do so can either be fatal to an application or lead to the granting of interim orders that should never have been granted. It is quite conceivable that had the court heard the applicants ex parte, as had been the original plan by the applicants, it would have been granted interim orders. This is because the founding papers are formulated to make the respondents appear to be distant relatives who are meddling in the affairs of the close family members. There is a basic rule of practice that governs ex parte applications, and that is that the utmost good faith must be demonstrated. I am reluctant to ascribe the lack of information referred to above as a demonstration of lack of good faith but certainly the applicants' attention and that of their attorneys attention are hereby drawn to this rule future purpose.

In deciding this case, faced with feuding members of the same family, the central question, became 'what would the deceased have wished'? The dead can not bury themselves, but unlike what Mr. Kadye submitted, their views on the matter are of relevance. Sometimes they state their views clearly for the living to be certain, but sometimes their views have to be inferred. The question for the Court became whether the deceased would have wished to be buried in Motlopi under the direction and management of the 1st Applicant, or in Gumare, under the direction and management of the 1st to 4th Respondents. Would he have wished to be buried at the place of his birth, Motlopi or at the place of his adoption as an adult, Gumare? Would he have wanted to lie by his late father and his other ancestors in Motlopi or would he have wished to be recognised as a chief of the Wayeyi and to be buried as such? Would he have wanted any one who challenged what he perceived to be his right to determine the place of his burial?

It is accepted that the deceased was born in Motlopi and his parents and other relatives were buried there. Those facts were not ignored in making the above

orders. They were however balanced against what ties, if any, the adult Calvin Kamakao had with the place of his birth. The evidence is that he moved from there first to go to school and later to work. The 6th Applicant states that she and the deceased considered Motlopi as their permanent home. This is an empty assertion not supported by anything more. For example there is no allegation that they had a house there, as is common with many Batswana who tend to have at least one home in the place of their 'home village'. This latter point is a matter I take judicial notice of. There was no information on when she and the children last visited Motlopi. There was a vague assertion that they made visits during holidays. As it turned out, the deceased died during or close to school holidays, but there was no evidence that the children at least, had been sent or were about to be sent to this 'permanent home' of their parents. The evidence would suggest that they were home in Gaborone with their mother when their father met his sudden death. It is actually questionable whether the 6th Applicant really still had any ties with Motlopi, even though she swears otherwise. As regards the deceased, I am not at all persuaded that he had particularly strong ties to Motlopi, by the time he died.

I consider, on the contrary, that the adult Calvin Kamanakao considered himself to be the chief of the Wayei people. His energy and time appear to have been poured into his quest to have the Wayei recognised as a separate tribe, with a special place in the national tribal landscape. He has asserted publicly that he is the paramount chief of the Wayei and has pursued his quest to be legally recognised as such by mounting publicised court actions. Thus it seems to me that it is unlikely that the deceased would have wished that that which he pursued with passion during his lifetime be ignored during his death. This is not a decision on whether the deceased was the Chief of the Wayei, that particular point is not for determination in this matter. This is a decision of how he perceived himself and how indeed some Wayei perceived him. No one can doubt that he was a leader of a group of people who considered him their chief. He led this group through the courts in court

actions, one of which saw the Chief Justice empanelling three judges to hear it. It can not thus be doubted that any one who doubted his right to lead the Wayeyi would not have been a person he would have wished to manage the internment of his remains.

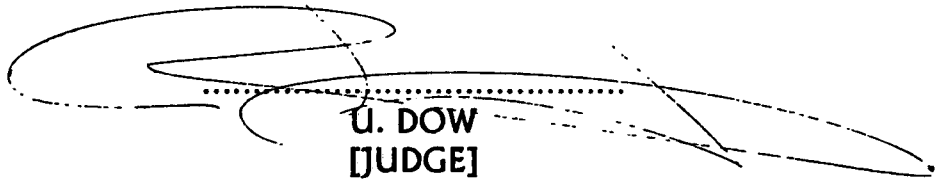
The 1st Applicant comes out very clearly that he disputes that the deceased was the chief of the Wayeyi. While he is certainly entitled to hold that view, it seems to me that it is unlikely that holding that view about the deceased, they could possibly have been close. The deceased would have considered that view the ultimate insult to him and his cause. If the 1st Applicant and the deceased had ever been close, the view by the 1st Applicant that the deceased was not a chief would have strained their relationship. Thus a person who sought to deny the deceased in his death, that which he fought for in his life, can hardly be considered to represent the interests of the deceased.

There is the issue of the children and what is in their best interests. It is quite clear from the evidence that the 6th Applicant's position moved from what can be summed as 'what ever the family decides' to a definitive position of choosing Motlopi as the place for the burial. Besides what has already been said above on this point, it seems to me that the 6th Applicant has failed to demonstrate how the children's interests would not be served by allowing the burial of the deceased at a place he himself would not have chosen, by all indications. It seems to me that what would be in the interests of the children would be to know that, that which their father would have wanted, has been done.

In conclusion therefore, it seems to me that the deceased would have wanted, to be recognised in death for what he fought for in his life. He certainly would not have wanted a denial of that which he believed in. It was for these reasons that the 1st and 2nd Respondents were found to be the two members of the family who were

most likely to represent the deceased's wishes. The roles of Kamanakao Association and Lydia Nyati-Ramahobo were important to the extent that they helped answer the question – 'what would the deceased have wished?'

DELIVERED IN OPEN COURT AT LOBATSE THIS 5TH DAY OF JUNE 2003



U. DOW
[JUDGE]