

IN THE HIGH COURT OF LESOTHO

In the matter of :

LIMPHO MAKATA                      Plaintiff

v

THEBE MAKATA                      Defendant

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice  
T.S. Cotran on the 13th day of September 1982

-----

The plaintiff Limpho Makata married the defendant Thebe Makata at the District Administrator's office Maseru on the 10th February 1978 under the provisions of the Marriage Act 1974. They have one child a daughter born in 1980.

It is common cause that the defendant had been previously married (in 1971) under sotho law and custom to a woman known as Mamakata Makata according to plaintiff or Machobane Tseleng according to defendant. I take it she is the same woman. That customary marriage still subsists. In her declaration the plaintiff says the defendant did not disclose to her that he has a wife to whom he is married by the customary law. The defendant in his plea says when he entered into the civil rites ceremony with the plaintiff she had "full knowledge" of the existence of the customary law marriage. The defendant admits that cohabitation with his customary law wife did not cease after his marriage to the plaintiff.

Mr. Maqutu made an application to strike out and excepted on the ground that the defendant has no defence at all even if the plaintiff was aware of the defendant's customary law marriage since the latter is void ab initio, and alternatively, that the plaintiff is entitled on defendant's own admission of continued cohabitation to a

/decree

decree of divorce on the ground of "adultery" by the defendant with his customary law wife.

Mr. Macutu has raised the same arguments before me in the recent case of Theko v Theko CIV/T/249/82 - dated 31st August 1982 - unreported, which were not successful, but has supplemented them today by referring to the attitude of judges in England in such cases as Hyde v Hyde 1866 L.R. 1 P & D 130 and Baindail v Baindail 1946 1 All E.R. 342, and to writers on Conflict of Laws (Graveson 7th Ed. 237, Dicey 9th Ed. 292 and Morris 2nd Ed. 42) and to a case in Kenya RS v SS and another 1969 E.A.L.R. 299.

I have no reason to depart from the views I held in Theko v Theko supra. The short answer to Mr. Macutu's submissions is that in those other countries the judges and writers were dealing with conflict of the laws whilst here we have dualism of laws supplemented in this particular instance by an express statutory provision (s.42) which allows for the continued validity of a previous customary law marriage from which it follows that a civil rites marriage can take place during the former's subsistence. It is a concession, so to speak, to the customary law institutions, and as Mr. Macutu pointed out in his heads of argument had been in existence since the Marriage Proclamation 7 of 1911 (Vol. III Laws of Lesotho p 1760 s.7) if not before. Section 42 of the Marriage Act cannot therefore be construed as a prohibition rendering the civil rites marriage null and void if a valid customary marriage is still in existence without doing violence to the language. It would enable a husband to get rid of his civil rites wife at random, a preposterous situation if the roles were reversed and the husband is plaintiff, and its consequences would bring havoc to the laws of marriage, civil as well as customary, and to the family. The customary law would not allow a man married by custom to dismiss his wife with impunity: I see no reason why the civil law should.

The application to strike out and the exception are accordingly dismissed with costs and the trial will proceed on the pleadings with leave to amend in case Mr. Macutu is able to bring the plaintiff's case within the principles enunciated in my judgment in Theko v Theko, supra, wherein I was prepared to extend a remedy to the underdog, if such be the case, but not to the fraudulent party or if both were in pari delicto.

Mr. Maoutu says he would like to test my opinions on this issue in the Court of Appeal and seeks leave to appeal. I think he is wasting time and money. However leave to appeal is hereby granted.

J. S. Lokan.

CHIEF JUSTICE  
13th September 1982

For Plaintiff: Mr. Maqutu  
For Defendant: Mr. Kolisang