Hon. Mr. Justice Molai J.

CIV/APN/293/82

IN THE HIGH COURT OF LESOTHO

In the Application of :

MARY-LOUISE 'MASEBATA MAFAESA — Applicant

and

RADEBE MAFAESA — 1st Respondent
TEBELLO MAFAESA — 2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 28th day of March, 1983.

On 17th November, 1982, applicant filed an urgent application in which she asked for an order of this Court against the Respondents in the following terms :

"1. A RULE NISI be hereby granted returnable on such date and time to be determined by the above Honourable Court, calling upon the Respondents to show cause why :

(a) Second Respondent shall not be interdicted from holding herself out as First Respondent's wife as First Respondent is lawfully and monogamously married to Applicant by Christian rites.

(b) First Respondent should not be restrained from holding second Respondent as his wife.

(c) First Respondent should not be interdicted from paying Lobola for second Respondent and proceeding with the customary marriage ceremony to second Respondent.

(d) Second Respondent shall not vacate the business premises at which the grocery store is situated, together with any premises or buildings belonging to the joint estate.

(e) Both First and Second Respondents should not pay costs in the event of opposition.

(f) Such other or alternative relief as this Court deems fit should not be granted.

2. Prayers 1 (a), 1(b), 1(c) and 1(d) operate with immediate effect as interim interdicts and that the affidavit of MARY-LOUISE 'MASEBATA MAFAESA annexed hereto will be used in support thereof."

2/ Applicant's founding ...

Applicant's founding affidavit was to the effect that she and 1st Respondent had entered into a Christian marriage on 4th December, 1971. The marriage which was in community of property still subsists. In April, 1982 and during the subsistence of the Christian marriage 1st Respondent purported to enter into a Sesotho Customary marriage with 2nd Respondent and they now hold themselves out as husband and wife. As a result 2nd Respondent is staying on one of the premises of the joint estate, 1st Respondent is assaulting applicant and misusing the joint estate on 2nd Respondent by deploying it to pay bohali for the latter. Applicant has consequently instituted, against 1st Respondent, proceedings for, inter alia, a decree of separation a mensa et thoro, division of the joint estate, and maintenance. The action CIV/T/277/82 is still pending before this court. Wherefor applicant prayed this Court for an order as aforesaid.

The application was heard on 18th November, 1982 by Cotran, C.J. who refused to grant the rule nisi and directed that notice of motion be served on the Respondents in the usual manner. Service was duly effected on 22nd November, 1982 and on the following day, 23rd November, 1982, the Respondents filed with the Registrar of this Court their notice of intention to oppose the application.

1st Respondent filed Respondents' opposing affidavit in which he admitted that on 4th December, 1971, he and the applicant concluded a Christian marriage but averred that the Christian marriage was preceeded by their Sesotho customary marriage, i.e. when he entered into the Christian marriage with the applicant a valid Sesotho customary marriage had already been completed and he considered the marriage according to Sesotho Law and Custom and not the Christian marriage to be binding between him and the applicant.

He contented, therefore, that in April, 1982 and following his valid and binding Sesotho customary marriage with applicant, he entered into another valid Sesotho customary marriage with 2nd Respondent. This, so goes the contention, he was pefectly entitled to do for according to Sesotho Law and Custom polygamy is allowed and a man can marry as many

3/ customary wives ....

customary law wives as he pleases. He admitted that 2nd Respondent was staying on one of the buildings of the joint estate but he was going to build a separate house for her in compliance with the requirement of Sesotho Custom. He denied to have assaulted applicant and misused the joint estate on 2nd Respondant and averred that he had only smacked applicant when she cheeked him. According to Sesotho law and custom, so the averment goes, when a man pays "bohali" out of his estate, he is not misusing the estate because it would later be reimbursed by the marriage of any daughters of the marriage. 1st Respondent admitted that proceedings for judicial separation CIV/T/277/82 had been instituted but denied that they were still pending before this Court as applicant's attorney had withdrawn them. Wherefor Respondents prayed that the application be dismissed with costs.

Applicant filed a replying affidavit and averred that she and 1st Respondent came from staunch Roman Catholic families and could not have married except by Christian marriage. On the day of the Christian marriage a beast was slaughtered and when that happened both parties did that to celebrate a Christian marriage. 1st Respondent was aware of the monogamous nature of their Christian marriage. In keeping with Roman Catholic tradition in Lesotho, bohali changed hands before marriage on the understanding that the marriage would be a Christian one. Applicant persisted in her averment that 1st Respondent had assaulted her and used a stick for that matter. She attached a medical report dated 24th August, 1982 (annexure A) according to which she had been assaulted, on 23rd August, 1982, with a blunt object and sustained a scalp scar on the left parietal area, and scars on the left breast and shoulders.

As proof that 1st Respondent was misusing the joint estate to her prejudice, applicant deposed that the former was himself admitting that he was going to build a house for 2nd Respondent out of the joint estate. Applicant further denied that her attorney ever withdrew the proceedings which had been instituted against 1st Respondent for judicial separation.

She therefore, prayed for judgment in terms of the notice of motion.

It is common cause that on 4th December, 1971,

4/ Applicant .....

Applicant and 1st Respondent got married to each other by Christian rites and that marriage still subsists. However, 1st Respondent's contention is that the Christian marriage was preceeded by a Sesotho Customary Marriage and he considers the latter and not the former marriage binding between him and the applicant. It is trite law that both the Sesotho Customary Law and the Christian or Civil Rites Marriages are recognised in this country - see The Marriage Act No. 10 of 1974, sec 42; Makata v. Makata, C. of A. (CIV) No.8 of 1982 (unreported) p. 2 et seq.

On the question whether a person can simultaneously marry under the two regimes, Golding, J.A. writing a majority judgment in the recent case of Makata v. Makata, supra, is recorded as having said at p. 4 :

> " In my view a man is given the choice and right to elect between polygamy or monogamy. Section 42 recognises Lesotho law and custom which permits polygamy and the validity of such marriages is clearly emphasised. The provisions of the Marriage Act do not apply to marriages contracted in accordance with Lesotho Law and custom. Section 29(1) expressly forbids a marriage under the Act by any person during the subsistence of another valid marriage contracted by him. The words "married" and "previous marriage" clearly refer to and mean a marriage recognised as valid in Lesotho. If a person's previous marriage has not been terminated he may not contract a marriage under this provision. A customary marriage is a valid marriage and if contracted before a marriage under the Act, is obviously a "previous marriage". Accordingly the plain meaning and effect of section 29(1) is that a person married by customary law may not marry under the Act during the subsistence of the earlier marriage or marriages.
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> While, in my respectful view, it has been rightly decided that a customary marriage by a husband while still married to another woman by civil rites is void ab initio, the position is equally, if not more, clear concerning a civil rites marriage during the subsistence of a customary marriage. The latter situation is expressly prohibited by section 29(1)."

On this authority, it seems to me that 1st Respondent's contention that he is married to applicant according to both the Sesotho customary marriage and the Christian rites marriage cannot be sustained and the decision in the present case must necessarily revolve on which one of the two marriage regimes the parties are married. 1st Respondent's contention (which is denied by applicant) that valid Sesotho customary law marriage was concluded or completed prior to the Christian one is based, inter alia, on the fact that his father had

approached the parents of applicant and both parents agreed about the "bohali" which was duly paid and the "Hlabiso" ceremony performed. The Sesotho Customary Law Marriage was therefore completed. The basis for the argument is presumably that the Sesotho customary marriage requirements as stated in sec. 34(1) of the Laws of Lerotholi, Part II, had been satisfied - a suggestion that the requirements stated in sec. 34 (1) of Part II of the Laws of Lerotholi are a comprehensive statement of Sesotho customary law marriage. The question whether or not sec. 34 (1) Part II of the Laws of Leotholi is a comprehensive statement of Sesotho customary law of marriage has already been answered in the negative by Cotran, C.J. in the case of Ramaisa v. Mphulenyane CIV/APN/335/75 (unreported) where the learned Chief Justice is recorded as having said, on the issue:

> "Sec. 34 of the Laws of Lerotholi, Part II, is not comprehensive statement of Sesotho customary law of marriage ..... where the parties do not in fact live with each other as husband and wife, there is prima facie no valid and complete marriage unless the contrary intention is prima facie apparent, or otherwise proved, the onus being on the person who assets that a marriage exists."

In the instant case, it is 1st Respondent who asserts that Sesotho Customary Law marriage exists. The onus of proof is therefore on him. However, all that 1st Respondent contents is that the requirements of sec. 34(1) of Part II of the Laws of Lerotholi were satisfied prior to the conclusion of their Christian marriage. He does not even suggests that the parties started living together before the Christian marriage was concluded. It seems to me therefore that Notwithstanding 1st Respondent's contention that the Provisions of Sec. 34 (1) Part II of the Laws of Lerotholi were satisfied before the Christian marriage, it cannot be conclusively inferred from this that the parties were married to each other according to Sesotho Customary Law and not Christian rites. In Jobo Mabitle v. Malimabe Mochema 1971 - 73 LLR 271 at p. 272 Jacobs, C.J. is reported as having said :

6/ "According to ....

> "According to Duncan in Sesotho Laws and Customs, it is possible for a couple to be married both according to Tradition and then in church, but it seems to me that in the present case, it was the intention of all concerned that the real and effective marriage would be solemnized in church."

It is clear from the above decision that in cases like the present one what is of paramount importance is the intention of the parties to the marriage at the time of their marriage. In my view, the intention need not always be spcifically expressed. It may be implied from the actions of the parties concerned. In the instant case, it seems to me to be common cause that after the requirements of sec. 34 (1) of Part II of the Laws of Lerotholi had been satisfied the parties, decided to go to church and have their marriage solemnized according to Christian rites and this was before they could resume life together as husband and wife. This being so, an irresistable inference to be drawn is that the implied intention of the parties, at the time of marriage, was that their marriage was to be a christian and not a customary law one. This position cannot be changed after more than ten years simple to satisfy amourous attentions that 1st Respondent now wishes to devote on 2nd Respondent. I come to the conclusion that 1st Respondent failed to discharge on a balance of probabilities, the onus, which rested on him to prove that the marriage between him and applicant was according to Sesotho customary law and therefore not a christian rites marriage which is monogamous and in community of property. On the papers placed before me,I am satisfied that on 4th December, 1971, 1st Respondent and applicant concluded a valid marriage under the provisions of the Marriage Act No. 10 of 1974 of which section 29(1) provides :

> "no person may marry who has previously been married to any other person still living unless such previous marriage has been dissolved or annulled by sentence of a competent court of law."

1st Respondent has in my view elected to be married according to Christian rites and not Sesotho Law and Custom. In the words of Goldin, J.A. in Makata v. Makata, supra, he cannot enjoy the two (marriage regimes) simultaneously. It follows therefore that because of his christian marriage with applicant, the nature of which marriage is monogamous,

7/ it cannot be .....

it cannot be in the mouth of 1st Respondent to say he validly married 2nd Respondent in April, 1982 during the subsistence of his marriage with applicant.

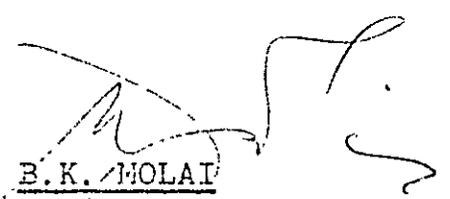
Furthermore, by reason of 1st Respondent's christian marriage with applicant, which marriage is in community of property and still subsists the latter has an interest in their joint estate. If 1st Respondent were to be permitted to use the joint estate on 2nd Respondent, it would no doubt be to the prejudice of the applicant who persists in her averment that she has instituted proceedings in CIV/T/277/82 in which she claims, inter alia, the division of the joint estate.

I am prepared to allow this application and accordingly make the following order against the Respondents, pendente lite :-

(a) Second Respondent will immediately vacate any premises or buildings belonging to the joint estate of 1st Respondent and applicant;

(b) First Respondent is interdicted from using in any manner, the joint estate or portion thereof on 2nd Respondent, and

(c) Respondents will pay costs of this application.



B.K. MOLAI
JUDGE.

28th March, 1983.

For the Applicant : Mr. Maqutu.
For the Respondent: Mr. Kolisang.